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## A Step Forward: Thailand Takes Dramatic Steps to Modernize Customs Laws

**B**usinesses involved with the Thai customs clearance process have been anxiously awaiting changes aimed at improving Thailand's customs laws, an issue that has long been subject to discussion and sometimes contentious debate. These changes come with the passage of the Customs Act B.E. 2560 (2017).

The new Act, effective November 13, 2017, repeals the outdated and controversial Customs Act B.E. 2469 (1926) and its prior amendments, and seeks to address many of its shortcomings. This article highlights some of the most significant revisions to the Customs Act, with specific focus on the Act's intent and penalty provisions and their effect on possible resolution of customs disputes through settlement.

### Streamlined Customs Appeals

Under the previous Act, the customs appeal process could sometimes take years to resolve, with importers required to post duty guarantees pending appeal and faced with no clear return deadlines. The new Act standardizes procedure and sets clear timelines for post-clearance customs audits and Board of Appeal reviews, and it imposes clear deadlines for the return of duty guarantees placed by companies during the appeals process.

### Modification of the Customs Rewards System

The new Act also revises the existing rewards regime dramatically, reducing the incentive and reward amounts provided to whistleblowers and initiating a cap on the amount of rewards. For example, whistleblowers will now only receive a maximum of THB 5 million, regardless of the amount of the fine and/or settlement.

### Change in Strict Liability Presumptions – Officers and Directors

Another key change to the Act is an amendment to the intent requirements for claims of customs duty evasion. Under the previous Act, section 27 presumed strict liability for all included criminal customs offenses, even where violations may have been due to error rather than intentional or negligent misconduct. The new Act, while still retaining some limited strict liability presumptions, changes the highly controversial presumption of intent for customs duty evasion claims under section 243, requiring a showing of “willful intent” or “negligence” by persons charged with duty evasion offenses.

In addition, where the charged party is a juristic entity, the new Act changes presumptions of strict liability for company officers, directors, and other authorized persons charged under the new Act. This is an important and welcome change, as it was common under the previous Act to impose charges on company representatives. This had the effect of shifting the burden of proof away from the prosecution and onto the accused to conclusively prove that he or she was not involved in the offense, had not admitted to the offense, or had acted reasonably to prevent the offense.

The new Act's change to these strict liability presumptions is consistent with recent decisions of the Constitutional Court that have concluded that presumptions of liability for officers, directors and other persons responsible for the operations of a company are unconstitutional.

### Classification and Penalties

The new Customs Act also addresses one of the most highly criticized aspects of the previous law: its criminal penalty provisions. This critical change includes reclassification of offenses and revisions to the method for calculating criminal fines.

Previously, most criminal penalties relevant to business operators were prescribed under section 27 of the Customs Act. For example, all customs offenses, including smuggling and attempting to commit a customs offense, were classified together under section 27. This offered little flexibility in punishment and frequently failed to account for the considerable differences in the range of wrongdoing by an offender. The new Act seeks to deal with this classification problem by now having penalties governed by three distinct sections: sections 242, 243, and 244.

The new Act also revises the penalty scheme to distinguish between degrees of customs offenses and prescribes new methods for calculating criminal fines.

Previously, under section 27, penalties were calculated at four times the combined price of goods plus the customs duty, imprisonment for a term not exceeding 10 years, or both. While some discretion existed for claims settled before reaching court, once at the trial court stage the only penalties the court could impose were the fine calculated at four times the price and/or imprisonment. Because these stringent penalties did not distinguish between types of offenses and offered the courts no discretion in calculating fines, penalties were often out of proportion with the alleged wrongdoing. This was also a major factor driving parties to seek settlement opportunities prior to trial even where there may have been little merit to the underlying claims against them.

The new section 243 applies to duty evasion and calculating criminal penalties using only the actual amount of the duty evaded. The penalty multiplier is also limited to a range of one-half to four times the base amount. Penalties can also include imprisonment for a term not exceeding 10 years, instead of or in addition to the fine.

The new Act also introduces different degrees of penalties for different levels of offense. For example, the penalty for smuggling under section 242 prohibits importing or exporting items that have “not duly passed through customs.” The penalty is four times the price of the article including the duty, imprisonment not exceeding 10 years, or both. In addition, the item shall be forfeited regardless of whether the person is punished. Section 244 prohibits customs evasion (i.e., importing items for the purpose of evading “restrictions or prohibitions with respect to such article”) and imposes a penalty of THB 500,000, imprisonment not exceeding 10 years, or both. In addition, the court may order the article to be forfeited regardless of whether there is anyone to be punished.

### Case Evaluation and Settlement

The amendments to the Thai Customs Act are expected to have a substantial impact on the evaluation of claims and whether to consider settlement. Under the previous Act, defendants faced an inflexible and excessive penalty if convicted for all classifications of offenses under Section 27, with the court's discretion limited only to the length of prison sentence. This placed strong pressure on parties to consider customs settlement opportunities to avoid trial even where there was a strong defense to the charge.

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The provisions under the new Act offer much more flexibility to an accused to carefully evaluate and consider defense and settlement options. First, the classification of the offense is taken into account in calculation of penalties. Second, the calculation method has been substantially changed and is rightfully based upon the amount of under-declaration and not the total value of the goods plus duty. Third, the court will now have the discretion to adjust monetary penalties for conviction on a case by case basis within specific guidelines. These factors will result in lower overall fines for conviction and increased court involvement in the evaluation of penalties. This, in turn, will allow the accused and their counsel the opportunity to more

effectively evaluate settlement options versus electing to defend at trial.

### Conclusion

The new Customs Act B.E. 2560 (2017) substantially improves the customs clearance process by improving clarity and fairness. This includes an overhaul of the penalty scheme, fundamental change to controversial strict liability presumptions, separate penalties for different types of offenses, and reduced penalties compared to the previous scheme. While there are still opportunities to improve the new Act and some existing challenges remain for companies seeking to ensure customs compliance, the new law goes a long way towards clarifying and correcting many of the shortcomings of its predecessor. ⚖️