

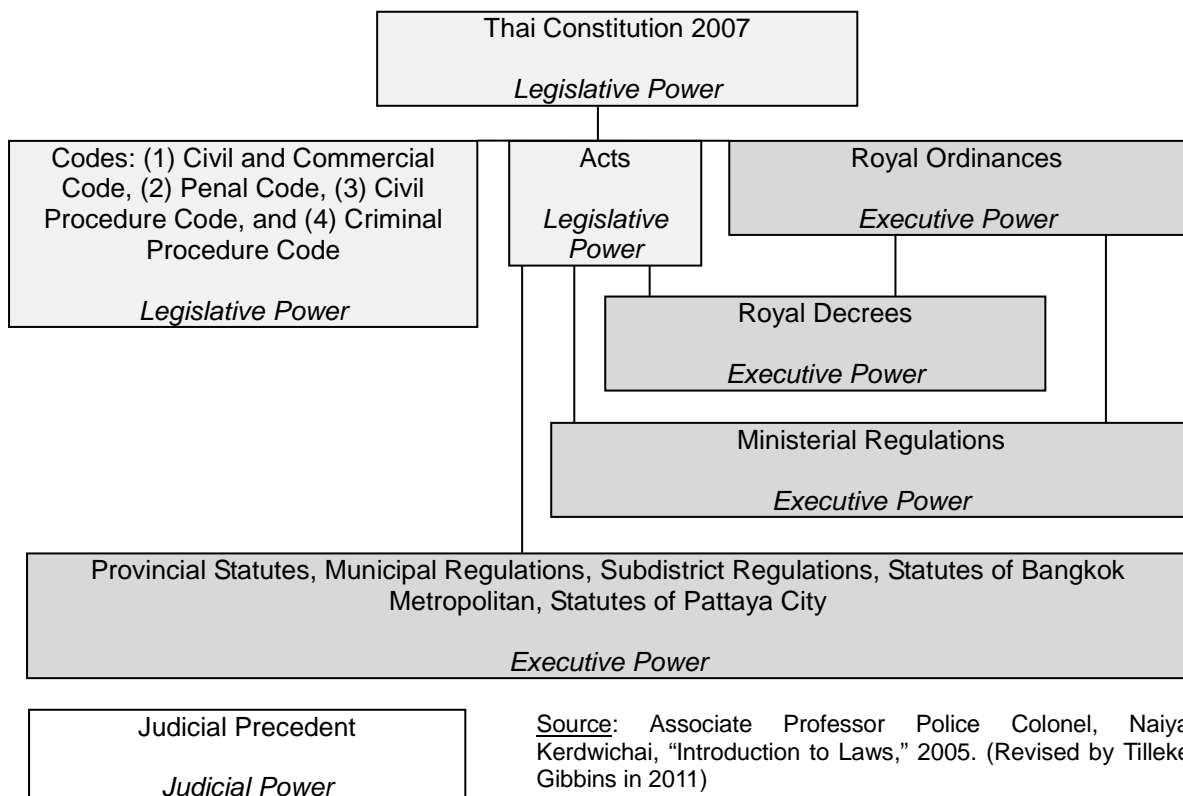
Tilleke & Gibbins

1. INTRODUCTION

1.1 Please give a brief outline of the legal system in Thailand. Is it based on common-law, civil-law, or some other system?

Thailand is a civil-law country with four principal fundamental codes: the Civil and Commercial Code, the Civil Procedure Code, the Penal Code, and the Criminal Procedure Code. Thailand is also governed by a constitution and bilateral and multilateral conventions and treaties.

The hierarchy of legal authority in Thailand can be generally described as follows.



Source: Associate Professor Police Colonel, Naiyana Kerdwichai, "Introduction to Laws," 2005. (Revised by Tilleke & Gibbins in 2011)

1.2 How are the courts organized in Thailand?

All Thai courts function in the name of H.M. the King and owe their existence to the Constitution and implementing statutes. Importantly, there is no right to a jury trial in the Thai law system; cases are adjudicated by judges.

The 2007 Constitution recognizes four systems of courts:

1. The Constitutional Court which addresses issues concerning whether or not existing laws are inconsistent with the Constitution.
2. The Courts of Justice which hear civil and criminal cases, including those involving tax, labor, intellectual property, international trade, bankruptcy, etc.
3. The Administrative Court which handles administrative disputes between the private sector and state entities and between state entities.
4. The Military Court which handles criminal cases committed by military officers.

The Administrative Courts possess the jurisdiction to adjudicate disputes between a government entity or official and a private individual or juristic person and disputes between government entities or officials. Importantly, this means that Administrative Courts have the jurisdiction to try disputes related to contracts with government entities. There is a single level of appeal from the Administrative Court to the Supreme Administrative Court.

The courts of justice are comprised of common courts and specialized courts. The common courts consist of the civil and criminal courts for each jurisdiction. There are five specialized courts:

1. The Juvenile and Family Court.
2. The Labor Court.
3. The Tax and Duty Court.
4. The Central Intellectual Property and International Trade Court.
5. The Central Bankruptcy Court.

Within the common courts (civil and criminal courts), there are three court levels: (1) the Courts of First Instance, which are trial courts having original and general or special jurisdiction over all civil and criminal matters; (2) the Courts of Appeal, which determine legal and factual issues on appeal from the Courts of First Instance; and (3) the Dika (Supreme) Court, which determines legal and factual issues on appeal from the Courts of First Instance and Courts of Appeal.

Within the specialized courts (except the Juvenile and Family Court), there are only two court levels, with appeals from the Courts of First Instance being heard directly by the Dika (Supreme) Court.

1.3 How are lawyers organized in Thailand?

Thailand's legal profession is limited to Thai nationals. However, foreign attorneys who obtained lifetime work permits when the first Alien Working Act was passed in 1972 are allowed to continue giving legal advice.

There exist, generally, three levels of legal practitioners in Thailand. To practice law (i.e., give legal advice), the practitioner must hold an undergraduate degree issued by an institution approved by the Lawyers Council of Thailand.

To litigate in courts, one must additionally possess Thai citizenship, legal experience, and must pass the lawyers' examination. This can be accomplished through either (1) one year of training in a legal firm, followed by sitting the exam, or (2) by sitting the exam beforehand, six months of legal training, and then a supplementary exam.

Those who wish to do so may pursue a Barrister-at-Law degree, a further one-year course offered by the Bar Institute. This degree is a prerequisite for those wishing to pursue a career as a judge or public prosecutor.

Lawyers may operate as sole practitioners or through partnerships or companies. The majority of the international law firms and many of the larger Thai firms situated in Bangkok operate through a company structure. There are also many lawyers working as sole practitioners in the provinces. In addition to private practice, lawyers may work as in-house counsel, government lawyers, judges, or in a variety of other law-related careers.

The Lawyers Council is given power under the Lawyers Act B.E. 2528 (1985) to issue rules regulating the professional practice and conduct of lawyers, breach of which constitutes professional misconduct. When a complaint of professional misconduct is filed against a particular practicing lawyer, the Lawyers Council appoints a committee consisting of three members to investigate the complaint. If they decide that the complaint is valid, the case is sent before the Disciplinary Committee.

1.4 What type of legal fee arrangements are common in Thailand?

Legal fees charged by international law firms are typically higher than those charged by local lawyers who practice as sole practitioners or in smaller firms in the provinces. While international firms

generally charge on the basis of hourly rates, local lawyers tend to work on the basis of fixed fees or no-win, no-fee arrangements. International law firms generally avoid the use of contingency fee arrangements since they often result in disputes with clients.

2. STRUCTURES FOR DOING BUSINESS

2.1 Is it necessary to set up a business organization in Thailand to provide services or sell goods in Thailand?

The most important law governing foreign direct investment in business in Thailand is the Foreign Business Act B.E. 2542 (1999) (FBA).

Under the FBA, the term “alien” means:

- A non-Thai natural person.
- A legal person not incorporated in Thailand.
- A legal person incorporated in Thailand with at least half of its company shares held by persons under the two foregoing categories, or a legal person with at least half of its total registered capital invested by such persons.
- A limited partnership or registered ordinary partnership, the managing partner or manager of which is a non-Thai natural person.

The FBA prescribes the categories of restricted businesses into three schedules:

- Schedule 1 covers businesses that are strictly prohibited to aliens. There are nine types of activities.
- Schedule 2 covers businesses that are prohibited to aliens unless they receive permission from the Cabinet. Foreigners may operate a business under Schedule 2 only if Thai nationals or juristic persons not considered to be aliens under the FBA hold shares of not less than 40% of the capital of that foreign juristic person. Unless there is a reasonable cause, the Minister of Commerce, with the approval of the Cabinet, may reduce the proportion requirement, but it shall not be less than 25%, and the number of Thai directors shall not be less than two-fifths of the total number of directors. The activities included on this list relate to national security or have impact on art, custom, folk handicrafts, or natural resources and environment. There are 13 types of activities. Aliens seeking to perform a Schedule 2 activity should apply to the Minister according to the rules and procedures stipulated by the Ministerial Regulations. If the Cabinet approves the application, a permit will be issued within 15 days after approval has been granted. The Minister may attach to it such conditions as imposed by the Cabinet or as

stipulated by the Ministerial Regulations issued under Section 18 of the FBA. The Minister will issue a permit within 15 days after approval has been granted.

- Schedule 3 covers businesses that are prohibited to aliens unless permission is granted by the Director-General of the Department of Business Development (DBD). The activities included on the list are those that Thais are not prepared to perform in competition with aliens. There are 21 types of activities. Aliens seeking to perform a Schedule 3 activity must apply for permission in accordance with Section 18. The Director-General will issue a permit within 15 days after permission has been granted. The Director-General may attach to it such conditions as imposed by the Ministerial Regulations issued under Section 18.

Under the FBA, retail sale in all categories of goods having the total minimum capital less than Thai baht (THB) 100 million or having the minimum capital of each shop less than THB 20 million is restricted under List 3 (14); and wholesale in all categories of goods having a minimum capital for each shop of less than THB 100 million is restricted under List 3 (15) of the FBA. Further, most service businesses are restricted to aliens under List 3 of the FBA. It is a criminal offense to conduct a reserved business under the FBA without a proper license, as explained above.

Generally speaking, the FBA does not affect Board of Investment (BOI) promotion or businesses under the law on the Industrial Estate Authority of Thailand (IEAT). In other words, it would still be possible for a new alien business to apply for investment promotion under the law on BOI promotion, or to apply for permission to do business under the law on IEAT. For businesses qualifying under these laws, the relevant regulations and the administering government agencies would determine which conditions may be fixed for such businesses, such as a minimum percentage of Thai ownership, amount of investment, or permitted activities. After the business has obtained approval from either of these authorities, the business shall apply for a certificate in accordance with the procedures stipulated by the Director-General pursuant to Section 12 of the FBA. The application process is an administrative procedure, rather than an approval process.

The foreign ownership restrictions under the FBA will not apply to U.S. nationals or nationals of countries with which Thailand has executed a free trade agreement, which includes Japanese nationals.

Thailand signed the Japan-Thailand Economic Partnership Agreement (JTEPA) in November 2007. Under JTEPA, a Japanese-owned Thai company is permitted to have Japanese ownership exceeding 50% to engage in the following eight businesses without being subject to an alien business license under the FBA, according to the conditions stipulated under JTEPA:

- Retailing business (except distilled alcohol).

- Wholesaling business (except distilled alcohol).
- Advertising business.
- Hotel business.
- Restaurant.
- General management consultancy.
- Logistics advisor (except transportation).
- Household electronic equipment repair and maintenance.

2.2 What forms of business organizations can be set up in Thailand?

The principal forms of business organizations are:

- Sole proprietorship.
- Ordinary partnership (unregistered).
- Ordinary partnership (registered).
- Limited partnership.
- Representative office.
- Regional office.
- Branch office of foreign company.
- Joint venture.
- Limited company.

A person, Thai or alien, may engage in business in the form of a single proprietorship, a partnership, a representative office, a regional office, a branch of a foreign corporation, a joint venture, or a limited company, provided the restrictions of the FBA are not breached.

2.3 What is the process, time required and cost for setting up each?

Sole Proprietorship

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 number and a value added tax certificate if applicable. Some sole proprietorships are required to obtain a Commercial Registration Certificate at the Ministry of Commerce. Outside Bangkok, registration of a sole proprietorship for a non-Thai may take longer, because the registration officials will want to be sure that the particular business activity is one in which an alien alone can properly engage, given the restrictions and exceptions of the FBA.

Partnership

In Thailand, three forms of partnership are permitted:

- An unregistered ordinary partnership.
- A registered ordinary partnership.
- A limited partnership.

These types of partnerships differ primarily in the liability of the partners in each. Thai national partnerships, which are defined as partnerships having two Thai natural or juristic persons for each alien partner, can engage in practically all forms of business.

Partnerships which have a foreigner as the managing partner or as the manager, or in which foreigners' investments amount to half or more of the total capital, shall be regarded as alien partnerships, and subject to the FBA.

Unregistered Ordinary Partnership

An unregistered ordinary partnership is one in which all partners are jointly liable for all the obligations and debts of the partnership. It is not registered with the Ministry of Commerce. This type of partnership, therefore, is not a legal entity (juristic person), and the partnership pays taxes at the rates applicable to individuals. Under the Revenue Code, an unregistered partnership, although not a juristic person, is considered a separate entity for tax purposes. The partnership (not the partner) pays taxes at the rates applicable to individuals. However, if a partner receives a salary, as opposed to a share of profit as a partner, then he/she would be liable for personal income tax on his/her salary. As the partnership is taxed as an entity, the partner would not have to pay tax a second time on his/her share of the profit. Each partner must contribute money, property, or services to the partnership. In case of services, if the partnership agreement does not fix the value of the service, it is presumed that the contribution will be equal to the average shares from the other partners who contributed cash or other valuable properties.

Registered Ordinary Partnership

A registered ordinary partnership is registered with the Ministry of Commerce, which makes it a juristic entity with a separate and distinct personality from each of the partners. As in unregistered ordinary partnerships, all the partners are jointly and unlimitedly liable for all the obligations of the partnership. The partnership must be registered at the Registration Office of the district in which the principal place of business of the partnership is located, or at the Office of Business Registration Services, Ministry of

Commerce, in Bangkok. A registered ordinary partnership partner may pursue any claim of, or any right acquired by, the partnership against third persons, even if he/she did not actually participate in the transaction. A partner's liability for the partnership's obligations ceases two years after he/she leaves the partnership.

Limited Partnership

A limited partnership is one in which the individual liabilities of one or more partners are limited to their respective contributions, and one or more partners are jointly liable without any limitation for all the obligations of the partnership.

Like a registered ordinary partnership, a limited partnership must register at the Registration Office in the district where the partnership's head office is located. In Bangkok this can be done at the Office of Business Registration Services, Ministry of Commerce. Until it is registered, the limited partnership remains an ordinary partnership for legal purposes, and all the partners continue to be jointly and severally liable for all the obligations of the partnership.

The firm name of a limited partnership may not contain the names of those partners with limited liability. Should their names be included in the firm name, they become liable to third persons to the same extent as partners with unlimited liability. The contributions of the partners with limited liability must be in cash or other valued properties. A limited partner cannot contribute services alone. No dividend or interest may be distributed to partners with limited liability except out of partnership profit. As a general rule, a limited partnership may 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.

In general, the partnership form of business organization is common among the Thais, but not among overseas investors, as it is based on individual rather than corporate status. None of the three forms of partnership allowed under Thai law conforms to the needs of most foreign investors. The Board of Investment does not promote partnerships, because businesses of this sort often conflict with the FBA. Furthermore, changes in ownership and control may jeopardize the good standing of a partnership or its license.

A registered partnership or a limited partnership having three or more partners may be converted to a limited company. In order to do so, the Registrar must receive the written consent of all partners within 14 days from the date on which all partners have given their consent. Moreover, the conversion must be publicized at least once in a local paper and notices must be forwarded to all creditors of the partnership informing them of the proposed conversion and requesting the creditors who may have

any objection to forward their protests against the conversion within 30 days from the date on which the notices have been given. Should there be any objection, the partnership cannot be converted unless the performance of obligations has already been fulfilled or security provided to the objecting creditor.

Representative Office

A representative office is defined as an office in Thailand of a foreign company engaged in the business of international trading. A representative office in Thailand cannot engage in any profit-seeking or profit-making enterprise. The scope of activities of a representative office must be limited to approved activities, or significant Thai tax liabilities can arise. The risk of exceeding the scope of activities is that the income of the parent or affiliated companies may be deemed earned in Thailand and subject to taxation.

If the representative office engages in other activities for which permission is not granted, such as buying or selling goods on behalf of the head office, it will be regarded as doing business in Thailand and may be subject to Thai taxation on all income received from Thailand. Also, the representative office may not act on behalf of third persons. Any such business or income-earning activities could amount to a violation of the conditions of the license to establish and operate a representative office, which in turn could result in revocation of that license.

A representative office which undertakes one or more of the approved activities in Thailand without rendering any service to any other person, and which refrains from prohibited activities, is not subject to Thai taxation. Such a representative office is understood to be receiving a subsidy from the head office to meet its expenses in Thailand. Gross receipts or revenues received by a representative office from the head office are not characterized as revenue to be included in the computation of juristic person income tax.

Even though they are not subject to taxation in Thailand, all representative offices are still required to obtain a Corporate Tax Identification number and submit income tax returns and audited financial statements to the Revenue Department. They are also required to submit the same to the Department of Business Development.

Scope of Representative Office Activities

“International trading business” means activities concerning:

- The finding of sources of purchase of goods or services in Thailand for the head office.

- The checking and controlling of quality and quantity of goods purchased for manufacturing in Thailand by the head office.
- The giving of advice on various aspects concerning goods of the head office sold to agents or consumers in Thailand.
- The dissemination of information concerning new goods or services of the head office.
- The report of movements of business in Thailand to the head office.

An international trading business is regarded as a service activity under Schedule 3 of the FBA, and thus the establishment of a representative office requires an alien business license from the Director-General of the Department of Business Development.

Fees for Representative Office

The nonrefundable application fee for a representative office is THB 2,000. If the application is approved, government fees must be paid at the rate of THB 5 for every THB 1,000 or a fraction thereof of the registered capital, with a minimum of THB 20,000 and a maximum of THB 250,000.

Tax Position of Representative Office

The representative office is required to obtain a corporate tax identification number and submit income tax returns and balance sheets, even if nil. Individual aliens and all local staff are required to obtain taxpayer cards and pay personal income tax.

Regional Office

A regional office means an office established by a transnational corporation in a country other than the country of registration of the head office, without having to register as a juristic person under the laws of the country where such office is established.

Scope of Permitted Regional Office Activities

A regional office may engage in the following permissible activities:

- Contacting, coordinating, and supervising on behalf of the head office the activities of branches and/or subsidiary companies located in the same region as the regional office.
- Providing services to the head office's branches and subsidiary companies, 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.

It is important to note that no income can be derived from providing the above activities. A regional office cannot accept a purchase order or make a sales offer, nor can it negotiate and enter into any business arrangement with a person or juristic person in the country where the office is established. All expenditures incurred by the regional office in connection with the above activities will be borne by the head office. The head office will be the only source of funds.

The permitted regional office activities as listed above are regarded as service activities under Schedule 3 of the FBA, and thus the establishment of a regional office requires an alien business license from the Director-General of the Department of Business Development.

Fees for Regional Office

The nonrefundable application fee for a regional office is THB 2,000. If the application is approved, the government fee will be set at the rate of THB 5 for every THB 1,000 or a fraction thereof of the registered capital, with a minimum of THB 20,000 and a maximum of THB 250,000.

Duration of Regional Office

A regional office may operate commencing from the date the fee is paid throughout the period approved.

Tax Position of Regional Office

In terms of tax requirements, the regional office is required to obtain a corporate tax identification number and submit income tax returns and balance sheets, even if nil. Individual aliens and all local staff are required to obtain taxpayer cards and pay personal income tax.

Branch Office

A foreign company planning to conduct business in Thailand, such as a contract project, usually establishes a branch office to undertake the project. There are no special registration requirements for the establishment of branches of foreign companies to do business in Thailand. However, most business activities fall within the scope of one or more laws or regulations which require special regulation or license (e.g., value added tax registration, taxpayer identification card, Commercial Registration Certificate, alien business license, etc.) before the commencement of the activities.

Foreign business establishments must therefore follow the generally applicable procedures. If the intended activity falls under the FBA, the branch must apply for an alien business license prior to performing any of the intended activities.

Joint Venture

A Thailand limited company which is owned by two or more companies is often referred to as a joint venture. Conceptually, this type of limited company can be viewed as an incorporated joint venture, although this term does not appear in the Civil and Commercial Code or elsewhere in Thai law. Another type of joint venture is an unincorporated joint venture, which is the type described below.

In a contracted project which cannot be carried out by a single company, it is common for a company to join with others in the form of a joint venture. According to Thai law, a joint venture has no legal personality. It is formed by contract between one company and another company or juristic partnership or individual, and it exists only for a particular project or specific venture. Although it may engage in business, it cannot be registered. The Revenue Department, however, treats a joint venture as a juristic company for purposes of tax liability. The joint venture must therefore apply for a taxpayer identification card. Moreover, value added tax registration is required if a joint venture is qualified under the requirements of the Revenue Code.

The Revenue Code requires that at least one of the joint venture partners be a juristic entity, and the Revenue Department further stipulates that the joint venture must also have two elements:

- A joint investment in the joint venture and sharing of profit or loss under the joint venture agreement.
- The partners having joint liability to third parties dealing with the joint venture.

A foreign company that participates in a joint venture is required to obtain an alien business license under the FBA and create a branch office in Thailand to engage in business as a partner of the joint venture. The conditions stipulated in the business permit issued to the foreign partner will be the same as described above. The foreign partner does not need to register for its own taxpayer identification card. However, the joint venture itself must register. The registration process for the permit of the foreign partner and the taxpayer identification card of the joint venture takes about eight to ten weeks to complete. The government fee, collected upon issuance of the business permit to the foreign partner, will be set at the rate of THB 5 for every THB 1,000 or a fraction thereof of the registered capital, with a minimum of THB 20,000 and a maximum of THB 250,000.

Limited Company

Under Thai law there are two types of limited companies—the limited public company and the limited private company. The law pertaining to public companies is found in the Public Limited Company Act B.E. 2535 (1992) and pertains to the creation of this separate form of entity. The formation of a private company is governed by the Civil and Commercial Code.

A private limited company is commonly used for those who desire a more permanent business in Thailand. As of July 1, 2008, according to the amended Civil and Commercial Code B.E. 2551 (2008) (CCC), limited companies are required to have a minimum of three shareholders at all times. (Previously, seven shareholders were required.) The initial step in forming a limited company is to reserve a name with the Department of Business Development and, if approved, file a Memorandum of Association. This must contain the following information:

- Name and location of the company.
- Objectives of the company.
- Amount of capital, divided into shares and par value.
- Name, address, and occupation of each promoter (subsequently called shareholder), and number of shares subscribed by them.

The government fee to register the Memorandum is THB 500 per THB 1 million of the registered capital, with a minimum fee of THB 500 and a maximum of THB 25,000. After the Memorandum has been approved and full subscription of shares has taken place, the promoters are required to call a statutory meeting of the share subscribers to formally bring the company into existence. The statutory meeting determines the following:

- Articles of Association (by-laws).
- Ratification of any contracts entered into and any expenses incurred by the promoters in promoting the company.
- Remuneration, if any, to be paid to the promoters.
- The number of preferred shares, if any, to be issued, and the nature and extent of the preferential rights accruing to them.
- The number of ordinary shares or preferred shares to be allotted as fully or partly paid-up other than in money, if any, and the amount up to which they shall be considered as paid-up.
- Appointment of the initial director(s) and auditor(s) and determination of the respective powers of the directors.

After the statutory meeting has been held, the promoters shall hand over the business to the director(s). The directors shall then cause the promoters and subscribers to pay forthwith upon each share payable in money such amount, not less than 25%, as provided by the prospectus, notice, advertisement, or invitation. The company is then registered as a legal entity (or juristic person).

If all necessary documents are complete and duly signed by all promoters, directors, and shareholders, the above steps could be completed in one day.

The government fee to establish a limited company is charged at the rate of THB 5,000 per THB 1 million of the registered capital, with THB 5,000 as the minimum and THB 250,000 as the maximum, not including miscellaneous certification fees and stamp duties.

A Thai limited company is managed by a board of directors, which is appointed by the shareholders. Meetings of shareholders and directors must conform to the requirements set forth in the CCC or the Articles of Association of the company. Under the CCC, an annual general meeting of the shareholders is required to be held.

A public limited company is governed by the Public Limited Company Act B.E. 2535 (1992), which was promulgated to replace the Public Limited Company Act B.E. 2521 (1978). The new Public Limited Company Act has eliminated the stringent shareholding and shareholder requirements.

2.4 Are there any fetters on the business activities that can be carried on by business organizations in Thailand?

Please refer to 2.1 and 2.3 above.

2.5 What are the ongoing obligations in relation to each of the forms of business organizations?

Please refer to 2.3 above.

3. CORPORATIONS

3.1 What are the different types of companies recognized in Thailand?

Under Thai law, there are two types of limited companies: (1) public limited (publicly held) companies, and (2) private limited (closely held) companies. There are other recognized business organizations

such as unregistered ordinary partnerships, registered ordinary partnerships and limited partnerships, branch offices of foreign incorporated companies, representative offices, and regional offices, the latter two of which are also regarded as branch offices of foreign incorporated companies.

3.2 What is the process for incorporation of a company?

The process of incorporating a limited company consists of reserving a company name and filing the Memorandum of Association (MOA) with the Thailand Ministry of Commerce. Companies must be formed with a minimum of three individual promoters (juristic persons cannot be promoters) to jointly sign application documents for submission to the Ministry of Commerce.

After the MOA has been approved and full subscription of shares has taken place, the promoters are required to call a statutory meeting of the share subscribers to approve Articles of Association (AOA) of the company, appointment of the members of the Board of Directors and fixing of their binding signatory, appointment of the auditor, etc. The auditor must be an individual certified public accountant licensed in Thailand. The meeting should also decide on the number of shares to be issued and rights assigned thereto, and indicate the paid-up value of each share, which must initially be at least 25% paid-up. The entire process can be completed in one day if all necessary documents are completed and signed by the promoters, directors, and shareholders.

A public limited company can be incorporated by at least fifteen individual promoters, who must prepare the MOA and register the same with the Registrar. Once the MOA is registered, the promoters can offer shares for sale to the public or any person according to the laws governing securities and exchanges. Once the subscription of shares reaches the number specified in the prospectus or public offering document, which shall not be less than 50% of the number of shares specified in the MOA, a statutory meeting shall be called to consider, among other things, the following:

- The company's Articles of Association (AOA).
- Ratification of the business done by the promoters and approval of expenses spent in the establishment of the company.
- Determination of the amount of money to be paid to the promoters (if specified in the prospectus).
- Specification of the nature of the preferred shares (if any).
- Determination of the number of ordinary shares or preferred shares to be issued if the payments therefor have been fully made.
- Election of directors.
- Election of the auditor and determination of audit fees.

The notice calling for the statutory meeting must be issued within two months from the date on which the subscription of shares reaches the specified number and must not be issued later than six months from the date the MOA is registered. Then, the directors shall register the company and submit, among other things, the company's AOA, list of shareholders, and minutes of the statutory meeting to the Registrar within three months from the date of the statutory meeting.

3.3 How can a minority shareholder protect its interests?

Under Thai company law, decisions of the shareholders to approve ordinary resolutions are decided by a majority vote, while a vote of at least 75% will be required to pass special resolutions. The shareholders may agree otherwise by fixing the conditions in the company's AOA. For example, one condition could be that approval of the minority shareholders is required to pass "certain" matters (with such being defined in the AOA). All shareholders are entitled to receive a notice calling for a general meeting of the shareholders, to attend the meeting, and to vote at the meeting. Under Thai law, the notice calling for a general meeting shall be published at least once in a local newspaper and sent to all shareholders via registered mail at least seven days in advance to approve ordinary resolutions and 14 days in advance to approve special resolutions.

Any shareholder in a private limited company or any one or more shareholders holding shares amounting to not less than 5 percent of the total number of shares sold in a public limited company has the right to claim against the directors for compensation for injury caused by them to the company in case the company refuses to claim against the directors.

3.4 Are there any corporate governance norms?

There are no compulsory corporate governance practices for a private limited company in Thailand. For a public limited company whose shares are listed on the Securities Exchange of Thailand, corporate governance practices regarding the duties and responsibilities of directors and executives and rights of shareholders and investors are regulated under the Security and Exchange Act B.E. 2535 (1992).

Under the Security and Exchange Act, companies' directors and executives shall perform their duties with responsibility, due care, and loyalty, and shall comply with all laws, company objectives, AOA, and resolutions of the Board of Directors and shareholders,

3.5 Are there any restrictions on a foreign-owned Thai company from raising capital/debt from Thai markets?

Private companies are generally not allowed to offer shares or other types of securities for sale to the public. If a foreign-owned Thai company has been granted an alien business license under the FBA, the minimum capital used for the business operation in Thailand is THB 2 million. If the business requires an alien business license (ABL) under the FBA, the company must have minimum capital of not less than 25 percent of the annual average of the first three years' estimated expenditures or THB 3 million, whichever is higher. One of the mandatory conditions under the ABL is that the total debt financing used in the business shall not exceed seven times the portion of the capital owned by the shareholders or owners of the business.

3.6 Can a Thai company have foreign directors?

Yes, foreigners can be appointed as directors of a Thai limited company. Generally, there are no nationality or residency requirements to be a manager or director of a limited company, with the exception of companies seeking permission to conduct businesses listed under List 2 of the FBA, in which case a minimum of two-fifths of the total number of directors must be Thai nationals. The restriction on nationality may also be applied under special laws such as the Insurance Act, Air Navigation Act, Thai Vessel Act, Land Transport Act, and Travel Agency Business Act. For a company established with Thai-US Treaty protection, a majority of its directors must be American or Thai nationals.

For a public limited company, its Board of Directors must consist of no less than five directors, at least one-half of whom must reside in Thailand.

3.7 Are there any norms for the sharing of profits?

According to Thai law, the sharing of profits of a company is done through the declaration of dividends to all shareholders, which is paid out of the company's profit provided that, at each distribution of dividends, the company shall allocate not less than 5 percent of its net profit to a reserve fund until the reserve fund reaches 10 percent of the capital of the company or a higher proportion which may be stipulated in the company's AOA. The distribution of dividends must be made to shareholders in proportion to the amount paid upon each share.

3.8 What type of shares can a company issue?

A company can issue ordinary shares and/or preference shares.

3.9 Are there any requirements in relation to the frequency and mode of holding board meetings?

No, there is no requirement imposed on private companies. Therefore, meetings of the board are to be called and held by decision of the director when he/she deems necessary. Public companies, however, are required to hold a meeting of the board at least once every three months.

3.10 What responsibilities and liabilities do company directors have?

Directors must, in their conduct of the business, apply the diligence of a careful businessman. Generally, directors are not personally liable for damages or injuries unless they intentionally or negligently commit a wrongful act, or commit an act or omit from doing an act specifically identified by law, either negligently or intentionally.

4. LIQUIDATION

4.1 Please give a brief outline of the procedure involved in the winding up or liquidation of a company in Thailand. Are there any requirements specific to Thailand?

Companies may voluntarily dissolve and liquidate. A special resolution adopted by the company's shareholders is required to do so. The resolution must be passed by a majority of not less than three-fourths of the shareholders who attend the meeting and are entitled to vote. A higher voting requirement is permissible if fixed in the AOA of the company. A liquidator must be appointed to settle the affairs of the company, to pay its debts, and to distribute its assets.

The legal procedures and time for liquidation and dissolution of a company takes at least a few months to a few years, depending on the completeness of the company's tax filings and accounts.

4.2 Please give a brief outline of the bankruptcy proceedings in Thailand. Are there any requirements related to the filing specific to Thailand?

Recent amendments to the Bankruptcy Act B.E. 2483 (1940) provide for two types of bankruptcy to be available at the Bankruptcy Court. First, a creditor can invoke a soft Chapter 11–style bankruptcy under Chapter 3/1 of the Act, whereby the Court will administer the reorganization of a debtor company and offer an automatic stay of court proceedings against the debtor. Second, the traditional

insolvency process can be invoked and a creditor can request that the Court participate in winding up the company.

Generally, a creditor may set up a bankruptcy charge against the debtor only when (1) the debtor is insolvent; (2) the debtor is a natural person who is indebted to one or several plaintiff creditors amounting to not less than THB 1 million, or the debtor is a juristic person who is indebted to one or several plaintiff creditors amounting to not less than THB 2 million; and (3) said debt may be determined in a definite amount, irrespective of whether such debt is due promptly or thereafter. The liquidator may also submit a petition to the Court when the contribution or shares have been fully paid up and the assets are insufficient to cover the debt as stated above.

Under the Bankruptcy Act, once the Court approves a petition for a bankruptcy, the court shall order the debtor to be under an absolute receivership. Then, the official receiver will solely manage and collect all of the debtor's assets, fix all creditors' claims, and submit a report to the court for final judgment. The debtor is prohibited from doing any act related to its assets or business, except such act which shall be done by order or approval of the Court, the official receiver, the assets administrator, or of a creditors' meeting, as prescribed under the Bankruptcy Act.

5. FOREIGN INVESTMENT REGULATIONS

5.1 What are the sources of law regulating foreign investment in Thailand?

The three statutes that are most relevant to the regulation of foreign investment in Thailand are the Foreign Business Act B.E. 2542 (1999), the Investment Promotion Act B.E. 2520 (1977), and the Industrial Estate Authority of Thailand Act B.E. 2522 (1979). Each of these laws is described below.

Foreign Business Act

The most important law governing foreign direct investment in business in Thailand is the Foreign Business Act (FBA), which reserves certain business activities for Thais. Under the FBA, the definition of "foreigner" includes, among other things, foreign nationals, foreign corporations, and companies incorporated in Thailand with at least half of their shares held by foreigners. Basically, foreign ownership in businesses which are reserved under Lists 1, 2, and 3 of the FBA is limited at 49%.

Business activities indicated in List 1 of the FBA, such as farming, forestry, antiques trading, and broadcasting, are strictly closed to foreigners. Foreigners 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 kind of service, can be 100% owned by foreigners if an ABL is granted by the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. (Please see 2.1 above for more information on the Foreign Business Act.)

Investment Promotion Act

The Board of Investment (BOI) is the government agency responsible for providing incentives to stimulate investment in Thailand. It is empowered to give both 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 investment decentralization policy, the BOI provides different levels of incentives to projects located in three geographical areas (Zones 1, 2, and 3).

Tax incentives consist of import duty reduction/exemption on machinery and raw or essential materials; corporate income tax exemption for one 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, etc.

One of the attractive non-tax incentives is that investors granted investment promotion by the BOI who are regarded as foreigners 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 Ministry of Commerce and apply for a certificate, which is an administrative procedure rather than an approval process. Other non-tax incentives include permission for foreigners to own land and visa and work permit privileges for expatriate employees who will work in the promoted company.

The BOI prescribes certain general criteria for applications for investment promotion such as a minimum of THB 1 million investment, minimum value added of 20%, maximum 3:1 debt-to-equity ratio, industrial standards at ISO 9000 level, new or certified used machinery only, modern production technology, adequate environmental protection, technology transfer, and training for local employees and others.

Industrial Estate Authority of Thailand Act

The Industrial Estates Authority of Thailand (IEAT) is another agency that grants incentives to investment projects located in industrial estates nationwide. In addition to benefits from the industrial environment and ready infrastructure, promoted investors are also 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 within the Export Processing Zone are granted additional tax-based incentives and privileges.

5.2 What are the various methods in which foreign investment in Thailand is possible?

Under Thai law, the principal forms of business organization are sole proprietorship, partnership (unregistered ordinary partnership, registered ordinary partnership, and limited partnership), limited company (private limited company and public limited company), representative office, branch office, regional office, and regional operating headquarters.

The formation of a limited company is generally the preferred structure since shareholders' liability is limited only to the remaining amount unpaid, if any, of the shares respectively held by them. Furthermore, only a limited company can apply for a BOI promotion certificate to receive tax and non-tax benefits as stated above. Other forms of business organization (such as sole proprietorship, branch office, and partnership) are not eligible for these privileges. (Please see 2.3 above for more information on forms of business organizations.)

5.3 What is the current foreign direct investment policy?

Under current BOI policy, the criteria for foreign shareholding are as follows:

- For projects in agriculture, animal husbandry, fisheries, mineral exploration and mining, and service businesses under List One of the FBA, Thai nationals must hold shares totaling not less than 51 percent of the registered capital.
- For manufacturing projects, there are no equity restrictions for foreign investors.
- The BOI may set the amount of shares eligible to be held by foreign investors in promoted projects when deemed appropriate.

Further, the government, through the BOI, has placed an emphasis on attracting investment in three key sectors that have been identified as priority activities for special privileges as follows:

- Activities related to energy saving and alternative energy (i.e., alcohol or fuel from agricultural products).
- Activities involving high technology (i.e., advanced ceramics, natural or synthetic fibers).
- Activities related to manufacture of eco-friendly materials and products.

The IEAT carries out the government's industrial development policy, which includes allocating land for further expansion, improving land conditions, and providing accommodations and facilities to assist entrepreneurs.

5.4 What are the circumstances under which regulatory approval is required?

As stated above, any foreigner wishing to engage in a business activity under Lists 2 or 3 of the FBA generally must first obtain an ABL. Business activities under List 1 of the FBA are closed to foreigners.

It is important to note that approval of an ABL application is not readily granted unless the authorities can be convinced that granting an approval will provide more benefits than disadvantages to Thailand and will not affect existing Thai companies that engage in the same business.

5.5 Can a foreign company set up a wholly owned subsidiary in Thailand?

The FBA requires Thai majority ownership in certain reserved activities such as farming, fishery, land trading, mining, wholesale/retail, brokerage/agency, restaurant, and all kinds of service activities. Some of these activities can be operated by a foreign majority-owned company if granted an ABL. Other special laws such as the Telecommunications Act, Insurance Act, Financial Institution Business Act, Travel Agency Business and Guide Act, and Private School Act also limit foreign equity ownership.

5.6 How long do regulatory approvals take?

An ABL application is a time-consuming process with an unpredictable outcome and is normally granted only to the extent necessary. Under the FBA, the ABL application shall be approved within 60 days from the date of the application's submission. In special cases, the approval period can be extended as necessary but shall not exceed 60 days from the lapse of the initial 60-day period.

The approval time for the BOI privileges will depend on the investment value (excluding cost of land and working capital) of each project. For example, the application will be approved within 40 working

days after submission of completed documents to the official for a project having an investment value not exceeding THB 80 million, 60 working days for a project having an investment value of more than THB 80 million but not exceeding THB 750 million, and 90 working days for a project having an investment value of more than THB 750 million.

5.7 Are there any restrictions on foreign ownership of land?

Under the Land Code B.E. 2497 (1954), 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 (even though less than 49%), it will be investigated by the Land Department to determine whether or not 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 foreigners from owning a building.

An exception to the foreign ownership rule applies to projects promoted by the BOI and the IEAT, under which 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 B.E. 2514 (1971) may also own land.

6. LABOR

6.1 What are the principal regulations governing rights and obligations of employees?

Normally, the rights and obligations of employees are subject to the contractual relationship between the employer and the employee as stipulated in the contract of employment. In addition, employees must be obliged to comply with the terms and conditions as stated in the company's work rules and regulations (if any) and as provided by Thai labor laws, such as the Labor Protection Act, Civil and Commercial Code on Hire of Service, Social Security Act, Workmen's Compensation Act, etc.

6.2 Are there any maximum working hour prescribed for employees?

The maximum number of working hours is eight per day and 48 per week, in excess of which employees are entitled to overtime pay, holiday pay, or holiday overtime pay, as applicable. In

hazardous lines of work, the maximum number of working hours is lower (i.e., seven per day and 42 per week).

6.3 How can the services of an employee be terminated?

A fixed contract of employment shall terminate upon the expiry date specified in the contract. In the case of an indefinite contract of employment, the employer may terminate an employee without cause by giving advance notice of at least one pay period or as specified in the contract (whichever is longer), or making payment in lieu thereof. In either case, an employer may terminate an employee for cause, for reasons specified in statute, with immediate effect and without payment of severance.

6.4 Are there mandatory requirements for grant of leave or public holidays?

Under the Labor Protection Act, the employer shall announce in advance at least thirteen public holidays, inclusive of National Labor Day. In regard to annual leave, the Labor Protection Act states that an employee who has worked continuously for one full year shall be entitled to annual holidays of not less than six working days.

6.5 Can employment contracts contain restrictive covenants such as non-compete clauses?

Yes, but their enforceability is subject to provisions in the Labor Protection Act and the Unfair Contract Terms Act, which are aimed at protecting the employee.

6.6 Can the employment contract compel employees to work for an establishment for a minimum period of time?

In the situation where the employer intends to hire any employee for a specific period of time, it is common to have a fixed contract of employment. In practice, however, regardless of whether the contract of employment is definite or indefinite, if an employee decides to resign, the employer cannot force the employee to stay with the company for the remainder of the agreed period fixed in the contract. Nevertheless, the employer maintains the right to claim for actual damages incurred due to the breach of contract by the employee.

6.7 Are women employees entitled to maternity leave?

Yes. Female employees who are pregnant shall be entitled to a maternity leave of not more than 90 days but are entitled to wage payment not exceeding 45 days.

6.8 Are male employees entitled to paternity leave?

There is no specific provision under Thai labor law regarding paternity leave. Entitlements in this area would depend on the mutual agreement between the employer and the employee.

6.9 What are the requirements for the issuance of shares by a Thai company to its employees/directors?

There are various issues which need to be taken into consideration, such as the status of the local entity, whether it is a limited company or a public company or a listed company, the share proportion of foreign employees holding shares in the Thai company, as well as other laws and regulations relating to the transfer of shares.

6.10 Can employees of a Thai company be granted employee stock options in a foreign company?

Yes, but there are regulations issued by the Securities and Exchange Commission with which compliance is required.

6.11 Are employee stock options eligible for favorable tax treatment?

Any benefit received by an employee (e.g., the difference between the market price of shares and the exercise price) is subject to personal income tax in the same manner as other income.

7. INTELLECTUAL PROPERTY

7.1 What types of intellectual property rights are protected in Thailand?

In Thailand, intellectual property rights protections are available for trademarks, patents, copyright, trade secrets, geographical indications, and integrated circuit designs. Each form of protection is described in greater detail below.

Trademarks

Thailand has a standard system of mark registration under the Trademark Act B.E. 2534 (1991), as amended by the Trademark Act (No. 2) B.E. 2543 (2000). Thailand has adopted the International (Nice) Classification of Goods and Services for the Purposes of the Registration of Marks. The definition “marks” means photographs, drawings, devices, brands, names, words, letters, manuals, signatures, combinations of colors, shapes, or configurations of objects, or any one or combination thereof. The Trademark Act classifies goods and services into 45 groups and provides legal protection and registration of the following:

- Trademarks.
- Service Marks.
- Certification Marks.
- Collective Marks.
- Trademark/Service Mark License/Registered User.

In addition to legal protection for trademarks registered in Thailand, the Trademark Act also provides protection for well-known trademarks. Owners of well-known marks who wish to record their marks as well-known marks in Thailand should submit an application together with evidence proving the famous reputation of their marks.

Patents

Thailand is now the 142nd contracting state of the Patent Cooperation Treaty (PCT), with the PCT having entered into force in Thailand on December 24, 2009. PCT applications with a filing date of December 24, 2009, or later are eligible to enter the national phase in Thailand.

For non-PCT applications (that is, applications that are directly filed in Thailand and do not enter Thailand through the PCT route), Thailand’s traditional patent system applies. All foreign applicants entitled to national treatment will be able to claim priority right within 12 months of the first foreign filing date in case of invention applications, and within 6 months of the first foreign filing date in case of design applications. If priority is not claimed, then the invention application can be filed in Thailand within 18 months from the first filing date, provided that the application has not been published or laid open anywhere.

Patents are protected under the Thai Patent Act B.E. 2522 (1979), as amended in by the Patent Act (No. 2) B.E. 2535 (1992) and the Patent Act (No. 3) B.E. 2542 (1999). The Patent Act provides protection for patents, design patents, and petty patents.

The following inventions are not qualified for patents or petty patents:

- Naturally occurring microorganisms and their components, animals or plants, or extracts from animals or plants.
- Scientific or mathematical rules or theories.
- Computer programs.
- Methods of diagnosis, cure, or treatment for human or animal diseases.

To be patentable, an invention must be new, non-obviously inventive, and industrially applicable. An invention which is new and capable of industrial application but which lacks an inventive step is entitled to a petty patent. Petty patent holders receive the same exclusive right to exploit an invention, as well as the right to grant licenses to others, as ordinary patent holders.

Product design means any form or composition of lines or colors which gives a special appearance to a product. Absolute novelty is required for a design to be patentable. That is, it must not be disclosed anywhere prior to the date of filing a patent application in Thailand.

The term of an invention patent is 20 years from the filing date and is not renewable. The term of protection for a petty patent is 6 years from the application date, and two 2-year extensions are available. The life of a design patent is 10 years from the filing date.

Copyright

The Thai Copyright Act B.E. 2537 (1994) provides protection for copyrighted works which include creations in the form of literary works (including computer programs); dramatic works; artistic works; musical, audiovisual, or cinematographic works; and sound and video broadcasting works. The protection of the copyrighted work extends to works that have not been registered. The owner can exploit his/her copyrighted works exclusively. Copyrighted works receive protection for the life of the creator plus an additional period of 50 years. For applied artistic works, the term of protection is reduced to 25 years from the date of creation or from the date of its first publication.

Trade Secrets

Trade information that is not generally known or readily accessible to groups of persons who normally deal with information of the said kind and which has commercial value can be protected as “trade secrets” under the Thai Trade Secrets Act B.E. 2545 (2002). Trade information as defined in the Act includes any information that conveys meaning, facts, or other things, communicated in whatever way

and arranged in whatever form. The following information can receive protection under the Trade Secrets Act: formulas, compounds, prototypes, experimental data, calculations, drawings, diagrams, supplier information, marketing or sales promotion plans, patterns, methods, techniques or processes, and programs.

Importantly, in order for trade information to be protected as a trade secret, its lawful controller must take reasonable measures to keep such information secret. As long as trade information has been kept secret and has commercial value, it is protected under the Act. Any disclosure or usage without authorization as well as unlawful access of the trade secret will constitute a misappropriation of the trade secret owner.

No registration is required to obtain trade secret protection. A trade secret is transferable by a written agreement signed by both parties. If no term of assignment is indicated in the agreement, the term of the assignment is 10 years.

Geographical Indication

According to the Thai Geographical Indications Protection Act B.E. 2546 (2003), “geographical indication” means a name, symbol, or any other thing used to call or represent a geographic source that identifies goods as originating from a geographic source where a quality, reputation, or specific characteristic of the goods is attributable to that geographic source. Under this definition, a geographical indication can be registered provided that it must not be a generic name of the item of goods for which the geographical indication is to be used or contrary to public order, morality, or public policy. The Act also provides protection for a foreign geographical indication as long as it has clear evidence that it is protected under the law of that country and has been continuously used until the date of application in Thailand. If granted, the protection of a geographical indication becomes effective from the date the application was filed.

Integrated Circuit Designs

Integrated circuit designs are protected under the Thai Act on Protection of Layout-Designs of Integrated Circuits B.E. 2543 (2000). They are not subject to the law governing patents.

The Protection of Layout-Designs of Integrated Circuits Act protects circuit designs that are not commonplace in the integrated circuit industry. It also protects circuit designs newly created through rearrangement of components and connecting parts of circuit designs or integrated circuits that are commonplace in the integrated circuit industry, resulting in a newly formed circuit design that is not commonplace.

The right to a circuit design is protected once registration is granted. Registration of a circuit design is valid for ten years from the filing date of the application or the first date of commercial exploitation, whichever is earlier. However, protection of an integrated circuit design shall expire 15 years after its creation date.

7.2 Are there any international treaties regarding intellectual property that Thailand is not a party?

Thailand is not a party to the following international treaties regarding intellectual property:

IP Protection

1. Brussels Convention
2. Madrid Agreement
3. Nairobi Treaty
4. Patent Law Treaty
5. Phonograms Convention
6. Rome Convention
7. Singapore Treaty on the Law of Trademark
8. Trademark Law Treaty
9. Washington Treaty
10. WIPO Copyright Treaty
11. WIPO Performances and Phonograms Treaty

Global Protection System

12. Budapest Treaty
13. Hague Agreement
14. Lisbon Agreement
15. Madrid Protocol

Classification

16. Locarno Agreement
17. Nice Agreement
18. Strasbourg Agreement
19. Vienna Agreement

7.3 Are there any regulations or guidelines by public institutions, such as the Fair Trade Commission or some other competition authority, in regard to intellectual property licenses?

There are regulations/guidelines for license agreements for trademarks, patents, and copyrights which are governed by the Department of Intellectual Property.

Trademarks

A trademark license agreement must be in written form and registered with the Department of Intellectual Property. According to the Notice of Department of Intellectual Property 2000, trademark license agreements shall at least provide:

1. Conditions and terms of agreement between a trademark proprietor and a person applying to be the authorized licensee which enable the proprietor to control the quality of goods manufactured by the licensee.
2. Goods for which the licensed trademark is to be used.
3. A provision specifying that only the authorized licensee has the right to use the trademark or that the proprietor has the sole right to authorize another person in addition to the authorized licensee to use it.

Patents

The patentee may authorize another person to use the patent by granting a license to exercise his/her rights, or may assign his/her patent to another person. In order for a license to be granted, the patentee shall not:

1. Impose upon the licensee any condition, restriction, or royalty term which tends to unfairly limit competition.
2. Require the licensee to pay a royalty for use of a patented invention after the patent has expired.

The patent license agreement and the assignment of a patent must be in writing and registered according to the requirements and procedures determined by ministerial regulations.

Therefore, it is compulsory to record the patent license agreement with the Patent Office to make it valid and enforceable between the parties and against third parties in Thailand.

When a patent is jointly owned, each of the joint patentees may separately exercise the rights of the patent without the consent of the other joint patentees. However, for recordal of license or assignment, it is necessary for the joint patentees to obtain consent from all patentees.

Copyrights

The owner of the copyrighted works may grant a license to another person for reproduction, adaptation, or public dissemination of the copyrighted works, or for the rent of an original or copy of a computer program, audiovisual work, cinematographic work, and sound recording with or without conditions.

Furthermore, conditions which restrict fair competition as provided in Ministerial Regulations 1997 issued under the Copyright Act are prohibited. Section 15 of the Copyright Act stipulates that licensing the rights can be done with or without conditions. Any conditions shall not unfairly restrict competition.

Finally, terms and conditions indicated in a license agreement pertaining to intellectual property must not be contrary to other relevant Thai laws, such as the Prices of Goods and Services Act, the Trade Competition Act, or other laws in connection with antimonopoly protection or unfair competition.

8. EXCHANGE CONTROL

8.1 Are there any restrictions on the amount of local currency that may be brought into or taken out of Thailand?

Unlimited amounts of Thai baht may be brought into Thailand. Thai baht may be taken out of Thailand without permission of the Exchange Control Officer, the Bank of Thailand, under the following conditions: (a) to Vietnam and Thailand's bordering countries (Laos, Cambodia, Malaysia, and Myanmar), up to THB 500,000 each time; or (b) to other countries up to THB 50,000 each time.

8.2 Are there any restrictions on the amount of foreign currency that may be brought into or taken out of Thailand?

Unlimited amounts of foreign currency may be brought into Thailand, under the condition that it must be sold or converted into Thai baht with authorized banks, authorized companies, or authorized persons or deposited into a foreign currency account located in Thailand within 360 days from the date of acquisition or importation. The only exceptions to these requirements are for foreigners temporarily staying in Thailand for a period of not more than three months, foreign embassies and persons with

diplomatic privileges, special organizations of the United Nations, international organizations or institutions, including their staff members and specialists with diplomatic privileges and immunities.

Repatriation of foreign currency out of Thailand can be undertaken through authorized banks. Commercial banks in Thailand are authorized by the Bank of Thailand to approve certain foreign exchange transactions, such as the following:

- Remittance of an unlimited amount in payment of imported goods.
- Remittance of up to US\$100 million or its equivalent per year for foreign direct investment or lending to affiliated entities/subsidiaries/parents abroad.
- Remittance of up to US\$5 million or its equivalent per person per year for the purchase of real property abroad.
- Remittance of up to US\$1 million or its equivalent belonging to a Thai national permanently living abroad per year.
- Remittance of an unlimited amount in repayment of foreign loan and accrued interest having proper documentary evidence.
- Remittance of an unlimited amount for obligations abroad having proper documentary evidence.

Foreign exchange transactions involving amounts in excess of above limitations require approval of the Bank of Thailand.

8.3 Are there any restrictions on the inflow or outflow of foreign exchange?

Please see the restrictions stated above.

9. M&A

9.1 What are the various methods of mergers and acquisitions available to Thai companies?

Two methods of M&A are commonly utilized in Thailand: share acquisition and asset acquisition.

Share Acquisition

A typical, straightforward, and swift way to acquire an existing business is to purchase the entire shares in the capital of the target company which operates the business from the owner/shareholders. By acquiring the shares, the acquirer will become the owner of the target company and automatically

assume all its assets, business, employees, debts, and liability. The acquirer will have control over the company and, by exercising voting right, have the powers to restructure the management, change the company's name, and earn profits.

The share acquisition requires no pre-approval from any authority unless the business is subject to specific laws which state otherwise. Generally, selling shareholders could be subject to income tax based on the capital gain (if any). In addition, the share transfer document is subject to stamp duties at the rate of 0.1% of the selling price or the paid-up value of shares, whichever is greater.

Asset Acquisition

Some acquirers prefer to purchase assets of the target company, instead of its shares. This method may be preferred in situations where the acquirer wishes to exclude debts and liabilities which will be left with the target company. Under this method, the acquirer may select to take over all or part of the assets, including inventory, accounts receivable, office lease, intellectual properties, etc. The acquirer may also select which employees will be transferred. Asset acquisition usually requires board and/or shareholders' resolution and involves obtaining pre-approval, notifying, and processing with several authorities and third parties.

The target company will have to book the proceeds from the sale and pay income tax on the profits generated. If the target company is registered for value added tax (VAT), 7% VAT will apply to the sale of movable assets and 3.3% specific business tax (SBT) will apply to the sale of immovable assets. Exemption of income tax, VAT, and SBT is granted under certain conditions.

9.2 What is the process and timing for each method?

Share Acquisition

Under Thai law, the sale or transfer of shares in a company can be legally effected simply by having both the transferor and the transferee execute a share transfer instrument certified by at least one witness. There are certain subsequent formalities, such as recording in the register of shareholders, cancelling and reissuing share certificates, and filing a new list of shareholders with the Registrar. Prior to executing the transfer, it is common for the acquirer to conduct due diligence on the target company. If the result is satisfactory, the acquirer will then enter into a share purchase agreement with the seller in order to set forth terms and conditions of the sale, representations and warranties, closing, etc.

Asset Acquisition

After due diligence and entering of asset purchase agreement, the asset acquisition is executed by means of physical delivery and registration (for certain types of assets) with authorities as well as renegotiation with employees.

The timing of both methods varies depending on various factors such as scope of due diligence, negotiation and revisions to the draft agreement, necessary processing with authorities (if required), etc. Generally, the execution of share transfer should take less time as it is simpler and requires fewer actions than asset transfer.

9.3 What are the criteria for determining which method is most suited to a particular case?

The criteria for determining the suitable method in a particular case include:

- Taxes and government fees applicable to each method.
- Debts of the company.
- Existing or potential liability of the company, such as pending lawsuits, tax audit, labor dispute, etc.

Generally, most acquirers would prefer share acquisition unless they wish to avoid assuming debts or liabilities of the company.

9.4 What are the additional requirements, if any, if one of the companies involved in the restructuring is listed on one or more of the stock exchanges in Thailand?

If the target company is a public company listed on the Stock Exchange of Thailand and the acquisition involves transferring 25% or any multiple of 25% of the total shares, the Securities and Exchange Act requires that the acquirer must make a tender offer according to the rules and procedures set forth by the Securities and Exchange Commission. The purpose of the tender offer is to provide a fair exit for minority shareholders by making it mandatory for the acquirer to make a general offer to all existing shareholders of the target company at the same price offered to the major shareholder.

9.5 What are the regulations restricting the acquisition of a certain percentage of shares in a company and when do compulsory takeover regulations apply?

Basically, there are no regulations restricting the acquisition of a certain percentage of shares except for the case where the acquirer is an alien and the target company engages in business reserved under the Foreign Business Act, such as wholesale/retail, broker/agent, restaurant, hotel, and any kind of service activity. For those businesses, alien ownership is limited at 49% of total shares unless an alien business license is granted. In addition, there are other statutes governing specific businesses which impose foreign ownership limits at different percentages.

As for public companies listed on the Stock Exchange of Thailand, the compulsory takeover regulations (tender offer) would be triggered at 25% (see 9.4 above).

9.6 Would the above forms of restructuring also be available to foreign companies?

Yes. Both the share acquisition method and the asset acquisition method are available to foreign acquirers.

9.7 Is there any legislation or other form of regulation which applies to restrict the potential anti-competitive results of a sale or acquisition of a business or company within Thailand?

Yes. The Trade Competition Act imposes a restriction on the merger of businesses (defined to include both share acquisition and asset acquisition) which could result in a monopoly or unfair restraint of trade unless approval from the Trade Competition Committee is granted. At present, however, the Trade Competition Committee has not yet set forth criteria (such as market shares, turnover, capital amount, and number of shares) to determine the “merger of business” that would trigger the approval requirements.

10. TAX

10.1 What determines the extent of a company's liability to pay Thai income tax?

Companies incorporated in Thailand and foreign companies carrying on business in Thailand are subject to Thai income tax. Foreign companies not carrying on business in Thailand but deriving certain types of income from or in Thailand are subject to income tax in the form of a withholding tax on the gross amount of income.

10.2 How is residence treated for tax purposes?

A company incorporated in Thailand is deemed to be a tax resident of Thailand and is subject to Thai income tax on its worldwide income, derived from both domestic and foreign sources.

10.3 What is the corporate tax rate and how is it applied?

Corporate income tax is imposed at the rate of 30% on the net profit earned during a tax year. The corporate income tax rate will be reduced to 23% for an accounting period beginning on or after January 1, 2012, and 20% for the next two accounting periods beginning on or after January 1, 2013. For an accounting period beginning on or after January 1, 2012, reduced rates at the progressive rates of 15% to 23%, with an exemption on the first THB 150,000 of net profit, are granted to small and medium-sized enterprises (SMEs) with total income not exceeding THB 30 million in that accounting period. For an accounting period beginning on or after January 1, 2013 onwards, the progressive rates for SMEs will be reduced to 15% to 20% with other conditions remain the same.

10.4 What is the tax rate applicable to foreign companies on their income earned in Thailand?

Foreign companies carrying on business in Thailand are subject to 30% corporate income tax on net profits derived from business carried on in Thailand. The corporate income tax rate will be reduced to 23% for an accounting period beginning on or after January 1, 2012, and 20% for the next two accounting periods beginning on or after January 1, 2013. Additionally, the net after-tax profits remitted or deemed remitted abroad are subject to 10% profit remittance tax.

Foreign companies not carrying on business in Thailand but deriving certain types of income from or in Thailand, usually in the form of service fees, royalties, interest, dividends, capital gains, rent, or

professional fees, are subject to 15% withholding tax, except for dividends which are subject to 10% withholding tax.

10.5 What other taxes are payable in Thailand?

Other taxes in Thailand include:

- Value added tax.
- Specific business tax.
- Municipal tax.
- Stamp duty.
- Excise tax.
- Signboard tax.
- Local development tax.
- House and land tax.

10.6 Is there a tax on dividends?

Dividends received by a foreign shareholder, whether an individual or a juristic entity, are subject to 10% withholding tax.

10.7 Are payments subject to withholding tax?

Withholding taxes apply to various categories of income paid to individual or juristic entities. The amount of tax to be withheld depends on the category of income and the tax status of the recipient.

10.8 Is capital gains tax payable in Thailand?

There is no separate capital gains tax in Thailand. Capital gains are taxed in the same manner as ordinary income.

11. DISPUTE RESOLUTION

11.1 Please give a brief outline of the civil procedure in Thailand.

A claim is commenced by filing a complaint to the court having jurisdiction over the matter, together with the court filing fee. Once the court has accepted the complaint, the plaintiff must ask the court to

issue a summons and pay the summons fee to have the summons and complaint served on the defendant.

The summons and complaint will then be served on the defendant by a court officer. The court may order substituted service in lieu of personal service in certain cases. Service may be instructed by registered mail with return receipt, by advertisement in a newspaper, or by posting at the defendant's dwelling place or place of business or at the courthouse.

Generally, within 15 days of receiving the summons and complaint, the defendant must reply with an answer, clearly admitting or denying the plaintiff's allegations in whole or in part, stating the basis of any denials, and setting forth any counterclaims (counterclaims are only appropriate in civil cases). The plaintiff must then answer in turn any counterclaim within 15 days after he/she has been properly served with the defendant's answer (containing the counterclaim). If there is reasonable cause, these times can be extended, but only with the court's permission.

A hearing will be scheduled thereafter at which the court will settle the issues in dispute and schedule the trial hearings. Depending on the court's backlog, the trial hearings may be scheduled six months to a year later. The court also encourages parties to mediate, and one or more mediation hearings may be scheduled prior to the trial hearings.

It is possible to apply to the court for a subpoena of known documents from the other party or from third parties and to summon witnesses to attend the court to give evidence, provided the documents or witnesses are located in Thailand.

Each party is required to provide the first list of evidence to the court and the opposing party not less than seven days before the first day of testimony to be given by the first witness. An additional list of evidence may be submitted to the court within 15 days after the first day of examining the witness. Either party can introduce new evidence after the deadline if he/she can show reasonable grounds for doing so.

Witnesses are required to authenticate documentary evidence. Their testimony must be in Thai or translated into Thai. Translators are permitted under the Civil Procedure Code for persons who do not speak Thai, but must be provided by the party concerned. Certain courts have begun to allow overseas witnesses to testify by videoconferencing. Alternatively, testimony from witnesses abroad can be taken through the use of Letters Rogatory.

After all the evidence has been heard, both parties are entitled to submit a closing statement containing their arguments supporting their contentions, citing pertinent evidence and legal precedents.

Judgments are given in writing and are read in court, except in petty cases where judgments may be given orally. Judgments generally set forth each party's presentation of the facts and statement of arguments and the court's decision.

All appeals to the Courts of Appeal and the Supreme Court must be filed within one month after the judgment being appealed was given, except in labor cases where the judgment must be appealed within 15 days. Filing an appeal does not in itself stay execution of a judgment or order of the Court of First Instance; a separate motion for a stay must be filed with or after the appeal.

11.2 How are foreign judgments enforced in Thailand?

Thailand is not a party to any bilateral or multilateral conventions on enforcement of foreign judgments and, accordingly, Thai courts will not enforce a foreign judgment. Foreign judgments may be accepted as evidence in a new trial commenced in Thailand and may be persuasive if they are not contrary to Thai public order or good morals.

11.3 What are the alternative methods of dispute resolution available in Thailand?

Arbitration as an alternative to court trials is recognized in Thailand under the Arbitration Act B.E. 2545 (2002), which repealed and replaced the 1987 Act. Thai arbitration law generally follows the UNCITRAL (United Nations Commission on International Trade Law) model act. Arbitration clauses are increasingly common in commercial contracts, particularly for international transactions and construction contracts.

The Thai courts frequently conduct court-supervised mediation. The Civil Procedure Code expressly authorizes the courts to conduct closed-door mediations in the presence of any or all parties, with or without their lawyers. In addition, the court is authorized to appoint independent parties to assist in the mediation. The court encourages parties to mediate where possible, but such mediation is not compulsory.

Parties to disputes in Thailand most often settle through informal negotiations.

11.4 How are arbitral awards enforced in Thailand?

There is no distinction between enforcement of arbitration awards rendered in Thailand and those rendered in foreign countries, so long as an award rendered in a foreign country is governed by a treaty, convention, or international agreement to which Thailand is a party. Foreign arbitral awards rendered in member countries of the New York Convention and the Geneva Protocol are recognized and enforced in Thailand, which is a member of both conventions. Arbitral awards are, thus, generally enforced whereas foreign judgments are not.

A petition to revoke an arbitration award must be filed with the court within 90 days from the date of receipt of the award. Under UNCITRAL, an arbitral award may only be revoked in the country in which it was issued. The effect of revocation of an arbitral award is that the award is no longer enforceable worldwide.

If either party refuses to comply with an arbitration award in Thailand, such award may be enforced only after a court judgment is obtained ordering enforcement. A petition for enforcement of an award must be filed with the court within three years from the date when the award can be enforced. The effect of a non-enforcement order is that the award is not enforceable in Thailand only.

11.5 What are the grounds on which an arbitration award can be challenged in the courts in Thailand?

The grounds for revocation or non-enforcement of an arbitral award are similar. Sections 40 and 43 of the Arbitration Act provide that a court may revoke or refuse enforcement of an arbitral award, where the party contesting the arbitral award or the enforcement thereof proves one of the following factors:

- A party to arbitration agreement was under some incapacity under the law applicable to that party.
- The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under the law of the country where the award was issued.
- The party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings.
- The award deals with a dispute not falling within the scope of the arbitration agreement or contains a decision on matters beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of arbitration agreement, the court may set aside or not enforce only the part that is beyond the scope of arbitration agreement or clause.

- The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, not in accordance with the law of the country where the award was issued.
- The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security.

The court may also set aside or refuse to enforce an arbitral award, where the court finds (on its own) that (1) the award involves a dispute not capable of settlement by arbitration under the law or (2) the recognition or enforcement of the award would be contrary to public policy.

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This article is intended to provide only general, non-specific legal information and does not purport to give a legal opinion or advice on specific facts.