

# บริษัท ที่ปรึกษากฎหมายแซนด์เลอร์และทองเอก จำกัด

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### DOING BUSINESS IN THAILAND

A foreign investor looking at a project or transaction in Thailand for the first time will find a legal framework and administrative practices, which satisfactorily govern most business transactions. The role of the law, lawyers and the judiciary in Thailand has been long established. It is a system within which most foreign and local investors can operate comfortably with a high degree of confidence in consistent interpretation and enforcement of the law.

- The modern Thai legal system is long established, dating from the reign of King Chulalongkorn in 1868. The Ministry of Justice was established in 1892. The Thai Bar Association was established in 1914. Its members presently number over 94,645 and include judges, prosecutors, practicing lawyers, professors, and others.
- There is an independent judiciary that provides a forum for the fair settlement of disputes. A high status is attached to being a judge, and the examinations to enter the judiciary are very difficult. The judiciary jealously guards its independence. Government agencies may be sued in the courts and cannot raise a defense of sovereign immunity. However, state property is not subject to execution.
- There is a Thai civil service that administers laws and regulations with a high degree of consistency, and is largely free from political influences. Few, if any, decisions in a normal business transaction or investment project require going above the civil service for a political decision.
- There are four basic codes: Civil and Commercial Code, Criminal Code, Civil Procedure Code, and Criminal Procedure Code. In adopting these codes early in the last century, Thailand selected features from the two western legal systems (common law and civil law) adapting them to the circumstances in Thailand. Decisions and rulings of the judiciary and civil service are not binding but have considerable force as precedents. In addition, there are the Land Code, the Revenue Code and hundreds of special laws and regulations governing most areas of commercial activity, many of them drafted and implemented with the assistance of international legal advisors. The legal and accounting professions are regulated under professional licensing systems, which encourage high standards of service.
- Although Thai is the language of the courts, most contracts between private parties may be executed in English or other foreign languages, and may be governed by foreign law.
- US lawyers may be surprised by the absence of juries, no class actions, no US-style discovery, no contingent fees, no penalty damages (with few exceptions), and no full recovery of legal fees.

## **THE GOVERNMENT OF THAILAND**

The Kingdom of Thailand is a constitutional monarchy. The King, who ascended to the throne on 9 June 2489 (1946), is the Head of State. A new constitution (18<sup>th</sup> since 1932) was approved in a referendum on 19 August 2007 by 58 percent of the voters. By royal decree on 24 August 2007, the constitution became the supreme law of Thailand. On 23 December 2007 a general election was held to elect members of the House of Representatives and the Senate.

The executive power is vested in the “Council of Ministers” which comprises the Prime Minister and 35 other Ministers appointed by the King. The Prime Minister is appointed upon recommendation of the House of Representatives, which usually nominates the leader of the coalition of political parties controlling the House. The current Prime Minister is Abhisit Vejjajiva. He is expected to dissolve the National Assembly and call for elections prior to the end of the 4-year term in December 2011.

The legislative power is exercised by the two chambers National Assembly. The Senate has 150 members: one elected from each of the 76 provinces; the remainders appointed by the Senate Selection Committee whose members are one judge each from the Constitutional Court, the Supreme Court of Justice, the Supreme Administrative Court and the chairmen of the Election Commission and the State Audit Commission. The House of Representatives has 480 members: [400 hundred elected on a constituency basis and 80 on a “party list” basis.]

### **The Judiciary**

#### **1. Trial, Appellate and Supreme Courts**

Cases will usually be heard by a general court of first instance, the court will depend on the subject of the proceedings and the value of the claims. Civil claims will be heard by Civil Courts and criminal claims will be heard by Criminal Courts. Alternatively, a specialty court, as described below, may be the court of first instance.

An appeal from a trial court or a specialized court is made to the Court of Appeal. The Court of Appeal will hear cases that are appealed on both points of fact and on points of law. A minimum of three judges must sit in session during an appeal.

The Supreme Court is the final appeals court and will generally only hear appeals made on points of law and occasionally appeals on points of fact from the Court of Appeal. Appeals from certain specialized courts may also be made directly to the Supreme Court. A minimum of three judges must sit through the proceedings; this number may be increased if warranted by the importance of the case.

#### **2. Constitutional Court**

This court has jurisdiction regarding the powers and duties of the National Assembly, the Council of Ministers and other constitutional organs, the President of the National Assembly, and the Prime Minister, the constitutionality of the nine Organic Acts; whether any law, rule or regulation violates the constitution; and to determine whether a person’s Constitutional rights or liberties have been violated by a provision of law which is contrary to or inconsistent with the Constitution.

#### **3. Administrative Court**

In March 2001, the Central Administrative Court opened; it has jurisdiction over a wide range of disputes involving government agencies, officials and administrative or state contracts.

**4. IPIT Court**

The Act for the Establishment of Courts of Intellectual Property and International Trade was enacted on October 26, 1996, and the Central IPIT Court opened on December 1, 1997. This court has jurisdiction over all civil and criminal cases regarding intellectual property and international trade, including claims under foreign loans.

**5. Other Specialty Courts**

Thailand has several other special purpose courts. The Tax Court, established in 1985, has accelerated procedures to deal with disputes regarding the Thai tax system. The Labour Court, established in 1980, has jurisdiction over case arising under the Labour Protection Act. The Bankruptcy Court, which has jurisdiction over all cases arising under the Bankruptcy Act, opened in June 1999.

**GENERAL LAWS GOVERNING DOING BUSINESS**

Investors may carry on business in Thailand through sole proprietorships, partnerships, private limited companies, or public limited companies. In addition, joint ventures, branches of foreign corporations, representative offices and regional offices may be utilized in some cases. Foreign investors, like domestic investors, must comply with the general business laws of Thailand. The principal laws include:

**Thai Companies Law**

The most common form of business organization for any major project is the private limited company.

**Private limited companies:** All shares must be issued and each share must be at least 25% paid up in cash or property. There is no equivalent of “authorized but unissued” shares or treasury stock. The registered capital of a Thai limited company may be increased by special resolution of the shareholders. The Articles of Association may include provisions for classing of shares, rights to nominate directors, greater-than-majority voting and quorum requirements, and rights of preference shares. In 2008 the use of directors’ proxies and circular board resolutions was prohibited.

**Public limited companies:** In 1992, the Public Limited Company Act came into force. The size of the public shareholding block is dealt with in the SET listing requirements. Only public limited companies may issue shares to the public. All companies wishing to list their shares on the SET (including, among others, BOI promoted companies who as a condition of promotion agreed to offer shares to the public after commencement of operations) must obtain approval of and file disclosure documents with the Office of the SEC to sell shares to the public, and then obtain SET approval to list their shares. Public offerings of new shares are subject to approval under the Securities and Exchange Act, which also came into force in 1992, and relevant regulations issued thereunder.

Some of the features of a public limited company (as distinct from private limited companies) include no restrictions on the transfer of shares (except to satisfy statutory or policy ceilings on alien ownership), no director’s proxies allowed, no circular board resolutions allowed, directors elected by cumulative voting (unless the articles provide otherwise), at least 50% of the directors must reside in Thailand, and board meetings must be held at least once every three months. Directors’ liabilities are substantially increased.

New SET listing requirements came into force in February 2001, and prescribed conditions of listing including minimum shareholding distribution requirements (ranging from 10 to 20% of issued shares), and the prohibition or restriction of sales by major shareholders for prescribed periods. New Take Over rules came into force in January 2003.

### **Revenue Code**

The Revenue Code prescribes companies income tax on net profits at a flat rate of 30%, with certain exceptions. Reduced rates may apply to certain SMEs after January 1, 2002, and to certain new listed companies, and to regional headquarters offices. Usual business deductions and depreciation allowances at rates ranging from 5 to 20% are allowed in calculating net profits. Accelerated depreciation methods are also permitted.

Withholding tax at rates of up to 15% is payable on many forms of outward remittances such as dividends (10%), royalties (15%), professional fees (15%) and other forms of income paid to companies not doing business in Thailand. Interest paid to foreign banks or financial institutions is taxed at 15%, subject to reduction to 10% under double tax treaties.

The Revenue Code also provides for a personal income tax at rates ranging from 5 to 37%.

Thailand has double tax treaties with over 50 countries, and these treaties provide relief from double taxation on certain forms of income. A double tax treaty with the United States came into force on January 1, 1998.

A major tax applicable to business in Thailand is the Value Added Tax (VAT). VAT is imposed on all natural and juristic persons who sell goods, render services or import goods and services. The current rate of VAT is 7%.

Stamp duty is payable in respect of a number of transactions, at rates prescribed in the Revenue Code.

### **Labor Law**

A new Labour Protection Act came into force in August 1998, consolidating a comprehensive set of labor regulations contained in numerous announcements and notifications. The law deals with such subjects as work hours, holidays, leaves of absence, women and child labor, wages and overtime, severance pay, workman compensation, compensation fund, welfare, work rules and other matters. There is a minimum legal wage in effect in all provinces of Thailand. The Labor Relations Act of 1975 governs labor relations problems. The Social Security Act was enacted in 1990 and established a fund with contributions by employers, employees and the government.

### **Exchange Control**

In the past, Thailand had comprehensive exchange control regulations, which were administered by the Bank of Thailand. Although approvals to repatriate capital and profits were discretionary, in practice approvals were granted as a matter of routine provided one complied with applicable procedures. A number of relaxations of exchange controls were announced by the Bank of Thailand since June 1990, and ceilings on outward remittances have been substantially increased. Presently, commercial banks are authorized to process most applications to purchase foreign currency. Foreign currency accounts may be established abroad and in Thailand.

### **Arbitration**

The 1987 Arbitration Act recognized arbitration awards made according to private agreements, and allowed enforcement through the courts. Thai law recognizes two forms of arbitration, arbitration in

court and arbitration out of court. Thailand is a party to the Geneva Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In April 2002, a new Arbitration Act came into force, superseding the 1987 Act. The new Act confirms the power of the courts to enforce arbitration awards, subject to defenses provided in the international conventions. It confirms that a state contract between a government agency and a private party may provide for arbitration to settle disputes, settling an issue concerning the jurisdiction of the new Administrative Court. It includes certain provisions of the UNCITRAL Model Law. The current government policy is to prohibit arbitration of disputes in state contracts, unless specifically approved by the Cabinet.

The Arbitration Institute was established as an independent agency on 17 July 2007 and has published rules of arbitration (latest version issued 2 May 2003), which are often specified in arbitration clauses. It is also common to find the Rules of Arbitration of the International Chamber of Commerce or the UNCITRAL Rules specified.

### **RESTRICTIONS ON FOREIGNERS DOING BUSINESS IN THAILAND**

There is no general licensing requirement for foreign investors in Thailand.

Restrictions on the percentage of foreign ownership of commercial banks, finance companies, commercial fishing, aircraft, commercial transportation, telecommunications, commodity export, mining, projects on forest land, and other businesses exist under various laws, Cabinet policies, trade association regulations, etc. In connection with seeking promotion by the BOI, Thai participation requirements will generally be prescribed in specified categories of business, but many categories are open to 100% foreign ownership.

#### **Foreign Business Law**

The most important law governing majority foreign-owned businesses in Thailand is the Foreign Business Operations Act, which controls three broad categories of businesses as described below. There remain a number of businesses, including most manufacturing businesses, which do not fall within any of the three categories and are open for investments by foreigners. The 1966 Treaty of Amity and Economic Relations between Thailand and the USA provides an exemption from the restrictions in the Foreign Business Law for US nationals and corporations for most (but not all) controlled businesses. Two recent BITs with Japan and Australia provide some relaxations for investors from those countries.

The Foreign Business Operations Act came into force in March 2000. It superseded the 1972 alien business law. "Alien" means a natural person or juristic person without Thai nationality, including a company with half or more than half of its shares held by foreigners.

The Act prescribes 43 restricted businesses in three annexes:

- Annex 1: 9 businesses prohibited for special reasons, relating to national media, agriculture, natural resources, religion, heritage and land.
- Annex 2: 13 businesses related to national safety or security or affecting arts, culture, traditional customs, folk handicrafts, natural resources and the environment. Licenses may be issued by the Minister of Commerce with the approval of the Cabinet.

- Annex 3: 21 businesses in which Thai people are not yet ready to compete with foreigners. Licenses may be issued by the Director-General with the consent of the Foreign Business Operation Committee.

There is a limited grandfather provision with respect to existing businesses. There is also the possibility of exemption under certain treaties to which Thailand is a party, as well as for businesses promoted by the BOI.

In the case of a restricted business carried on by a foreigner, a minimum capital of Baht three million or greater is prescribed, to be specified in a ministerial regulation. In the case of businesses under Annex 2, at least 2/5 of the directors must be Thai and a minimum of 40% of the shares must be owned by Thai persons (which may be reduced to 25% by Cabinet approval). Businesses under Annexes 2 or 3 may have conditions attached to foreign business licenses such as: minimum debt/equity ratio, number of foreign directors resident in Thailand, amount and period of investment, technology and assets, etc.

The Act recently has been interpreted in strict ways, which are frustrating for certain foreign-owned businesses, and are counter-productive.

There are additional provisions of importance in the Act, including, for example, a minimum capital of Baht two million applicable to all foreign businesses (not only restricted businesses), and a requirement for existing restricted businesses to obtain a certificate.

#### **Alien Work Permits**

The Working of Aliens Act (1978) requires that every foreigner working in Thailand obtain a work permit with certain exceptions. Presently, 39 occupations are closed to foreigners, including architecture, civil engineering, accounting and law. Generally, foreigners may start working only after a work permit is issued. In practice, little difficulty is experienced in obtaining work permits for qualified foreigners in positions for which qualified Thai nationals are not available.

#### **Immigration Law**

The Immigration Act (1979) prescribes a number of visa categories. Foreigners wishing to reside and work in Thailand need a non-immigrant visa, which is initially valid for 90 days or one year and is renewable. The procedures to acquire a non-immigrant visa valid for one year are normally complicated, and are linked to procedures of the Department of Employment, Ministry of Labour governing work permits. Foreigners of most nationalities may enter Thailand for periods of up to 15 or 30 days without a visa.

#### **Land Code**

Generally, foreigners may not own land. For the purposes of the Land Code, a company is deemed to be foreign if more than 49% of its shares are owned by foreigners or more than half of the shareholders are foreigners.

However, in Bangkok and certain other areas foreigners may purchase up to 1600 SQM of land for residential purposes subject to making an investment of Baht 40 million or more and complying with regulations of the Ministry of Interior. Under the Condominium Act, foreigners may own up to 49% of the units in a condominium.

For industrial purposes, a company promoted by the BOI or IEAT may be granted the right to own land as noted below. A foreign company may lease immovable property, and a registered lease of up to 30-years duration provides secure tenure. A new law which allows duration of leases up to 50 years for commercial and industrial purposes was enacted in 1999.

### **Investment Laws**

The BOI prescribes ceilings on foreign ownership, on a case-by-case basis, for some projects awarded promotional privileges (see below).

## **INVESTMENT PROMOTION LAWS**

### **Board of Investment**

The BOI was established under the Investment Promotion Law, 1977, which follows the same general form of the first investment promotion law enacted in 1963. Both foreign and local investors may apply for incentives under this law.

A list of businesses eligible for promotion is maintained by the BOI, which will consider additional businesses on a case-by-case basis. Conditions may be imposed on promoted projects including minimum capital investment, minimum Thai share participation, requirements to use local raw materials, nationality and number of employees, training of labor, and distribution, designation and quality of products.

Promoted companies are given guarantees against nationalization and competition from the government sector.

Tax and non-tax incentives offered by the BOI are determined by the location and scope of the enterprise. A business located in Zone 1 (Bangkok and five surrounding provinces) will obtain less benefits than an identical operation located in Zone 2 (11 adjacent provinces and Phuket). Operations located in the remaining 58 provinces (Zone 3) receive the most incentives, with those operating in the 18 least developed provinces being eligible for more benefits. Subject to the above, promoted projects are granted a number of incentives, including:

- “Priority activities” prescribed by the BOI currently receive Zone 3 incentives, regardless of location (one-zone policy);
- right to employ foreign technicians and managers;
- right to own land;
- exemption or reductions in import duties on imported machinery;
- reduction of up to 90% of import duties on imported raw materials for a one-year, renewable period;
- exemption from payment of companies income tax for a period of between three and eight years;
- exemption of income tax on dividends.

If the project is export oriented, it may qualify for further discretionary benefits.

Even though a particular project is eligible for promotion, obtaining promotion usually is not a condition to proceeding with the project. In some instances, for example, foreign investors decide to proceed without promotion to avoid delays, costs or minimum Thai participation requirements involved in applying for and obtaining promotion, or because the incentives offered by the Board of Investment are not felt to be necessary.

The BOI publishes in English “A Guide to the Board of Investment”, the “Thailand Business Legal Handbook” (which is one of the best English summaries of Thai business laws available), and numerous other publications concerning investment in Thailand.

The BOI provides a service (through the BOI One Stop Center) to assist investors who have difficulties with the administrative procedures involved in obtaining numerous official permits, licenses and approvals from various government departments. Further information may be found in the BOI website at [www.boi.go.th](http://www.boi.go.th)

**Industrial Estate Authority of Thailand**

The IEAT is authorized by the Industrial Estate Authority Act to establish and operate industrial estates. The following incentives are available from IEAT:

1. The right to own land, except for certain IEAT land which is only available by lease;
2. The right to bring foreign technicians and managers into Thailand;
3. For businesses in an export-processing zone, exemption of import duty and value added tax on imported machinery, equipment and materials.

The IEAT has authority to issue factory licenses and to provide other permits and facilities within its industrial estates.

**Renewable Energy Policies**

In 2009, the government announced a policy to encourage investment in solar, wind, waste gas and other renewable energy projects, including subsidies in the form of “adders” to tariffs. Numerous renewable projects have been started. See [www.erc.or.th](http://www.erc.or.th), [www.dede.go.th](http://www.dede.go.th), [www.eppo.go.th](http://www.eppo.go.th), [www.pea.co.th](http://www.pea.co.th), and [www.egat.co.th](http://www.egat.co.th).

Department/Organization	Website
Bank of Thailand (BOT)	<a href="http://www.bot.or.th">www.bot.or.th</a> (Thai and English)
Board of Investment (BOI)	<a href="http://www.boi.go.th">www.boi.go.th</a> (several languages)
Energy Policy and Planning Office (EPPO)	<a href="http://www.eppo.go.th">www.eppo.go.th</a> (Thai and English)
Ministry of Commerce (MOC)	<a href="http://www.moc.go.th">www.moc.go.th</a> (Thai and English)
Ministry of Energy (MOE)	<a href="http://www.energy.go.th/en/aboutUs_04structure.asp">www.energy.go.th/en/aboutUs_04structure.asp</a> (English)
Ministry of Finance (MOF)	<a href="http://www.mof.go.th">www.mof.go.th</a> (Thai and English)
Ministry of Foreign Affairs (MFA)	<a href="http://www.mfa.go.th">www.mfa.go.th</a> (English)
Office of the Council of State	<a href="http://www.krisdika.go.th">www.krisdika.go.th</a> (Thai)
Office of Judiciary	<a href="http://www.judiciary.go.th/eng/engjud.htm">www.judiciary.go.th/eng/engjud.htm</a> (English)
Petroleum Institute of Thailand (PTIT)	<a href="http://www.ptit.org">www.ptit.org</a> (English)
Securities & Exchange Commission (SEC)	<a href="http://www.sec.or.th">www.sec.or.th</a> (Thai and English)
Stock Exchange of Thailand (SET)	<a href="http://www.set.or.th/th/index.html">www.set.or.th/th/index.html</a> (Thai and English)
Thai Arbitration Institute (TAI)	<a href="http://www.adro.coj.go.th">www.adro.coj.go.th</a> (Thai)