

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



contents

- 1 **Licensing Facilitation Act**
By reducing officials' discretionary authority, increasing transparency, and creating accountability, the Licensing Facilitation Act aims to make obtaining government licenses easier.
- 3 **Corporate Guarantors' Rights**
Legal changes will affect the rights and obligations of corporate guarantors.
- 4 **New Debt Collection Law**
Thailand's legislature has passed the Debt Collection Act to stamp out deceptive and unscrupulous practices.
- 5 **Fixed-Term Employment**
This article highlights the key issues when entering into fixed-term employment contracts.
- 6 **Employer Obligations in Myanmar**
In this article, we provide an overview of foreign investors' significant obligations when hiring employees in Myanmar.
- 7 **Front-of-Package Labeling**
Several countries, including Thailand, are moving toward a form of nutritional labeling that simplifies the most important information and places it where it is visible at first sight.
- 8 **Update on Patent Prosecution Highway**
Last year, the Thai Department of Intellectual Property and the Japanese Patent Office initiated a two-year program that provides a fast-track channel to accelerate substantive examination of patent applications.
- 9 **Geographical Indications**
In Indonesia, many products have been registered as geographical indications. This article looks at the ins and outs of the local practice.
- 10 **Trademark Registration in Cambodia**
Following Cambodia's accession to the Madrid Protocol, we review the trademark registration and renewal process.
- 11 **Protecting IP under Unfair Competition Laws**
We look at Vietnam's unfair competition laws and how they can be used to protect trade indications.
- 12 **Tilleke & Gibbins Updates**
Our firm has opened a new office in Phnom Penh, Cambodia, and we have been recognized in the ALB Diversity List 2015 and the Lex Mundi Pro Bono Foundation Awards.

New Transparency in Licensing: Overview of the Licensing Facilitation Act

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In Franz Kafka's novel *The Castle*, the main character, known only as "K," futilely attempts to gain access to a mysterious group of administrators that run a small village from a castle. K is challenged throughout the story to learn the obscure and constantly changing ways of the castle's imposing bureaucracy.

Investors in Thailand and other Southeast Asian countries can sometimes feel like K as they navigate shifting bureaucratic labyrinths of official procedures, forms, queues, and seals. Indeed, according to the 2014-2015 World Economic Forum's country profile for Thailand, inefficient government bureaucracy and corruption are listed as two of the top three "most problematic factors for doing business" in Thailand (government instability is the third).

But a new law seeks to shine a light on the shadowy world of bureaucratic officialdom in Thailand. The Licensing Facilitation Act (the Act), which became effective on July 21, aims to make obtaining government licenses easier. The Act works by promoting three core principles of good governance: reducing officials' discretionary authority; increasing transparency; and creating accountability. The Act is the first of its kind in Thailand. And encouragingly, it is part of a broader government trend to address corruption in Thailand.

The Act is also expansive. With a few notable exceptions, the law applies to all licenses granted in Thailand. Everything from work permits and marriage registrations to drug approvals and foreign business licenses are covered by the law. The exceptions include natural resources and environmental-related licensing (such as mining concessions and Environmental Impact Assessments); the courts; the National Assembly and Council of Ministers; and the armed forces.

Manuals

The Act's primary means to reduce official discretion and increase transparency is through written manuals. Every government agency that grants licenses and is subject to the Act must publicly release a manual that describes how to obtain the license. The manuals must be kept where applicants submit their license applications. They can also be obtained electronically or purchased.

Each manual must contain all of the rules, conditions, and procedures associated with submitting a license application. The official is not allowed to deviate from what the manual says. In other words, an official does not have any discretion as to what should or should not be submitted to apply for the license. The manual governs the application process, not the official.

The law expressly states that if the submitted application is complete as per the manual, the official is legally prohibited from asking for any more documents or evidence. Upon acceptance, the official is also prohibited from refusing to consider the application because of a defect. This predictability also makes it easier for the applicant to prepare the application in advance, and have confidence that what they submit will be accepted. In addition, the increased transparency and reduced discretion takes away opportunities for corrupt officials to take bribes.

Continued on page 2

Licensing Facilitation Act (from page 1)

Importantly, the manual must also state the time period for an official to give a decision on the license. The official is required to notify the applicant of the decision on the license within seven days after finishing his or her consideration. This requirement, if properly applied, will not only speed up the licensing process, but also further reduce chances to take bribes to “process” an application faster.

Admirably, the Act goes beyond just setting time limits, and makes the official accountable for failing to follow the prescribed deadlines. If the official has not made a decision at the end of the period stated in the manual, the official must state the reason for the delay in writing every seven days until a decision is made. The official must give a reason in writing to the Public Sector Development Commission—a government body under the Prime Minister’s office—every time he or she seeks to delay the decision. The law’s drafters hope that written delays would look bad on an official’s employment record and serve as a disincentive to keep to the deadlines.

If the official fails to comply with the time requirements stated in the manual or explain the delay, he or she is automatically liable for any damage caused. The only exception is if the failure to comply was due to a force majeure event. The law does not state how the damages would be calculated and to whom the official would be liable. The law also does not state how an applicant can pursue a case against an individual official, but it is assumed that the case would go through the Administrative Court, similar to other cases against government agencies.

Submissions and Renewals

The Act also governs the submission of license applications. Under the law, an official must ask an applicant to immediately fix an error in the application if there is a defect. For example, if an applicant submits an application with a mistake (e.g., a document is missing, a form is incorrectly filled out, etc.), the official cannot wait days or weeks to tell the applicant about the problem. If it is not possible for the defect to be immediately remedied, the official must make a record of the error and the time period to fix it. The applicant and official must also sign the record, creating evidence that the applicant can later use to hold the official to account.

If the applicant does not comply with the official’s suggestion to fix the application, the official must return the application to the applicant. The official must also state in writing why it was returned, creating an evidentiary record. If the applicant disagrees with the official’s request to fix the application, the applicant has the choice to appeal or submit a new application.

Another key feature of the Act is the creation of a One-Stop Service Center. The Thai cabinet, known formally as the Council of Ministers, has the authority to establish One-Stop Service Centers to receive all applications under the laws related to licensing. The One-Stop Service Center would be its own government agency with branch offices under different ministries and different provinces. It would accept applications, inform applicants on the licensing rules, send applications to the relevant agency deciding on the license, and give recommendations to the Thai cabinet on improving licensing rules and application requirements. The One-Stop Service Center can greatly ease the burden on applicants, as people would not be required to visit various agencies to obtain multiple licenses needed for an investment project.

Oversight

The Act also contains oversight mechanisms. For example, if a licensing official does not grant a license because of dishonesty or negligence, the relevant authority can bring a disciplinary action or even criminal charges against that official. Criminal charges against public officials are rare in Thailand, so it remains to be seen how or whether such cases will actually be brought.

Further, the Public Sector Development Commission is mandated to inspect whether the licensing officials’ work flow and period of time for granting the license stated in the manual are compliant with the “good governance” rules. These rules are not specifically defined in the Act. For instance, if the Public Sector Development Commission thinks that the asked-for delay is unreasonable or caused by inefficiencies, the agency can report the problem to the Thai cabinet, and give recommendations for how the agency can improve.

Additionally, licensing authorities must review the laws that empower them to grant licenses every five years. The authority can review earlier, if necessary. The authorities must submit reports of their review to the Thai cabinet for consideration. Hopefully, unnecessary licenses or inefficient licensing processes will be weeded out through this review mechanism.

Outlook

The Licensing Facilitation Act has the potential to make obtaining official licenses and approvals much easier. The new law is also a welcome sign that indicates the Thai government understands how important transparency and predictability is to doing business. And reducing officials’ discretion in the licensing process will help decrease acts

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of bribery, which will also improve the country’s business environment.

At this stage, the effectiveness of the manuals remains to be seen. There is a risk that a manual may have “open-ended” requirements. For example, a manual may list the documents required for submission, and then state “... and other documents the official deems necessary” or something similar. Such language would of course completely defeat the purpose and spirit of the legislation, so it is unlikely. As agencies release their manuals over the following weeks and months, investors will have a better sense of how the Act will be implemented and its consequences.

Overall, however, the Act is a positive indication that regulatory reform is underway for the better in Thailand. And when the Act is considered in light of other new legislation, such as the amendments to the anti-corruption law, investors should expect an enhanced investment environment and better governance. A more transparent and less Kafkaesque bureaucracy would certainly be a boon for Thailand. 🏛️