

Doing business in Thailand

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OVERVIEW

1. What are the key recent developments affecting doing business in your jurisdiction?

The business climate in Thailand continues to be positive and welcoming to foreign investment. Currently, deregulation and trade liberalisation are taking place on many fronts, largely driven by Thailand's participation in the Association of Southeast Nations (ASEAN) Economic Community, that is expected to come into effect on 31 December, 2015. Ultimately, this should result in freer movement of goods, services, capital and natural persons. Changes can already be seen, such as the elimination or substantial reduction in tariffs on many goods originating from ASEAN member states and harmonisation of securities regulations. In other developments, the corporate income tax rate has temporarily been reduced for small and medium enterprises.

Overall economic and domestic investment is positive, despite recent widespread political turmoil in Bangkok and serious flooding across the country.

LEGAL SYSTEM

2. What is the legal system based on (for example, civil law, common law or a mixture of both)?

Thailand has a codified legal system, where all rules and regulations are enacted in writing. Thailand has a civil law and dual court system. Although court decisions do not generate binding precedent, they are nonetheless significantly influenced by decisions of higher courts and other past rulings or legal interpretations.

The codified legal system means that Thailand has a hierarchy of laws that is mainly divided between:

- Constitutional Acts.
- Royal Ordinances.
- Royal Decrees.
- Ministerial Regulations.

FOREIGN INVESTMENT

3. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

Certain types of business activities are reserved for Thai nationals only (*Foreign Business Act 1999 (FBA)*). Foreign investment in those businesses must comprise less than 50% of share capital unless specially permitted or otherwise exempt.

Potential investors should check with the three lists attached to the FBA, as summarised below, to determine whether their proposed business falls under any of the reserved business activities.

List 1. This contains activities prohibited to non-nationals, including:

- Newspaper or radio broadcasting stations and radio and television station businesses.
- Rice farming and growing plantations or crops.
- Livestock farming.
- Forestry and timber processing from a natural forest.
- Fishery in Thai territorial waters and specific economic zones.
- Extraction of Thai medicinal herbs.
- Trading and auctioning of antique objects or objects of historical value from Thailand.
- Making or casting of Buddha images and monk alms bowls.
- Land trading.

List 2. This contains activities related to national safety or security, or those which affect arts and culture, tradition, folk handicrafts or natural resources and the environment. Among other things, they include:

- The production, sale and maintenance of firearms and armaments.
- Domestic transportation by land, water and air.
- Trading of Thai antiques or art objects.
- Mining, including rock blasting and rock crushing.
- Timber processing for production of furniture and utensils.

A foreign majority-owned company can engage in List 2 activities if Thai nationals or legal persons hold not less than 40% of the total shares and the number of Thai directors is not less than two-fifths of the total number of directors. Exceptions are those which receive:

- Permission from the Minister of Commerce with approval by the Cabinet (if there is a reasonable cause, the Minister with the approval of the Cabinet may reduce the Thai shareholding requirement, which cannot be less than 25% of the total shares).
- Investment promotion from the Board of Investment.
- Authorisation by the Industrial Estate Authority of Thailand.
- Permission under a treaty to which Thailand is bound.

List 3. This contains activities in which there are economic protections for Thai nationals. Among other things, they include:

- Accounting, legal, architectural or engineering services.



- Retail and wholesale.
- Advertising businesses.
- Hotels.
- Guided touring.
- Selling food or beverages.
- Any kind of service business.

There are exceptions to List 3 for those which receive:

- Permission from the Director-General of the Department of Business Development at the Ministry of Commerce, with approval by the Foreign Business Committee, on obtaining a Foreign Business License.
- Investment promotion from the Board of Investment or from the Industrial Estate Authority of Thailand, on obtaining a Foreign Business Certificate from the Director-General of the Department of Business Development at the Ministry of Commerce.
- Protection under a treaty or obligation to which Thailand is bound, including:
 - US Treaty of Amity and Economic Relations.
 - Thai-Australia Free Trade Agreement (TAFTA).
 - Japan-Thailand Economic Partnership Agreement (JTEPA), on obtaining a Foreign Business Certificate from the Director-General of the Department of Business Development at the Ministry of Commerce.

4. Are there any restrictions on doing business with certain countries or jurisdictions?

Trade sanctions are determined by Cabinet resolution, but would apply on notification by the relevant regulator. For example, the Department of Foreign Trade can announce sanctions with respect to the import and/or export of goods. Similarly, banks in Thailand would be obligated to comply with monetary sanctions as announced by the Bank of Thailand. The import or export of armaments always requires the approval of the Ministry of Defence, which may prohibit imports and/or exports from/to certain countries.

In addition, the international commitments to which Thailand is bound as a member state, for example, the UN, the World Trade Organization, and the Association of Southeast Asian Nations, must take into account whether it requires a member state to level any sanction to comply with its obligations.

Some trade sanctions are in place. For the most up-to-date listing of effective sanctions, it would be necessary to inquire with the relevant regulator.

5. Are there any exchange control or currency regulations?

Foreign exchange transactions are regulated by the Exchange Control Act 1942 (as amended) and Ministerial Regulation No. 13 (1954) issued under the Exchange Control Act, where detailed restrictions for all circumstances will be issued by Notification of the Ministry of Finance and Notices of the Competent Officer.

Commercial banks are authorised by the Bank of Thailand to approve the following foreign exchange transactions in its name:

- Remittance of an unlimited amount in payment of imported goods.
- Remittance for investing in overseas ventures in which Thai legal entities hold at least 10% shares.
- Lending to affiliated entities abroad for legal entities, as necessary and appropriate.
- Remittance of up to US\$50 million or its equivalent per year for lending to non-affiliated companies.
- Remittance for institutional investors to invest in foreign securities, up to an amount not exceeding the limit set by their supervisory authorities. Such investors include:
 - government pension funds;
 - social security funds;
 - insurance companies;
 - legal persons with assets of at least THB5,000 million;
 - listed companies on the Stock Exchange of Thailand (SET).
- Remittance for investment by other investors in overseas securities issued by foreign entities through private funds or securities companies. The limit is subject to the guidelines set by the Thai Securities and Exchange Commission (SEC).
- Remittance of up to US\$10 million or its equivalent per person per year for the purchase of real property in a foreign country.
- Remittance for the purchase of shares, warranties, and options of related companies abroad under employee benefit plans is permitted for up to US\$1 million per person.
- Remittance to Thai emigrants who are permanent residents abroad of up to US\$1 million or its equivalent per person per year.

Sums that exceed the limitations, or are for purposes other than those specified by the Bank of Thailand, require the Bank of Thailand's approval. In practice, various commercial banks require copies of supporting documents for certain transactions, including both inbound and outbound transactions, for example, remitting investment in Thai subsidiaries requires a list of shareholders describing the relationship between the transferor and transferee, and a loan transaction requires a copy of the loan agreement.

In addition, with the implementation of the US Foreign Account Tax Compliance Act (FATCA) in 2014 for commercial banks, there will be some changes for customer accounts regarding foreign financial institutions.

6. What grants or incentives are available to investors?

The Board of Investment (BOI) of Thailand grants both fiscal and non-fiscal incentives to qualifying investment projects in Thailand and these incentives are available equally to both Thai and foreign investors. The incentives include, among other things:

- Income tax holiday of up to eight years (depending on the geographical location of the project, which is divided into three zones).
- Withholding tax exemption for dividend distribution during the tax holiday.
- 100% foreign ownership in certain businesses reserved under the FBA.
- Customs duty exemption or reduction for imported raw materials and machinery.

- Land ownership for foreign companies.
- Withdrawing or remitting money abroad in foreign currency.
- Visa and work permit privileges for expatriates.

Further to the incentives offered by the BOI, privileges granted by the Industrial Estate Authority of Thailand (IEAT) could benefit foreign investors in terms of both tax and non-tax incentives. This includes exemption from import duty for machinery and permission to own land for business operations.

BUSINESS VEHICLES

7. What are the most common forms of business vehicle used in your jurisdiction?

Several types of business entity are available in Thailand, including ordinary partnerships, registered ordinary partnerships, limited partnerships, private limited companies, and public companies.

Trusts created by any legal act will have no effect unless they are created through a provision of law that permits the creation of a trust (for example, the Trust for Transactions in Capital Market Act B.E. 2550, 2007).

The most common form of business vehicle used by foreign companies is the private limited company, as it limits shareholders' liability (to the remaining amount of unpaid (if any), registered capital due on the shares respectively held by them). In addition, if Thai nationals own more than 50% of its share capital, a private limited company is not regarded as foreign under the Foreign Business Act and therefore is not restricted from engaging in reserved business (see *Question 3*).

8. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, what are the main registration and reporting requirements?

Registration and formation

At least three natural persons (promoters) are required to establish a private limited company. The incorporation of a limited company must be registered with the Department of Business Development (DBD) of the Ministry of Commerce (www.dbd.go.th). The process involves the reservation of a company name, filing and registration of a memorandum of association and the incorporation documents, which must be signed by all promoters and directors. If all incorporation documents are signed and ready, the filing and registration with the DBD can be completed within one day. Total government fees are about 0.55% of the registered capital, with a minimum of THB5,500 and a maximum of THB275,000.

Reporting requirements

All limited companies must file audited financial statements of the fiscal year (12-month accounting period) with the Ministry of Commerce and Revenue Department within five months of the end of the fiscal year. The audited financial statement must be approved by a general meeting of shareholders within four months of the end of the fiscal year, and the Ministry of Commerce also requires that the filing must be done within one month of the approval of the general meeting. There are no government fees charged for submitting audited financial statements.

Share capital

In general, there are no minimum or maximum share capital requirements for companies. However, the FBA has ruled that the minimum share capital for a foreign majority-owned company is THB2 million. If the intended activity is reserved under the FBA (see *Question 3*), the minimum share capital is THB3 million, for each reserved business. The par value of each share must be at least

THB5. The registered capital must be initially paid up at the minimum of 25% of the total amount.

If the company has foreign employees, the company must have at least THB2 million registered capital, 100% paid-up, per work permit.

Non-cash consideration

Shares can be issued for non-cash consideration. In principle, non-cash capital contributions (payments in kind), such as assets or services, are acceptable if approved by the statutory shareholders' meeting or by a special resolution.

Rights attaching to shares

Restrictions on rights attaching to shares. The following restrictions apply:

- Shares are indivisible.
- A company cannot take its own shares in pledge.
- The whole amount of every share must be paid in money, unless approved by the statutory meeting or special resolution of the general meeting of shareholders in case of an increase in the registered capital.
- A shareholder cannot avail himself of a set-off against the company as to payments on shares.

Other rights or restrictions may be given by the company's memorandum of association, articles of association, or the general meeting of shareholders.

Automatic rights attaching to shares. Automatic rights attached to shares include, among other things:

- The right to receive a share certificate.
- The right to transfer shares without the consent of the company unless shares are entered in a name certificate and otherwise provided in the company's articles of association.
- The right to attend and vote at any general meetings of the shareholders.
- The right to receive dividends.
- The right to inspect the register of shareholders and the minutes of the board of directors' and shareholders' meetings.
- The right to submit an application to the court to cancel any resolution of the general meeting which is contrary to the law or company's articles of association.
- The right to claim for compensation against directors for injury caused by them to the company.
- The right to purchase new shares in proportion to the shares currently held by shareholders.
- The right to receive the remaining property of the company once the company has been liquidated.

9. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, outline the management structure and key liability issues.

Management structure

A private limited company is managed by a board of directors consisting of at least one director who is elected by the shareholders in a general meeting.

Management restrictions

Generally, there is no nationality requirement for directors, except for foreign companies permitted to engage in a business in List 2 of the FBA (see *Question 3*).

In addition, the Immigration Act and the Alien Employment Act provide that foreigners wishing to work in Thailand must obtain a work permit from the Ministry of Labor and maintain a valid non-immigrant visa while staying in Thailand.

Directors' and officers' liability

Directors are generally not personally liable to a third party for their actions on behalf of the company, unless they are in breach of their authority as stipulated in the memorandum and articles of association of the company or a shareholders' resolution. Directors can also be criminally liable if the company commits a criminal offence under certain statutes.

Parent company liability

A parent company, as a shareholder, is only liable for the debts and losses of its subsidiary (which is a limited company in Thailand) up to the amount unpaid on its shares.

EMPLOYMENT Laws, contracts and permits

10. What are the main laws regulating employment relationships?

The main laws regulating employment relationships in Thailand are the:

- Thai Civil and Commercial Code on Hire of Services (sections 575 to 586).
- Labour Protection Act 1998 (as amended in 2008, No. 2, 2008, No. 3, and 2010, No.4).
- Labour Relations Act 1975 (as amended in 1991, No. 2, and 2001, No.3).
- Social Security Act 1990 (as amended in 1994, No. 2 and 1999, No. 3).
- Workmen's Compensation Act 1994.
- Working of Aliens Act 2008 (WAA).
- Royal Decree Naming Professions Prohibited to Aliens 1979 (RD), (as amended in 1993, No. 2, 2000, No. 3 and 2005 No. 4(RD)).
- Act on Establishment of Labour Court and Labour Court Procedure 1979 (as amended in 2007, No.2).
- Home Workers Protection Act 2010.
- Occupational Safety and Health Act 2011.

In addition, most laws provide for the promulgation of ministerial regulations, which offer additional clarity and rules.

Thai labour law applies to all employees working in Thailand, regardless of their nationality or tenure. It is not possible to avoid the applicability of Thai labour law through the use of choice of law provisions.

The WAA and the RD regulate employment of non-Thai nationals working in Thailand.

Subject to certain arcane exceptions, none of the laws are relevant to employment of Thai employees outside Thailand or employees (of whatever nationality) of Thai companies working outside Thailand.

11. Is a written contract of employment required? If so, what main terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

Employment contracts do not need to be in writing. An employment relationship can be proven by an employer's payroll documents or other reports/filings submitted to the Social Security Office or the Revenue Department. In addition, the terms of an employment relationship can be defined by the parties' conduct (implied terms). A collective bargaining agreement can also apply.

12. Do foreign employees require work permits and/or residency permits?

Thai labour and immigration laws require that foreign persons wishing to work or physically operate a business in Thailand must obtain a work permit from the Ministry of Labour and maintain a valid non-immigrant visa while staying in Thailand. A foreign person intending to work in Thailand must obtain:

- A non-immigrant business (B) visa from any Royal Thai Embassy/Consulate abroad before entering Thailand.
- A work permit from the Ministry of Labour in Thailand before starting work.

The work permit application must be sponsored by an entity or sponsor who is registered in Thailand. Processing the application normally takes between ten and 14 days. The processing time can be reduced to one day for companies that:

- Receive investment promotion.
- Have at least THB30 million paid-up capital.
- Otherwise qualify.

Government fees for a work permit are in the range of THB850 to THB6,100 depending on the validity period granted, which could be up to two years, plus minimal stamp duty.

While staying in Thailand, the foreign person must comply with the period of stay that is initially granted at 90 days on arrival (stamped in the passport). A one-year visa can be applied for within Thailand after the work permit is obtained, subject to renewal before the expiration date. The foreign person must leave Thailand by the expiry date or apply for an extension of stay in Thailand, otherwise, a fine for overstaying may be imposed.

There is no requirement for foreign employees to apply for permanent residence (PR) permits. Non-nationals with one-year non-immigrant visas who have resided in Thailand consecutively for at least three years are eligible to apply for a PR permit. There are several categories under which the PR application can be submitted, such as, business or employment purposes, experts/academics, or to support a family (spouse and/or children) who are Thai citizens. Various factors are taken into consideration when reviewing a PR application such as:

- The applicant's income.
- The applicant's properties.
- The applicant's knowledge.
- The applicant's proficiency in his or her profession.
- The applicant's family status.
- Conditions relating to national security.

A PR application under the category of employment is subject to the following conditions:

- The applicant must have worked in Thailand with a valid work permit for at least three consecutive years before the application.
- The applicant must have been working in the current company for at least one year before the application.
- The applicant must earn income of at least THB80,000 per month (for a foreigner with a Thai family) or THB100,000 per month (for a foreigner without a Thai family) on average for at least two consecutive years before the application. Evidence of income tax filing is also required.
- The applicant must be able to understand and speak Thai to an average standard.

Each nationality is allowed an annual quota of 100 PR permits, and the entire process takes at least one year from the submission date. A non-refundable PR application fee is charged at THB7,600 while the PR permit fee (after approval is granted) is charged at THB191,400.

Termination and redundancy

13. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Employees are not entitled by law to management representation or to consultation in relation to corporate transactions. Nevertheless, employees are protected in situations of termination of employment without cause, whether in relation to redundancy or otherwise. In addition, employee consent is required in situations of transfer of employment from one legal entity to another.

14. How is the termination of individual employment contracts regulated?

Employment can be terminated, regardless of the reason, provided that the termination is conducted in accordance with Thai labour law. Termination is defined as any action taken by the employer that prevents the employee from working and being paid. There is a difference between termination with cause and without cause, and termination that is fair and unfair. Fair and unfair terminations are undefined in Thai labour law and their meaning will be interpreted by the courts on the facts of each case.

Termination with cause is only permissible in certain specific situations. Reasons which justify termination with cause include (*Labour Protection Act, section 119*):

- Dishonestly performing duties or intentionally committing a criminal offence against the employer.
- Deliberately causing damage to the employer.
- Negligently causing severe damage to the employer.
- Violating the employer's work rules and regulations or lawful working orders, despite having received a written warning for the same offence within the immediately preceding 12 months (for serious cases, the requirement of a written warning does not apply).
- Abandoning work for three consecutive working days, whether or not a holiday is taken in between, without justifiable reason.
- Having been sentenced to imprisonment by final court judgment. If the offence is committed by negligence or is a petty offence, it must be a case that causes the employer to incur loss or damage.

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 a notice of termination at least one pay period in advance or as stipulated in the employment agreement, whichever is longer. Alternatively the employer can terminate the employment immediately, by making a payment in lieu of the notice given to the employee.
- Provide compulsory severance pay, the amount of which depends on the length of service, ranging from one month to ten months.

In addition to the above, there is also a risk of claims for unfair termination. If a terminated employee considers his or her termination unfair, he or she may pursue the case in the labour courts, seeking compensation for unfair dismissal. The court, at its discretion, can award compensation beyond mere severance and payment of wages in lieu of notice, and so on. In making its determination, the court must consider various factors, such as:

- The age of the employee.
- The employee's tenure.
- The employee's position.
- The reason for termination.

If the court finds a termination unfair, it may order re-employment or damages. To avoid claims for unfair termination, employers should negotiate with outgoing employees to reach an amicable end to the employment relationship.

15. Are redundancies and mass layoffs regulated?

As a general matter, redundancies and mass layoffs are not regulated differently than other circumstances in which termination may occur. However, when employment is terminated due to certain kinds of restructuring relating to deployment of new technology or machinery, employers must both:

- Give 60 days' advance notice to the Labour Inspector.
- Give 60 days' advance notice to the affected employees, or make payment in lieu of this notice.

For this type of termination, normal severance pay is required (see *Question 14*), and the employer must also pay special severance to those employees who have at least six years' tenure.

TAX

Taxes on employment

16. In what circumstances is an employee taxed in your jurisdiction and what criteria are used?

A person (Thai or foreign) who resides in Thailand for a total period of 180 days or more (not necessarily consecutively) in any tax (calendar) year is considered a resident of Thailand for tax purposes.

17. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

Tax resident employees

Tax resident employees are subject to personal income tax at progressive rates of 5% to 35%. The tax year is from 1 January to 31 December.

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 of THB750 per month. This rate is effective from 1 January 2014.

Non-tax resident employees

Non-tax resident employees are subject to income tax in the form of a withholding tax on the gross amount of their Thai-source income at the flat rate of 15%. Tax payable is withheld at source at the time of the payment.

Employers

Employers must withhold income tax at the progressive rate or at the flat rate of 15% and remit the tax to the Thai tax authority no later than the seventh day of the month following the month of payment.

Employers must contribute annually to the Workmen's Compensation Fund between 0.2% and 1% of an employee's annual earnings (up to a maximum of THB240,000), depending on the classification of the employer.

Business vehicles

18. When is a business vehicle subject to tax in your jurisdiction?

Tax resident business

Companies incorporated in Thailand are deemed to be tax residents of Thailand.

Non-tax resident business

Non-tax resident business entities (foreign companies) not carrying on business in Thailand must pay a withholding tax on the gross amount of their Thai-source income (such as service fees, royalties, interest and rental income) at the flat rate of 15% (or 10% for dividends). Tax payable is withheld at source at the time of the payment.

19. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction (including tax rates)?

Corporate income tax

This must be paid at the rate of 20% on the net profit earned during a tax year. Reduced rates at the progressive rates of 15% to 20%, with an exemption on the first THB300,000 of net profit, are granted to small and medium-sized enterprises.

Value added tax (VAT)

VAT is payable at the rate of 7% (or 0% for export of goods and services) on the following categories of business transactions:

- Sale of goods.
- Provision of services.
- Export sales.
- Import of goods for any purpose.

Some business activities are exempt from VAT (such as sales of agricultural products).

Specific business tax (SBT)

Some business activities are subject to SBT instead of VAT, such as:

- Banking or similar activities.
- Lending money on the security of a property mortgage in the ordinary course of business.

- Securities.
- Life insurance.
- Pawn shop services.
- Commercial sales of immovable property or sales of immovable property for profit.

The rate payable varies between 0.1% and 3% of gross monthly receipts.

Municipal tax

This applies to anyone subject to SBT and is charged at the rate of 10% of the SBT payable. Municipal tax is already included in the 7% of VAT paid.

Stamp duty

There are 28 transaction documents subject to stamp duty (*Stamp Duty Schedule, Revenue Code*). The rate of stamp duty payable depends on the document executed.

Dividends, interest and IP royalties

20. How are the following taxed:

- Dividends paid to foreign corporate shareholders?
- Dividends received from foreign companies?
- Interest paid to foreign corporate shareholders?
- Intellectual property (IP) royalties paid to foreign corporate shareholders?

Dividends paid

Dividends are subject to a withholding tax of 10%.

Dividends received

Dividends are taxed as the ordinary income of the Thai company. Tax exemptions are granted with certain conditions.

Interest paid

Interest is subject to a withholding tax of 15%.

IP royalties paid

Royalties paid to foreign corporate shareholders are subject to a withholding tax at 15%, which can be reduced to 5%, 8% or 10% under some tax treaties.

Groups, affiliates and related parties

21. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

Thailand does not have thin capitalisation rules.

22. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

There are no controlled foreign corporation rules in Thailand. A Thai parent company is only subject to tax on dividends paid to it by a foreign subsidiary.

23. Are there any transfer pricing rules?

The Revenue Department has the power to make assessments regarding:

- The transfer of assets without compensation.
- The rendering of services without service charge.
- The lending of money without interest.

Additionally, it can make assessments of other activities with compensation, service charges, or interest in an amount considered to be lower than the market value without justification.

Customs duties

24. How are imports and exports taxed?

Customs duty is imposed mainly on imported and selected exported goods. Customs duty is levied in accordance with the Harmonised Commodity Description and Coding System.

As a signatory to the General Agreement on Tariffs and Trade and a member of the World Trade Organisation, Thailand complies with all relevant standards and codes when determining customs duty.

Imports and exports are also subject to VAT (see *Question 19*).

Double tax treaties

25. Is there a wide network of double tax treaties?

Thailand has signed 56 double tax treaties with many of its notable trading partners.

COMPETITION

26. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single-firm) conduct regulated by competition law?

Competition authority

The responsible authority for trade competition is the Office of Thai Trade Competition Commission (OTCC). It is an authority established by the Trade Competition Act, B.E. 2542, 1999 and is under the Department of Internal Trade at the Ministry of Commerce. Please see the OTCC's website (<http://otcc.dit.go.th>) which provides the laws and regulations on competition, including guidelines on the interpretation of unfair trade practices.

The Trade Competition Act and regulations issued under the Act apply to business operations in Thailand, regardless of the business operators' nationality.

Restrictive agreements and practices

Restrictive agreements and practices are regulated by competition law under the Trade Competition Act. Any operations or acts that may cause a monopoly, reduce competition or create unfair trade competition with regard to any goods or services, are generally prohibited. However, they are still subject to certain statutory exceptions or exemptions granted by the Trade Competition Commission. Penalties for violation include imprisonment for a term not exceeding three years, or a fine not exceeding THB6 million. There is a double penalty for repeat offences.

Unilateral conduct

A business operator is expressly prohibited from performing any act that is outside the limits of free and fair competition and would have the effect of destroying, impairing, impeding, or restricting the operation of another business operator. In addition, a business operator that is deemed to have market domination (that is, having a market share of more than 50% in such business with sales revenues exceeding THB1 billion in the previous year) is specifically prohibited from engaging in unilateral acts that are seen as abusing a dominant position. This includes unreasonably fixing prices or suspending services or goods without justification, to reduce the quantity below market demand. Penalties for violation include imprisonment for a term not exceeding three years or a fine not exceeding THB6 million. There is a double penalty for repeat offences.

27. Are mergers and acquisitions subject to merger control?

Mergers and acquisitions, or any other agreements that would result in a monopoly or unfair competition, are expressly prohibited unless permission is granted by the Trade Competition Commission. However, there is no regulation issued by the responsible authority regarding the conditions or terms that would deem mergers and acquisitions as monopolies or unfair competition. The merger control laws do not specifically address foreign businesses.

INTELLECTUAL PROPERTY

28. Outline the main IP rights in your jurisdiction.

Patents

Definition and legal requirements. To qualify for an invention patent, an invention must be all of the following:

- New.
- Involve an inventive step.
- Have an industrial application.

An invention that lacks an inventive step (a utility model) can be protected by a petty patent. A patent owner enjoys exclusive rights to produce, import, use or sell the protected product or process.

Registration. To obtain protection, an application for a patent must be submitted to the Department of Intellectual Property.

Enforcement and remedies. A patent owner can bring:

- A criminal action to prevent infringement, which includes fines from THB20,000 to THB400,000 and/or imprisonment of six months to two years.
- A tort action under the Civil and Commercial Code.

Length of protection. An invention patent is protected for a non-renewable period of 20 years. A petty patent is protected for six years, which is renewable for a further two years on two occasions (up to a maximum of ten years in total).

Trade marks

Definition and legal requirements. The Trademark Act 1991 (as amended) provides a framework for the registration and protection of trade marks, service marks, certification marks and collective marks. To be capable of registration, a mark must be all of the following:

- Distinctive.
- Not be excluded by the Trademark Act.

- Not be identical or similar to trade marks already registered.

Protection. Applications for trade mark registration must be submitted to the Department of Intellectual Property. The owner of a registered mark has the exclusive right to use the registered mark for the goods in respect of which registration has been granted. Owners of unregistered marks are not entitled to institute any legal proceedings in court to prevent the use or claim for damages for the infringement of an unregistered mark, except in passing-off cases.

There is no specific legislation relating to unregistered trade marks in Thailand. The owner of an unregistered trade mark can obtain indirect protection under the Civil and Commercial Code if identifiable ownership rights to the unregistered mark (such as established reputation and goodwill) can be established.

Enforcement and remedies. A trade mark owner can bring:

- A criminal action in a case where a third party forges or imitates a mark without authorisation or imports, sells or offers for sale, products bearing forged or imitative marks. The penalties include fines from THB200,000 to THB400,000 and/or imprisonment of two to four years.
- A tort action under the Civil and Commercial Code.

For unregistered marks, enforcement can be through an action for passing off under the Civil and Commercial Code and/or the Penal Code.

Length of protection and renewability. Protection lasts for ten years from the date of filing an application for registration, renewable indefinitely for ten-year periods. There is no defined term of protection for unregistered marks.

Registered designs

Definition. Registered designs are protected by the Thai Patent Act 1979, as amended. To qualify, a product design must be all of the following:

- Composed of lines or colours which give a special appearance to a product.
- New.
- For industrial use.

Registration. Applications for a design patent must be submitted to the Department of Intellectual Property.

Enforcement and remedies. The enforcement procedure is the same as for patents (see above, *Patents*).

Length of protection and renewability. Protection is for a non-renewable ten-year period.

Unregistered designs

There is no specific protection for unregistered designs. However, a design may be protected under section 4(7) of the Copyright Act 1994, as a work of applied art (see below, *Copyright*).

Copyright

Definition and legal requirements. Copyright can subsist in the following original works (*Copyright Act 1994*):

- Literary (including computer programmes).
- Artistic.
- Dramatic.
- Musical.
- Audio-visual.
- Cinematographic.
- Sound and video broadcasts.

- Compilations.
- Any other original works of a literary, scientific or artistic nature.

A copyright owner has the exclusive right to:

- Reproduce or adapt the work.
- Disseminate the work to the public.
- Rent out the work.
- Grant licences for the work.
- Sell the copyright.

Protection. Copyright protection arises automatically on creation or publication of the work. Alternatively, the copyright owner can record his ownership with the Department of Intellectual Property, in order to create proof of ownership.

Enforcement and remedies. The enforcement options are the same as for patents. The penalties for a criminal action include fines from THB20,000 to THB800,000 and/or imprisonment of six months to four years. Repeat offenders (within five years) can be liable to double punishment.

Length of protection and renewability. Protection for most works lasts for the lifetime of the creator plus 50 years, except works of applied art which are protected for 25 years from the date of the work was created or, if published, 25 years from publication (see above, *Unregistered designs*).

MARKETING AGREEMENTS

29. Are marketing agreements regulated?

Agency

Agency agreements are regulated by general contract and agency principles under the Civil and Commercial Code and must be construed in accordance and comply with their express terms.

Distribution

There are no specific laws relating to distribution agreements.

Franchising

There are no specific laws relating to franchise agreements. However, if a franchising agreement contains a provision related to granting a licence to use a registered trade mark, the franchising agreement must be made in writing and registered with the competent officer under the Trademark Act.

The principle of freedom of contract applies to all marketing agreements, provided the terms and provisions agreed by the contracting parties are not contrary to public order or good morals.

E-COMMERCE

30. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)?

E-commerce transactions are generally regulated under the Civil and Commercial Code which forms the basis for Thai contract law, including contracts made at distance.

The Electronic Transactions Act 2001 (as amended) specifically provides for comprehensive regulation of electronic entry into contracts, electronic signatures, electronic payments, e-commerce service providers and implementation on security measures. There are numerous regulations issued under the Act, whether by the Electronic Transactions Commission or the Bank of Thailand. In addition, the Act on Computer-Related Offences 2007 is relevant to e-commerce as it sets out various criminal offences involving or relating to computers. Importantly, it also establishes extensive

data retention requirements and obligations for service providers to co-operate with and assist law enforcement.

ADVERTISING

31. Outline the regulation of advertising in your jurisdiction.

In Thailand, advertising is regulated either directly or indirectly by several statutes. Some of this legislation applies generally, such as the Consumer Protection Act (CPA), while others only target specific categories of advertising. For instance, the Food Act and the Drug Act only regulate the advertising and the labelling of foods and drugs respectively; they do not apply to other types of advertisements. The CPA, on the contrary, sets out the basic principles of advertising laws that ensure truth in advertising and full disclosure of labelling. The CPA applies to all types of advertising, except for matters which are specifically controlled by other laws, in which case the CPA is applicable only to the extent that it is not in repetition or inconsistent with the relevant specific legislation.

While most advertisements are not subject to prior government approval, advertising of certain products must be reviewed and approved by a responsible authority before launching, particularly when advertising food, drugs, and medical devices. The government supervises advertising in Thailand through three main official bodies. The Office of the Consumer Protection Board monitors all forms of advertising and labels, and looks for violations of the CPA. The Directing Board for Broadcast Division controls and examines radio and TV advertisements. The Food and Drug Administration oversees and approves food and drug advertisements.

DATA PROTECTION

32. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

There is no specific data protection legislation in Thailand. However, a draft law, the Personal Data Protection Act, has been under consideration for quite some time.

There are also a number of statutory laws that address the subject of data protection.

PRODUCT LIABILITY

33. How is product liability and product safety regulated?

Two laws were recently adopted to address product liability and product safety issues:

- The substantive Unsafe Goods Liability Act 2008 (Product Liability Act), which came into force in February 2009.
- The Consumer Case Procedure Act 2008, a procedural law to regulate court proceedings in relation to disputes between consumers and business operators. This took effect in August 2008.

Unsafe Goods Liability Act

The Product Liability Act (PL Act) is designed to protect consumers who incur damage from a defective or dangerous product by imposing strict liability on business operators involved in the manufacture and/or sale of the product. The operator may be found liable regardless of whether it was negligent in making or selling the defective or dangerous product. The PL Act addresses three specific types of product defects:

- Manufacturing defects.
- Design defects.
- Insufficient warnings (or failure to warn).

Under the PL Act, product liability cannot be waived or limited by way of contract or by any waiver or limitation of liability statement given by an operator. The PL Act does not have retroactive application and, therefore, products sold to consumers before enactment are not subject to this specific product liability legislation.

Consumer Case Procedure Act

The Consumer Case Procedure Act 2008 (CCP Act) is intended to make it easier for consumers to pursue product liability and general consumer claims against business operators. The CCP Act simplifies and expedites the legal process for an injured party to seek redress. For example, consumers can file complaints orally, and court fees are waived for consumers who wish to file an action. In addition, the court is given considerable discretion under the CCP Act to conduct the proceedings and to ensure that consumers receive fair treatment.

MAIN BUSINESS ORGANISATIONS

Board of Investment

W www.boi.go.th

Main activities. Grants privileges to investors in Thailand.

Ministry of Commerce

W www.moc.go.th

Main activities. Handles a broad portfolio including regulation of domestic trade, foreign trade, foreign business regulation and company registration.

Securities and Exchange Commission

W www.sec.or.th

Main activities. Under the authority of the Ministry of Finance, together with the Bank of Thailand, serves as the primary regulator of securities, derivatives, securities exchanges, and related services.

Revenue Department

W www.rd.go.th

Main activities. Collects several taxes, such as income tax, VAT, specific business tax, stamp duty, and so on.

Ministry of Labour

W www.mol.go.th

Main activities. The primary regulator of employment, dealing with labour standards and workplace safety, as well as authorisation for foreign nationals to work in Thailand.

ONLINE RESOURCES

Website of the Royal Thai Government Gazette

W www.ratchakitcha.soc.go.th

Description. Website of the Royal Thai Government Gazette. The Government Gazette is Thailand's public journal. Law and regulatory notifications are officially published by the Cabinet and the Royal Gazette Publishing House on the website, and it is only available in Thai.

Website of the Council of State

W www.krisdika.go.th

Description. Website of the Council of State. The Council of State is a department under the Prime Minister, which gives advice to state entities. It also produces codified versions of laws and regulations. Materials are primarily available in Thai, though the website provides some English translations. Only the original Thai text has legal effect.

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