



DOING BUSINESS IN THAILAND

-DHARMNITI LAW OFFICE

Disclaimer: This report is a basic report providing general information on the legal system, investment, tax systems and other key aspects relevant to investors. This report should not be regarded as legal advice under any circumstances.

Introduction of Thailand

Geography and Climate

Thailand's 514,000 square kilometers lie in the middle of mainland Southeast Asia. It is bordered to the north by Burma and Laos, to the east by Laos and Cambodia, to the south by the Gulf of Thailand and Malaysia, and to the west by the Andaman Sea and Burma.

Tropical wet and dry or savanna climate is the most common climate in Thailand, while the South and the eastern tip of the East have a tropical monsoon climate. Temperatures normally range from an average annual high of 38 °C to a low of 19 °C.

Population and Language

By 2014, the population of Thailand was approximately 68 million with 75% Thai, 14% Thai Chinese, and 3% is ethnically Malay and the rest belong to minority groups. Thailand's official language is Thai.

Religion

Approximately 94.6% of Thais are Theravada Buddhists, while 4.6% of population is Muslim, the second largest religious group in Thailand with Christians making up 0.7% of the population.

The Political System

Thailand is a constitutional monarchy under a parliamentary democracy system, that is headed by His Majesty the King Bhumibol Adulyadej, Rama IX. The government is constituted by the executive branch, the legislative branch and the judiciary, the Prime Minister is the head of the government.

Currency

The Currency of Thailand is Thai Baht, abbreviated as THB. The currency contains the following denominations: 1000 Baht note, 500 Baht note, 100 Baht note, 50 baht note, 20 Baht note, 10 Baht coin, 5 Baht coin, 2 Baht coin, 1 Baht coin, 50 Satang coin and 25 Satang coin.

Legal System

Law

The legal system of Thailand is a civil law system that consists of constitutional law, public law and private law. Thailand's constitution was instituted in 2007. The most significant codes of law in Thailand are the Criminal Code and the Civil and Commercial Code.

Courts

There are four distinct courts in Thailand's court system, these are: The Constitutional Courts, The Administrative Courts, The Military Courts and The Courts of Justice. The Courts of Justice handle the cases unrelated to the other three courts, under the 2007 Constitution of Thailand, nine lower courts including: Municipal Courts, Provincial Courts, Civil Courts, Criminal Courts, Labor Courts, Tax Courts, Bankruptcy Courts, Juvenile and Family Courts, and the Intellectual Property and International Trade Court work as the Courts of First Instance, together with the higher courts, Courts of Appeal and Supreme Court, to make up the Courts of Justice.

Arbitration

Arbitration cases that occur in Thailand are mainly conducted by three arbitration institutions: International Chamber of Commerce (ICC), the Alternative Dispute Office (ADRO), also known as the Thai Arbitration Institute, and the Thai Commercial Arbitration Institute of the Board of Trade.

Foreign Investment

The Foreign Business Act

The *Foreign Business Act* specifies the definition of 'Foreigner', the restrictions applicable to foreign businesses and the Foreign Business License application.

According to the *Foreign Business Act*, a 'Foreigner' means:

- i) 'a natural person not of Thai nationality;
- ii) or a juristic person not registered in Thailand;
- iii) or a juristic person registered in Thailand which has 50% or more of its capital shares held by foreigners; or a
- iv) limited partnership or registered ordinary partnership that has the foreign natural person as the managing partner or manager.

Restrictions on Foreign Participation in Specific Sectors

Three lists of businesses classified in three different restriction levels are set forth in the *Foreign Business Act*. These three lists are officially stipulated as:

1. Business activities for which foreigners cannot obtain a business license for “special reasons”;
2. Business activities that affect national security or safety, art, culture, customs, native manufacturing/ handicraft production, natural resources, or the environment;
3. Business activities where Thais consider they are not sufficiently prepared to compete with foreigners.

The lists are detailed in Appendix A.

Foreign Business Act Overview

Thailand’s Foreign Business Act allows a limited company with majority foreign ownership to be registered in Thailand depending on the nature of the company’s business. If the nature of the foreign majority owned company’s business is allowed, this law generally requires that the minimum capitalization of the business activity be at least 25 percent of the yearly average of the estimated expenses for the company’s first three years of operation, and, in any case, not less than three million Baht for each category of business activity for which the FBL is issued.

To apply for a FBL, initial three year estimates of income/expenses and of technology transfer must be made and included in the application with a detailed description of the company’s expected management and operations.

The application for a FBL must be approved and issued by either the Cabinet of Thailand or the Foreign Business Board of the Ministry of Commerce depending on the nature of the business the applying company intends to pursue prior to the issuance of that FBL. Please be aware that Government approval may limit the total percentage of shares allowed to be owned by foreign shareholders to not more than 60 to 75 percent of the company’s shares, moreover the Government may limit the foreign directors to not more than 60 percent of the company’s directors.

In terms of timing, this process usually takes at least four to six months to complete. Moreover, until the above entire process is complete and the FBL issued, the limited company (with majority foreign shareholder ownership) may not engage in its primary business activities.

A limited company with majority foreign ownership may be formed and registered in Thailand with relatively little difficulty if it engages in certain types of business activities and if its initial capital is at least 100 million Baht (approximately US\$3,000,000) that is paid in full.

Forms of Business Organization

Limited Liability Companies

The Limited Liability Company is the most popular and common form of company in Thailand. At least three promoters are required for setting up a Limited Liability Company, the promoters must be natural persons. The memorandum of association must contain the company name in Thai language, the structure of capital and the statement of the shareholder's limited liability. If foreign investors and Thai nationals set the company up together, then the Ministry of Commerce is authorized to investigate the capital background of the Thai shareholders to see if the Thai shareholder is in fact a nominee for a foreign shareholder, which is deemed to be illegal in Thailand.

Thai law requires that all private limited companies, whether majority Thai owned or majority foreign owned, are formed and registered in Thailand pursuant to the Civil and Commercial Code and the Revenue Code.

A private limited company's main registration documents are the memorandum of association; articles of association; company certificate; corporate objectives and the share register. All private limited companies must have a minimum of three (3) shareholders with at least twenty five (25) percent of the initial registered capital paid up within six (6) months of the company's registration. In addition, all private limited companies must have a minimum of one (1) authorized director who has the authority to bind the company by signing and affixing the company's seal.

Thai law does not require that employees of a Thai limited company be Thai citizens, however, all employees, including authorized directors and other management, who are foreign citizens, must obtain work permits and appropriate visas in order to legally work in the Kingdom. A company that employs foreign citizens must generally have fully paid capital of at least two (2) million Baht as well as a minimum of four (4) Thai employees for each foreign national employed. The documentation related to both the company and the foreign employee must be provided and submitted to the Labor and Immigration Departments along with the applications for a work permit and the visa. If a limited company employs ten (10) or more persons, then rules and regulations of the company relating to its personnel must also be prepared and approved by the Ministry of Labor.

Once a limited company is registered, it must have an annual independent audit, its directors and shareholders must also hold an annual ordinary shareholder meeting and it must have its financial statement and tax return prepared and filed no later than one hundred and fifty (150) days after its fiscal year ends.

Partnership

Two forms of Partnerships exist in Thailand, one is an Ordinary Partnership and the other is a Registered Ordinary Partnership.

An Ordinary Partnership is an unregistered partnership; an ordinary partnership is not a juristic person but is comprised of partners who are natural persons, which is the reason the partners have an obligation for unlimited joint and several liability. The tax rate applicable to an ordinary partnership is subject to Personal Income Tax at the progressive rate.

After registration at the Ministry of Commerce, an unregistered partnership is converted to a registered partnership which is then a juristic person.

Limited Partnership is a branch of a registered partnership; at least one managing partner is not liable to the debt of partnership personally. As this form of partnership is able to protect the interest of specific partner, Limited Partnership is the most popular partnership in Thailand.

Branch Offices

Investor may set up a Branch Office for its parent company instead of establish a company in Thailand. A branch office is operated by the branch officer who is appointed by a Power of Attorney. A Branch Office can run the business the parent company does, however, if the business or activities is restricted under the *Foreign Business Act*, the Branch Office should apply for the necessary foreign business license, otherwise this business or activities cannot legally be conducted in Thailand. Branch Office is subject to Corporate Income Tax at rate of 20%.

Representative Offices

A Representative Office is the office established and representing a foreign company in purchasing or market searching activities. It is different from a Branch Office as a Representative Office requires a license and minimum capital remitted into Thailand. As the Representative Office may not have any income from the activities it can conduct, income tax is normally exempted but the withholding tax from the salary paid to employees is still imposed.

Regional Operating Headquarter

Regional Operating Headquarter, (ROH) is a juristic person in Thailand providing administrative, technical service and other service support to its foreign branches or associative companies. The tax incentives available to ROH companies are quite attractive i.e. ROH companies are subject to corporate income tax at the rate of 10% while the normal rate is 20%. The minimum paid-up capital required for a ROH is 10 million THB, moreover it must provide support services to its regional branches or associative companies must cover at least 3 countries, finally half of its income must be derived from foreign countries.

Investment Incentives

The Board of Investment (BOI) and the *Investment Promotion Act*

The BOI is an agency of the Thai government, under the Ministry of Industry's administration. It provides investment information, business assistance and investment incentives to foreign investors in order to promote investment in Thailand.

The *Investment Promotion Act* is the main legislation covering investment promotion; it specifies basic conditions, protections, rights and obligations of investors and their investments.¹

BOI Incentives

According to the *Investment Promotion Act*, investors can be granted tax incentives and non-tax incentives by the BOI. Tax incentives may include a 50% reduction of a juristic person's corporate income tax; exemption of juristic person's corporate income tax or the exemption/reduction of import duties on imported machinery for a promoted project. Investors may also be permitted to own land in Thailand and remit money abroad in foreign currency after they receive investment promotion privileges from the BOI.

BOI Investment Promotion Zones

Based on the different economic situations across the various provinces of Thailand, the BOI has divided the country into three basic promotion zones. The more developed provinces (such as Bangkok and Nonthaburi) are located in Zone 1 and are less promoted, whereas Zone 2 is made up of moderately developed provinces and Zone 3 is generally comprised of less developed provinces. The system is structured in such a way that the less developed provinces offer investors more promotion benefits. The incentive scheme and the map detailing the three zones is located at Appendix B.

BOI Promotion Eligibility Criteria

The BOI has announced seven activities that are eligible for promotion:

1. Agriculture and Agricultural Products;
2. Mining, Ceramics and Basic Metals;
3. Light Industry;
4. Metal Products, Machinery and Transport Equipment;
5. Electronic Industry and Electric Appliances;
6. Chemicals, Paper and Plastics;

¹ Read the official translation of Investment Promotion Act:
http://www.boi.go.th/english/download/boi_forms/proact_eng.pdf

7. Services and Public Utilities.

These seven activities have their own criteria, however, the most basic and common standard for these activities is the required minimum investment capital of one million THB. Appendix C provides web links to the different investment criteria applicable to these seven activities.

Trade and Investment Support Office

The Trade and Investment Support Office was established by the BOI and provides investors with advice, investment information services (excluding legal advice), it also provides information on accounting as well as the activities that foreigners are prohibited from doing in Thailand (i.e. exclusions under the *Foreign Business Act*.)

Foreign Shareholding in BOI-promoted Projects

Not all of the BOI-promoted Projects are able to be 100% owned by foreigners. Projects in agriculture, animal husbandry, fisheries, mineral exploration and mining and service businesses fall under List One of the *Foreign Business Act*, hence Thai nationals must hold shares totaling not less than 51 percent of the registered capital in such entity, but there are no equity restrictions for foreign investors relating to manufacturing projects. The Board has the right to set the amount of shares eligible to be held by foreign investors on promoted projects when deemed appropriate.

The BOI Promotion Application Process

Thailand's BOI will accept applications for a grant of promotional privileges if, among other criteria, the applicant proposes substantial initial capitalization for the company to be registered, usually in a minimum amount of one million Baht. However, whether or not an applicant will be granted tax exemptions and promotional privileges will be dependent on the nature of the applicant's business activities.

Among other factors, the BOI may promote a company if it has products and/or services that are unavailable or insufficiently available in Thailand and are deemed economically and technologically appropriate.

The BOI gives special consideration to investments in projects that operate in the provinces outside of the Bangkok metropolitan area, reduce environmental problems, conserve energy, contribute to technological development, and/or significantly strengthen the balance of payments. The BOI will also promote a company when it has at least three affiliated legal entities in the region (Asia), at least 10 million Baht of capital that is fully paid and is the Regional Headquarters of its affiliates.

The following is a brief summary of the more important legal steps that will be necessary to obtain BOI promotional privileges.

1. An application for a Grant of Promotional Privileges must be prepared and submitted to the Office of the Secretary (which then passes it to the Investment Promotion Division (IPD) and to the BOI itself for its approval.
2. An application for a Promotion Certificate must be prepared and submitted to the Office of the Board of Investment (OBOI) and subsequently approved.
3. If the BOI grants promotional privileges to your Company then it is highly likely that it will require that the limited company's shareholders pay into the company's bank account 100 percent of the registered capital of the Company.

Please, note that generally the approval/issuance of an application for a Promotion Certificate requires that a company be formed within six months of the date of the Grant of Promotional Privileges and that the substantive formation documents (e.g. JV, licensing, technological transfer, technical assistance and confidentiality contracts) and the substantive registration documents (Memorandum of Association, Articles of Association, Certificate of Company Registration, Certificate of Directors, Shareholder Register, Certificate of Investment from the Bank of Thailand, etc.) be attached to the application.

All of the above must be completed in about six (6) months, and we expect that at least two (2) months would be needed for this process.

Thereafter, the company must undertake the following:

- i. Within six (6) months of grant, initiate factory construction, purchase of machinery, etc. and submit all relevant documentation pertaining to these to the OBOI;
- ii. Within twenty four (24) months of grant complete the importation of machinery and equipment for the project; and
- iii. Within thirty (30) months, complete the construction, installation of machinery and equipment and be able to commence operations.

Subsequent to beginning operations, every six (6) months a report must be prepared and submitted to the IPD, and an annual report must be prepared and submitted to the OBOI. These reports should discuss and evidence compliance by the company with the conditions of promotion (e.g. local raw material usage, employment, technicians, exports, and foreign exchange).

Also, if factory licensing will be required, the necessary applications for these types of licenses from the Department of Industrial Works, the Industrial Estate Office and/or the Provincial Industrial Office must be prepared and submitted for approval and issuance.

Please note that if the company will employ foreigners, own or lease land and import machinery, additional forms must be prepared and submitted to the OBOI.

The BOI One Start One Stop Investment Center

One Start One Stop Investment Center (OSOS) was established in 2009. This center provides facilitative services to investors especially those involved with private sector

investment. OSOS has staff from several Government agencies to ensure the investor is able to understand the wider picture in terms of investment structure.

Other Investment Incentives

Maximum tax and import duty privileges are given to regions/provinces with low income and inadequate investment. Priority is given to projects focusing on agricultural activities and agricultural products as well as projects related to technological and human resource development, public utilities, infrastructure and basic services.

Taxation

General

Businesses in Thailand may required to pay Corporate Income Tax, Personal Income Tax, Value Added Tax (VAT), Withholding Tax and special business tax depending on the nature of the business.

Thai Revenue Code is the main taxation law in Thailand, the other taxation law should be concerned about are Customs Act, Excise Act and Petroleum Income Tax.

Corporate Income Tax

Corporate Income Tax (CIT) is the tax imposed from juristic persons including: Private Company, Public Company, Limited Company, Limited Partnership, Registered Ordinary Partnership, Contractual Joint Venture, Foreign Company and Partnership.

Generally, the CIT rate is 20% effective from 2013. With respect to Small and Medium Enterprise, the first 150,000 THB of net profits is exempted and the net profits from 150,000 THB to 1 million THB is subject to the rate of 15%, in case the net profits exceed 1 million THB, the rate is 20% for the exceeding portion.

In calculating CIT, deductible expenses are as follows:

1. Ordinary and necessary expenses. However, the deductible amount of the following expenses is allowed at a special rate:
 - a. 200% deduction of Research and Development expense,
 - b. 200% deduction of job training expense,
 - c. 200% deduction of expenditure on the provision of equipment for the disabled;
2. Interest, except interest on capital reserves or funds of the company;
3. Taxes, except for Corporate Income Tax and Value Added Tax paid to the Thai government;
4. Net losses carried forward from the last five accounting periods;
5. Bad debts;
6. Wear and tear;

7. Donations of up to 2% of net profits;
8. Provident fund contributions;
9. Entertainment expenses up to 0.3% of gross receipt but not exceeding 10 million baht;
10. Further tax deduction for donations made to public education institutions, and also for any expenses used for the maintenance of public parks, public playgrounds, and/or sports grounds;
11. Depreciation: Provided that in no case shall the deduction exceed the following percentage of cost as shown below. However, if a company adopts an accounting method, which the depreciation rates vary from year to year, the company is allowed to do so provided that the number of years over which an asset depreciated shall not be less than 100 divided by the percentage prescribed below.²

Personal Income Tax

Personal Income Tax (PIT) is the tax imposed on an individual person, Ordinary Partnership and other non-juristic party's. PIT calculated based on assemble income, deductions and allowance: Taxable income = assemble income-deduction-allowance. Assemble income includes 8 categories:

1. Income from personal services rendered to employers;
2. Income by virtue of jobs, positions or services rendered;
3. Income from goodwill, copyright, franchise, other rights, annuity or income in the nature of yearly payments derived from a will or any other juristic Act or judgment of the Court;
4. Income in the nature of dividends, interest on deposits with banks in Thailand, shares of profits or other benefits from a juristic company, juristic partnership, or mutual fund, payments received as a result of the reduction of capital, a bonus, an increased capital holdings, gains from amalgamation, acquisition or dissolution of juristic companies or partnerships, and gains from transferring of shares or partnership holdings;
5. Income from letting of property and from breaches of contracts, installment sales or hire-purchase contracts;
6. Income from liberal professions;
7. Income from construction and other contracts of work;
8. Income from business, commerce, agriculture, industry, transport or any other activity not specified earlier.

PIT progressive tax rates:

- i) The first 150,000 THB is exempted from PIT;
- ii) Income exceeding 150,000 THB but less than 300,000 THB is subject to the rate of 5%;
- iii) Income exceeding 300,000 THB but less than 500,000 THB is subject to the PIT rate of 10%;

² Source from Thai Revenue Department

- iv) Income exceeding 500,000 THB but less than 750,000 THB is subject to the PIT rate of 15%;
- v) Income exceeding 750,000 THB but less than 1,000,000 THB is subject to the PIT rate of 20%;
- vi) Income exceeding 1,000,000 THB but less than 2,000,000 THB is subject to the PIT rate of 25%;
- vii) Income exceeding 2,000,000 THB but less than 4,000,000 THB is subject to the PIT rate of 30%;
- viii) Income over 4,000,000 THB is subject to the PIT rate of 35%.

Withholding of Income Tax from Source

Juristic persons should pay Withholding Tax for 6 types of income:

1. Dividends at rate of 10%;
2. Interest at the rate of 1%;
3. Royalties at the rate of 3%;
4. Advising fee at the rate of 2%;
5. Services or professional fee, at the rate of 3% for the company having a permanent branch in Thailand; and 5% for the company not having permanent branch in Thailand;
- Prize at the rate of 5%.

With respect to individual payers, the withholding tax rate and categories are different from those applicable to juristic persons:

1. Employment income is withheld at the rate of 5 - 37%;
2. Rents and prizes at the rate of 5%;
3. Ship rental charges at the rate of 1%;
4. Service and professional fees at the rate of 3%;
5. Public entertainer remuneration for Thai resident is 5% and non resident is 5 - 37 %; Advertising fees, 2%.

Treaties for the Avoidance of Double Taxation

Thailand has treaties for avoiding double taxation (based on the OECD model) with 59 countries including: Australia, Canada, China, France, Germany, Japan, Korea, Netherlands, Russia, Sweden, Switzerland, Turkey, UK and USA. The tax payer eligible to obtain such privilege should obtain the tax residence certificate from the beneficiary of the income.

Value Added Tax

Value Added Tax (VAT) is an indirect tax levied on the added value of each stage of production and distribution. Any person, importer, juristic person may subject to VAT. VAT rate in Thailand is 7% in general, the activities such as export of goods, supply goods or services to government, aircraft or sea-vessels engaging in international transportation subject to the VAT of 0%. Small enterprise which annual turnover is less than 1.8 million THB is exempted from VAT, so as the activities of sales and

imports of unprocessed agricultural products, fertilizers, pesticides, animal feeds and transportation, healthcare services and educational service.

Specific Business Tax

Seven types of businesses are subject to Specific Business Tax (SBT): banking, finance and similar business which is subject to the SBT at rate of 3.0%; the business of finance, securities and credit foncier at rate of 3.0%; life insurance, 2.5%; pawn brokerage, 2.5%; business with regular transactions similar to commercial banks, 3.0%; real estate, 0.1%; sale of securities in a securities market, 0.1%.

Stamp Duty

Stamp duty is the tax on instruments, the instruments liable to stamp duty include,: transfers of land, a lease, stock transfers, debentures, mortgages, life assurance policies, annuities, power of attorney, promissory notes, letters of credit, travelers cheques. Revenue Code provides the rate of stamp duty in different instruments; please find the table of rate on Revenue Department official website: <http://www.rd.go.th/publish/21986.0.html>

Appeal Procedures under the Revenue Code

A tax payer can appeal to the Board of Appeals in they disagree with their tax assessment. Such appeal must be lodged within 30 days from the date of receiving the applicable assessment notice. If the tax payer disagree with the ruling of the Board of Appeals, then they can appeal to the Court within 30 days from the date of receiving the ruling.

An appeal does not postpone the paying of tax. However, the tax payer can postpone paying tax only if they obtain the authorization of the Director General while waiting wait for the decision of the appeal or judgment from the relevant Court.

Signboard Tax

The tax payer of signboard tax is the owner of: Signboards at a hotel, Company's nameplate installed in front of the building / office space, Advertising boards at an airport / bus stop / hotel / shopping center / department store, Billboards at toll ways, Posters shown in the train station and other types of signboard. The signboard tax rate is calculated by the area of signboard and language. The criteria for signboard tax is as follows:

1. Signboards that display only Thai words are taxed at the rate of Baht 3 per 500 square centimeters;
2. Signboards displaying both Thai and foreign words and/or pictures are taxed at 20 Baht per 500 square centimeters;
3. Signboards that display foreign words alone with a picture or logo are taxed at 40 Baht per 500 square centimeters; and

4. Signboards that display foreign words alone or have Thai words below the foreign words are taxed at 40 Baht per 500 square centimeters.

Excise Tax

15 types of commodities manufactured in Thailand or imported are subject to Excise Tax and the tax rate is based on ad valorem or a specific rate. These 15 commodities are: Fuel oil and petroleum products; certain non-alcoholic beverages; certain electrical appliances; crystal glassware; motor vehicles; boats; perfume products and cosmetics; entertaining services, turf courses and gold courses; alcoholic beverages; cigarettes containing tobacco; woollen carpet; motorcycles; batteries; playing cards; and ozone depleting substances.

Product Liability

Introduction:

In Thailand, the key pieces of legislation dealing with the issue of product liability are:

1. *Liability for Damages Arising from Unsafe Product Act* (2008) otherwise known as the *Product Liability Act* (2008); and
2. *The Consumer Cases Act* (2008).

The Thai *Civil and Commercial Code* is also relevant as it supplements the *Product Liability Act* in relation to compensation to injured persons.

Product Liability Act (2008)

Purpose of the Act

The main purposes behind this legislation were to:

- a. Instill greater consumer confidence in products in Thailand and to better protect the public from dangerous or defective products;
- b. Simplify the previous legal approach to product liability which was overly complicated and make it easier for injured persons to receive justice and fair compensation.

Scope of the Act

This Act offers consumers considerable protection given that it provides that 'Business Operators', as defined therein as:

1. Manufacturers (or hirers for manufacture),
2. Importers,
3. Sellers of products; or
4. Persons who use a name, trademark, trade name, mark or statement that would lead to the belief that they are the manufacturer, hirer for manufacture or importer of the product);

are subject to a legislative regime whereby they can be held jointly liable to affected persons who have suffered 'damage' from 'unsafe products' which have been 'sold, distributed to, dispensed or given to' consumers, regardless of whether the damage was intentionally or

negligently caused by the Business Operator(s).

The purpose of making the various Business Operators jointly liable is to make it easier for consumers to seek redress as it is not necessary for them to single out exactly which party in the product chain was responsible for the damage.

Defendant Shopping Issue:

Under section 5 of this Act, any of the ‘Business Operator(s)’ who are in the product chain leading to the injured party are jointly liable despite the fact that the ‘Product’ may have been free of defects at the time it left the possession of a particular supplier or manufacturer.

Hence, this feature of the law could lead consumers to undertake ‘defendant shopping’ in the case of a claim, whereby they search for the wealthiest defendant(s) in the supply chain to sue. This aspect of the law could be highly prejudicial to larger and wealthier Business Operators such as large profitable companies as they will offer a more advantageous target for injured parties given their greater fiscal resources.

Commencement of the Act:

The effective date of the Act (which was 20 February 2009) is also crucially important as section 15 provides that any products sold to consumers before this date are not covered by this legislation, instead they are to be handled by the *Civil & Commercial Code*.

Definition of ‘Products’:

Section 4 of the Act defines ‘Products’ to mean any kind of movable property manufactured or imported for sale including ‘Agricultural Products’ and electricity, other exclusions are outlined in the *Ministerial Regulations* (2010) and mainly relate to certain agricultural products that are grown in Thailand such as dried tobacco and de-husked rice.

What Constitutes ‘Damage’ under the Act:

In relation to what constitutes ‘damage’ under this Act, this term is broadly defined given that it covers damage to:

- ❖ the body;
- ❖ health;
- ❖ hygiene;
- ❖ mental damage; and
- ❖ damage to property.

In terms of ‘mental damage’ the act defines this to mean: pain, phobia, anxiety, sorrow, shame, or similar types of mental damage.

Note: The scope of damage may be better clarified in future judgments of the Supreme Court when cases involving the interpretation of ‘mental damage’ are clearly addressed by the Court.

Burden of Proof:

In order for Business Operator(s) to be liable under this Act, the injured party must prove that:

1. They suffered the actual damage due to the Product of the Business Operator; AND
2. The use and storage of the Product was done in the normal manner.

However, the injured party shall not be required to provide evidence that the damage occurred from the action(s) of a particular Business Operator(s).

Application of Strict Liability Doctrine under the Act:

This legislation extends tort law in Thailand by applying the doctrine of strict liability as each Business Operator is jointly liable to the Injured Party if they can prove that they suffered the actual damage from the Product of the Business Operator.

For instance, the manufacturer of a defective product will be considered liable even if they were not negligent in making the Product defective. However, note section 8 of the Act which provides some exceptions to manufacturer liability.

Defenses Available to Business Operators under the Act:

An injured person should be aware that under section 7 of this Act a Business Operator can avoid liability if they are able to prove one of the following:

- a) Their Product is not in fact an unsafe product. **Note:** This is a question of fact and will likely turn on technical evidence and expert witness testimony to prove that the product is in fact safe;
- b) The injured party was already aware that the Product was unsafe before using it;
- c) The damage that was sustained by the injured person was due to their incorrect usage or storage of the product. It is worth noting that this last exemption only applies when the Business Operator has clearly and accurately marked on the Product the correct usage, applicable warnings and the correct storage method on the product.
- d) Section 8 of the Act provides that a manufacturer of the Product who is producing the Product under the orders of another party authorizing such production will not be liable under this Act if they can provide evidence that:
 1. The danger was caused by the design of the party authorizing the production of the Product OR
 2. Compliance with the instructions provided by the party authorizing the production of the ProductWhere the manufacturer had not and should not have foreseen such danger/ safety issue.
- e) The manufacturer of component parts shall not be liable under this Act if they can prove that the danger/ product safety issue was caused by the design, assembly, instructions, storage warning message or Product information provided by the manufacturer of the Product

Agreement between Consumer & Business Operator(s)

Limiting Liability:

In relation to whether a preceding agreement between a ‘Consumer’ and the Business Operator (such as purchase terms and conditions) will affect the product liability of the Business Operator, section 9 of this Act provides that the Business Operators’ liability is not able to be exempted or limited by an agreement between the parties which is entered into before the damage occurs.

Prescription Period:

Section 12 provides that a claim for damages caused by an unsafe Products under the Act must be filed within three (3) years from the day when the damage and the person bound to

make compensation became known to the injured person OR within ten (10) years from when the Product was purchased.

HOWEVER, if an injured person's body, health or hygiene suffers damage that is caused by an accumulation of chemicals in their body or in the event that a period of time must pass before symptoms appear, the injured person has three (3) years counting from the date that they became aware of the damage and the identity of the Business Operator(s) responsible but such period must not exceed ten (10) years from the date that the injured person became aware of the damage. It is worth noting that this prescription period is also in line with section 13 of the *Consumer Cases Act* (2008).

If there are negotiations between an injured person/ or their representative (consumer protection board) and an Business Operator(s) then the prescription period will be suspended until either party terminates the negotiations It is worth noting that this prescription period is also in line with section 14 of the *Consumer Cases Act* (2008).

Compensation for Injured Parties:

In terms of product liability compensation for injured parties, there are a number of important issues to consider including:

- i. Punitive damages awarded by Thai Courts are relatively small in comparison to those issued by courts in Western jurisdictions especially those awarded in the United States of America. Indeed, section 11(2) of the *Product Liability Act* only permits the Court to award punitive damages in certain limited circumstances (see below) and these are capped at no more than double the actual damages;
- ii. Punitive Damages may be awarded by the Court to an injured person if it is found that the Business Operator has manufactured, imported or sold a Product where:
 - a) it is aware that such product is unsafe, OR
 - b) is unaware of such danger due to their gross negligence; OR
 - c) does not proceed with any appropriate action to prevent such damage after becoming aware that the Product was unsafe.
- iii. Could be difficult to put a monetary figure on mental damage;
- iv. If an injured person has died then that person's husband/wife, children or the inheritors under their estate shall have rights to compensation for mental damage such as sorrow, pain, anxiety etc.

Thai Civil and Commercial Code

The Civil Code supplements the *Product Liability Act* in relation to compensation (see section 11 of the Act).

Compensation for Injured Parties:

Section 438 *Civil & Commercial Code* is important in terms of compensation for a Wrongful Act as it states that the Court shall determine the manner and the extent of compensation according to the circumstances and gravity of the Wrongful Act. Compensation may include damages for any injury caused.

Injured Party Contributing to Damage Sustained:

If the fault of the injured party has contributed to the damage they have suffered then section 442 of the Code provides that the obligation to compensate them and the extent of such

compensation will depend on the particular circumstances, especially which party was mainly responsible for the damage sustained.

Compensation in the case of Death of Injured Person:

In the case of death, section 443 provides that compensation from the responsible party shall include funeral and other necessary expenses. Moreover, if a person dies due to damage from a product then any person who is deprived of their legal support is also entitled to claim for compensation.

Consumer Cases Act (2008):

Application:

This legislation applies to all cases arising from the consumption of goods and services and includes all cases under the *Product Liability Act (2008)*.

Purpose of the Act

The main purpose behind this legislation was to give consumers access to cheaper, simpler and swifter legal proceedings.

Parties to a Product Liability Case:

According to section 19 of the *Consumer Cases Act (2008)*, the Consumer Protection Board (Sor Kor Bor) is entitled to file a law suit for damages on behalf of an injured party. If the Board takes up a case, the cost of litigation is borne by the Board and as such this option is more advantageous for persons of limited financial means. However, the public should however be aware that the Board's effectiveness is limited due to its finite resources.

Filing a Case:

According to section 20 an injured consumer of a product is able to file their case verbally or in writing. If the injured person files their complaint verbally then a case officer shall arrange the recording of the details of their complaint and shall arrange for them to sign it.

The Court will require that the facts of their case and the relief that they require are expressed clearly in the filing documents otherwise it may require them to amend the documents to improve clarity.

Courts:

Depending on the amount of compensation claimed, product liability cases are filed in the following courts;

- ❖ If the damages claim is less than 300,000 THB the case is filed with the district court;
- ❖ If the damages claim is more than 300,000 THB the case is filed with the provincial court (if filed in the provinces) or one of the 3 Bangkok Civil Courts (if filed in BKK)

Length of Cases:

These cases are significantly faster than ordinary civil law cases, most cases in the court of first instance are finalized within one year. If a decision is contested on a question of law it can then be appealed to the Consumer Case Section of the Appeal Court or the Regional Appeal Court.

But if the Supreme Court gives leave to appeal the case (permission must be sought first & if

involving a question of fact then the claim must be for at least 200,000 THB – section 51) then the appeal can take up to 2 or 3+ years to be finalized given the Supreme Courts' heavy workload.

Mediation Stage:

If a product liability case goes to a court hearing then people should also be aware that it will first be subject to mediation between the parties which shall be conducted by a case officer or a person duly appointed by the Court or a party which is mutually appointed by the parties.

Penalty re Court Fees for Unreasonable Cases:

If the Court feels that an injured person or their legal representative has filed a lawsuit on unreasonable grounds, claimed excessive damages or unnecessarily delayed the proceedings of their case then section 18 of the *Consumer Cases Act* (2008) permits the Court to order the injured person to pay the court fees in whole or in part and if they are not paid then the Court has the power to strike the lawsuit from its list.

Flexibility re Compensation Awards:

Under section 40 of the *Consumer Cases Act* the Court may state in its judgment or order that it reserves the right to revise such judgment or order, but not for more than 10 years from the date that the judgment is issued.

Labour Law

Work Rules:

If running a company or business in Thailand, one of the more important matters which senior management should bear in mind is the requirement that those employers with ten or more staff must have the work rules prepared in Thai language with a copy to be held at the place of business operations or the employer's office.

Relevant employers must ensure that they disseminate and openly post the work rules at the place of work, these rules must also be submitted to the Director General of the Department of Labour Protection and Welfare or his designate to review within seven days of the rules becoming effective. If such rules are deemed to contravene the law, an order can be made by the Director General to have them changed.

Work rules must as a minimum address the following issues:

1. Working days, working hours and rest periods;
2. Holidays and rules related to taking holidays;
3. Rules related to overtime and work on holidays;
4. Date and place of payment of wages, overtime, holiday pay and holiday overtime pay;
5. Leave and rules for taking leave;
6. Discipline and disciplinary actions - this must include several things including scope & meaning of the term 'grievances', procedure for submission of grievance; investigation and consideration, procedures for settlement of grievance and protection of person submitting the grievance and other persons involved (see section 109 of the Labour Protection Act - LPA).

7. How to submit a grievance;
8. Employee termination, severance pay and special severance pay.

It is worth noting that the work rules may go beyond the abovementioned issues but in doing so, employers should be careful to adhere to section 150 of the *Civil and Commercial Code* which stipulates that 'an act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals'.

Employee/ Staff Register:

Employers with ten or more staff also need to be aware that they will need to prepare a register of their employees in Thai language that will need to be held at their place of business operations or their office such that it is ready for inspection by Labour Department officials during business hours.

According to the law, the staff register must provide the following details for each staff member:

- (1) Name and family name;
- (2) Gender - Note: In the case of transsexuals employers must use their natural gender.
- (3) Nationality;
- (4) Date of Birth;
- (5) Residential Address;
- (6) Date of Commencing Employment;
- (7) Position/ Job Responsibility;
- (8) Wage or other remuneration;
- (9) Date of termination (if applicable).

Employers must update their staff register within fifteen days of an employee starting employment. If an employees' details change during their employment then the employer must update the register within fifteen days from the actual date of such change or within fifteen days from the date the employee informed them of such change. Following termination of an employee, their employer must retain the employees details on the register for at least two years from the date of termination. If there is a lawsuit, labor dispute concerning labour relations with respect to an employee, then the register on the concerned employee must be retained by the employer until the issuance of a final order or judgment concerning the matter.

Work Breaks:

Employers of staff in Thailand should be mindful that on work days they must arrange for their employees to have a rest period of not less than one hour per day after the employee has been working for not more than 5 consecutive hours. However, employers and employees are able to agree in advance that a rest period shall be less than one hour but when combined together with other breaks/ rest periods taken during the day, the staff must have at least one hour of rest during each working day.

When overtime is to be performed continuously for at least two hours in excess of normal working hours, an employer must arrange for their employee(s) to have a rest period of at least 20 minutes prior to the employee(s) commencing such overtime

work. However, this rule doesn't always apply; for instance it will not be applied if the employee agrees otherwise and the employee is performing work which because of its characteristics or nature must be performed continuously or the work is emergency work.

Working Hours:

Another important matter that employers must also consider is that they need to inform their employees of the normal hours of work i.e. the start and finish times. However, if this isn't possible due to the nature of the work then the employer and employee are able to make an agreement to fix the working hours for each day.

Employers should also be cognizant that special provisions for working hours apply to pregnant women as they are not allowed to work between the hours of 10 pm and 6 am, except where the employee works in a position of an executive, professional or their work relate to administration, finance or accounting. In such cases, the employer is able, from time to time, to request the pregnant employee to work overtime on a working day to the extent that it doesn't affect the health of the pregnant staff member and as long as the employee agrees in advance.

Ordinarily an employee is not permitted to work more than 8 hours per day whilst the total hours of work in one week must not exceed 48 hours. However, if the working time on any day is less than 8 hours then the employer and employee may agree to add the balance of working time to the working time on another working day subject to the condition that it shall not exceed 9 hours a day, nor can the total hours of work in one week exceed 48 hours.

Employers of workers engaged in professional or technical work, administrative or management work, clerical work, trade or service occupation should be especially cognizant of Ministerial Regulation No. 7 (1998) as it enables employees and their employer to agree on the normal working hours which can be set at any number i.e. ten hours a day, subject to the requirement that the total working hours in one week don't exceed 48 hours.

However, for those jobs defined as being hazardous to the health and safety of the employee under Ministerial Regulation No. 2 (1998) including:

- (1) work that must be conducted underground, underwater or in an unventilated place;
- (2) work involving radioactivity;
- (3) metal welding;
- (4) hazardous substance transportation work;
- (5) hazardous chemical production;
Work involving the use of equipment or machinery which exposes the worker to vibrations which may be harmful; and
- (7) work involving extreme heat or cold that may be harmful;

these employees must not work in excess of 7 hours per day whilst their total hours of work in one week must not exceed 42 hours.

Overtime:

Employers also need to pay special attention to section 24 of the LPA as it provides that employers are not permitted to tell an employee to work overtime on a working day unless the consent of the employee has first been obtained. However, senior management should bear in mind that in cases where the characteristics or nature of the work requires the work to be performed continuously, such that if there is a stoppage it will cause damage to the company, or where the work is considered emergency work, an employer can order their employees to work overtime to the extent necessary. It is worth noting one key exception in that employees under 18 years of age are not permitted to work overtime.

In the case of pregnant staff Ministerial Regulation No. 7 (1998) provides that an employer is able to have a pregnant staff member who is an executive or who performs technical, administrative, financial or accounting work to work overtime on a working day as long as the employee gives their consent.

Another important overtime exception can be found in section 65 of the LPA which provides that various occupations such as fire fighting or work concerning the prevention of public hazards are not entitled to overtime pay and holiday overtime pay but are instead entitled to remuneration based on the hourly wage rate for working days for the number of actual hours they work.

The overtime hours worked by an employee under sections 24 and 25 of the LPA, in aggregate are not permitted to exceed 36 hours in a week according to Ministerial Regulation No. 3 (1998).

Working on Holidays:

In relation to working on holidays, directors and HR managers should be conscious of section 25 of the LPA as it stipulates that an employer is not allowed to order an employee to work on a holiday, except in the following cases:

1. when the characteristics or nature of the work requires the work to be performed continuously, such that if there is a stoppage it will cause damage; or
2. where the work is urgent work.

In such cases an employer may order their employees to work on a holiday to the extent necessary.

It is worth noting that despite section 25, employees under 18 years of age are not permitted to work on holidays.

It should also be stressed that employers in certain sectors of the economy are permitted to instruct their employees to work on a holiday. Such types of business include hotels, places of amusement such as a theatre, transport, restaurants, shops that sell drinks, clubs or medical facilities such as hospitals. As noted above the overtime hours worked by an employee under sections 24 and 25 of the LPA in aggregate are not permitted to exceed 36 hours in a week according to Ministerial Regulation No. 3 (1998).

According to section 63 of the LPA if an employer requires an employee to work overtime on a holiday, the employer must pay the employee overtime pay calculated at the rate of three (3) times the normal hourly wage rate for the overtime hours worked.

Weekly Holiday:

Our first topic is 'weekly holidays' which many readers know as their 'weekend'. In many cases workers in Thailand take their weekly holiday on the weekend (i.e. Saturday and Sunday), however companies should be aware that the law gives employers considerable scope as to when such holidays can be set. Indeed, according to section 28 of the LPA an employer must arrange for their employee to have a weekly holiday of not less than one day per week, with the interval between such weekly holidays not being more than six days. Moreover, the employer and the employee are able to agree in advance to fix any day in the week as the weekly holiday.

HR Departments should also note that employee's that perform certain types of work such as:

- ❖ hotel work (i.e. concierge or maids),
- ❖ work in the field of transportation (i.e. coach driver)
- ❖ work in the forest (i.e. lumberer),
- ❖ or such other work as prescribed in ministerial regulations,

within any period of four consecutive weeks, can make a prior agreement with their employer to accumulate weekly holidays such that they are used at one time; however employers must note that such holidays must be taken within those four consecutive weeks.

National/Traditional Holidays:

Employers should also be aware that they are required to announce to their staff in advance the prescribed traditional/ national holidays for that year, which shall not be less than thirteen days, inclusive of National Labour Day as prescribed by the Minister.

In 2013 national/ traditional holidays include: New Year's Day, Chakri Day, The King's Birthday, the Queen's Birthday and Songkran.

If a national/traditional holiday falls on the weekly holiday of an employee, then the employee is entitled to a substitute holiday to be taken on the following work day.

Employers should however be mindful of the exceptions detailed in *Ministerial Regulation No. 4* (1998) which details a list of different types of work where the employer can prevent employees taking traditional holidays on those days, these jobs include:

- (1) Works in the businesses of a hotel, entertainment establishment, restaurant, club, medical establishment and tourist service establishment; and
- (2) Forestry work, work performed in remote areas, transportation work and work of a nature/ conditions which requires continuous performance otherwise damage

would be caused to the work itself.

Note: Section 29 provides that if an employer prevents an employee taking leave on a traditional holiday by virtue of *Ministerial Regulation No. 4* (1998) then the employer and employee may agree to another day being taken in substitution for such holiday or otherwise that the employer pay the employee holiday pay for the traditional holiday that was worked.

Annual Leave:

Where an employee has worked consecutively for a full year, managers should note that such staff are entitled to take annual leave of not less than six working days in the following year.

The employer has the power to determine in advance when the employees' annual leave is able to be taken or they may set such dates by making an agreement with the employee. In following years, an employer is able to determine annual leave for the employee but such leave must be at least six working days per year.

Employers should bear in mind that they and their employees may agree in advance to accumulate and postpone annual leave which has not been taken in a particular year to be combined with the annual leave of following years. Moreover, with regard to an employee who has worked for less than one year, an employer is permitted to determine their annual leave on a proportional basis.

Sick/Medical Leave:

Employees are entitled to take sick leave for as many days as the employee is actually ill; however staff are only entitled to receive paid sick leave up to a maximum of thirty working days per year.

When staff take sick leave for three or more working days, their employer is entitled to require the staff member to produce a medical certificate from a doctor or from a government medical facility (i.e. hospital). If the employee is unable to produce a medical certificate from a doctor or from a government medical facility, they must give a suitable explanation to their employer, if they fail to provide a suitable explanation the employer may commence disciplinary proceedings against them according to the work regulations.

Employers should also bear in mind that days on which an employee is unable to work due to an injury or illness arising from their work or maternity leave taken under section 41 of the LPA shall not be considered to be sick leave.

Special Types of Leave Available to Staff:

Senior Management & HR Departments should also be conscious that under the LPA employees are able to take advantage of the following special types of leave, including:

Sterilization Leave - Employees are entitled to take leave to be sterilized. The amount

of time able to be taken under this type of leave is be prescribed by the doctor on the medical certificate issued to the employee. This type of leave is paid leave and is able to be utilized by both male and female employees.

Maternity Leave - Pregnant female employee have the right to take maternity leave of not more than ninety days per pregnancy (including holidays which fall within the ninety days). The employer must pay the pregnant staff member their basic pay which shall not exceed forty five days. Staff can usually commence taking this leave towards the end of their pregnancy but they should refer to their work rules to seek guidance on this matter.

Business Leave - Employees are entitled to take business leave as necessary in accordance with the work regulations. Hence, it is important that employers cover this type of leave in their work rules especially how to lodge an application and under what circumstances this leave can be taken.

Military Service Leave - Given national security considerations, employees are entitled to take military service leave for the purpose of mobilization for inspection, military training/ exercises or testing for combat readiness in accordance with the law on military service. This leave can be of any duration but is only paid up to a maximum of sixty days per year.

Training & Skills Development Leave - An employee is entitled to take leave for training or development of knowledge and competency in accordance with the criteria and procedures prescribed in *Ministerial Regulation No. 5 (1998)* which provides guidance on this type of leave by stating that this type of leave can be taken in the following cases:

- (1) where the training improves the social welfare of the employee or improves the skills and expertise of the employee such that it improves their working efficiency;
- (2) Where the leave relates to an educational examination organized by the Government.

In order to take this type of leave the employee must notify their employer and provide evidence of the course/ examination not less than seven days before the date of taking this leave. Employers should be aware that they are able to deny this type of leave applications if:

- i. In the year it is requested, the employee has already been permitted to take this type of leave for more than thirty days or on three occasions already; or
- ii. They can show that the proposed leave would cause damage or negatively affect their business operations.

Employers should note that this type of leave is unpaid leave.

Payment Issues

When paying monies to employees in Thailand whether it be wages, overtime pay or other benefits, senior management and HR Departments should bear in mind the following key points:

- i. In the case of staff who are under the age of 18, an employer must pay the salary to the employee rather than anyone else such as their parents/ guardians.
- ii. Such monies should be paid in Thai baht except where the employee agrees to payment in a note or in another currency;
- iii. Payment shall be made at the employees workplace or if it is to be made elsewhere then the employee must first give their consent;
- iv. Weekly holidays, national/traditional holidays (i.e. New Years Day) and annual leave are to be paid by the employer according to the employees' ordinary daily wage rate;
- v. If wages are calculated on a monthly, daily or hourly basis or at other time intervals which do not exceed one month or on the basis of work units performed, then payment must be made at least once per month unless otherwise agreed between the staff member and the employer where such change is to the benefit of the staff member;
- vi. Overtime pay, holiday pay and holiday overtime pay shall be paid by the company to the employees at least once a month;
- vii. Payment records relating to the payment of wages, overtime pay, holiday pay and overtime holiday pay (i.e. bank transfer/ deposit slips) must be retained by the employer in their records for at least two years from when payment is made. If however there is a lawsuit or labor dispute concerning labour relations with respect to an employee, then the payment records for the concerned employee must be retained by the employer until the issuance of a final order or judgment concerning the matter.

Gender Equality in the Workplace:

Managers should be aware that according to the *Labour Protection Act* employers must treat male and female employees equally with regard to employment for work, unless such treatment is not possible due to the characteristics or nature of the work. Gender equality in Thai workplaces is further strengthened by section 53 of the Act which provides as follows:

'In case of work of the same type, quality and quantity, the wages, overtime pay, holiday pay and holiday overtime pay fixed by the employer shall be equal regardless of whether the employee is male or female'.

Examples of jobs where treatment of the sexes could be justifiably different would be in such industries as those requiring greater physical strength.

HR Managers and company directors should also note that equal treatment between the sexes is enshrined within the *Thai Constitution* at section 30 of Part 2 (Equality) which provides that:

'All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted'.

Section 16 of the LPA also evidences how gender equality has been promoted as this

section has been amended under Section 8 of the *Labour Protection Act (No. 2) (2008)* to prevent employers or supervisors sexually harassing any employee rather than just women and children which was originally the case under the first enactment of the LPA.

Termination:

There are a number of considerations which employers should consider when terminating staff, including:

1. It is prohibited to terminate a female employee because of her pregnancy;
2. Terminating staff without cause will result in them having to pay severance pay to the staff.
3. An employer is able to terminate an employee immediately and without notice or severance pay if the employee's actions falls within those mentioned in section 119 of the LPA.
4. Unused annual leave will need to be paid out to terminated staff.
5. Employers should carefully review the employees labour contract/ agreement and the internal company work rules to see exactly what provisions deal with termination and what if any conditions apply to the termination of the employee with or without cause.
6. When terminating a staff member, the employer must ordinarily give them advance written notice thereof at or before one full payment cycle. For instance if the staff member is paid monthly then they shall be entitled to advance notice of one month. However if the employer wishes, they can instead simply pay the employee the wages for the advance notice period instead. This latter approach is often used by companies to prevent staff causing problems at a workplace after they have been informed that they will be terminated. It is worth noting that not more than three months advance notice be given.
7. If the employer and the employee operate a Provident Fund then terminated staff who have participated in it may also be entitled to monies they have invested. Managers should carefully read the rules laid down in the Provident Fund Rules to determine the terminated staff's entitlements (if any).
8. Employers should also be aware that following termination an employee can sue them in the Labour Court of Thailand for unfair dismissal i.e. where the employer terminates a staff members' employment for no reason or for an insufficient reason. The Court in determining this matter will examine the circumstances of the case and will carefully consider any reasons for termination which are given by the employer. In terms of relief to employees, the Court can order the employer to reinstate the employee but if this is deemed impossible then the court can award damages based on several factors including length of service, age of employee, circumstances of the employee etc.
9. Employees engaged under a fixed term employment agreement are automatically terminated at the end of the term of the agreement and the employer is not required to give them prior notice.
10. In those cases where an employee reaches the stipulated retirement age as detailed in their work rules, this is considered as termination without just cause and as such entitles the retiring staff member to severance pay, the wages for the advance notice period as well as their unused annual leave entitlements to be paid out as well in addition to other benefits due to them as provided in the work rules and regulations.

11. On a side note, generally speaking unless an employee's employment agreement provides otherwise, an employee can resign at any time.

Severance Pay:

One of the most problematic and contested areas of the labour law which is frequently the basis of litigation is the law relating to severance pay. Section 119 of the LPA sets down the conditions under which an employer is not required to pay an employee severance pay following termination, these circumstances include where an employee:

1. Performs their duties dishonestly or where the employee intentionally commits a criminal act against the employer;
2. Intentionally causes their employer to suffer losses;
3. Performs an act of negligence which causes the employer to suffer severe losses;
4. Violates the employer's work rules regulations or orders which are legal and fair with the employer having already given the staff member a written warning except in serious situations where an employer is not required to give a warning. The written warning shall be effective for a period of one year from the date of the commission of the violation by the employee;
5. Neglects their duties for a period of three consecutive working days without a reasonable cause, whether or not there is a holiday intervening in such period.
6. Having been imprisoned by a final judgment

In all other cases, an Employer shall be required to pay severance pay to employees who are terminated, which shall be calculated as follows (see section 118 of the LPA):

- 1) For an employee who has worked less than one hundred and twenty days they shall not be entitled to severance pay.
- 2) For an employee who has worked for at least one hundred and twenty days consecutively but less than one year, they shall be paid wages of not less than thirty days (at their last wage rate).
- 3) For an employee who has worked for at least one year consecutively but less than three years, they shall be paid wages of not less than ninety days (at their last wage rate).
- 4) For an employee who has worked for at least three years consecutively but less than six years, they shall be paid wages of not less than one hundred and eighty days (at their last wage rate).
- 5) For an employee who has worked for at least six years consecutively but less than ten years, they shall be paid wages of not less than two hundred and forty days (at their last wage rate).
- 6) For an employee who has worked for ten years of more consecutively they shall be paid wages of not less than three hundred days (at their last wage rate).

Employers should note that staff employed for a fixed period of two years or less are not entitled to severance pay upon the expiry of the fixed period if the work falls under one of the following conditions:

- i) If a person is employed for a specific project under the fixed period contract, this exception cannot be used by an ordinary business to employ staff to avoid severance pay entitlements.
- ii) Temporary work with a fixed expiry date or a clause which provides that the

- contract will expire upon the success of a project; or
iii) Seasonal work such as fruit picking.

Calculating the term of service of an employee is an important aspect of calculating severance pay, hence employers should be familiar with section 19 of the LPA as it provides that when assessing the period of employment, the following days shall also be included in the employees term of service:

- i. holidays,
- ii. days of leave,
- iii. days on which an employer released the employee from work for the benefit of the employee; and
- iv. days on which the employer ordered the employee not to work for the benefit of the employer.

If an employee has not worked for a consecutive period because the employer has intentionally adjusted their work in order to deprive the employee of his rights under the LPA then section 20 of the LPA provides that all periods of employment shall be added together so that the employee shall be entitled to obtain his legal rights

Immigration, Visas and Work Permits

Under Thai law foreign nationals are not permitted to undertake any work within the Kingdom without having first obtained a work permit from the the Labour Department, unless the person or the type of employment is exempted under the *Alien Employment Act*. In order to lodge and application for a work permit with the relevant Thai authorities, the individual will also need to ensure that they have a valid "Non-Immigrant" visa when they submit their application.

In determining whether to grant a foreigner a work permit, the responsible Government officials will consider various factors such as the individuals' work experience and academic qualifications for the position they are applying for. Moreover, the granting of a work permit will also be subject to the following requirements:

- i. The foreign national must have paid a specified minimum amount of personal income tax in the previous personal tax year (if they worked in Thailand). However, if the foreign national has not previously been employed in the Kingdom then the employer will need to submit documentation which evidences that, the foreign employee will have a monthly income (in Thailand) of at least 50,000 Baht for a single employee and 60,000 per month if they are married. Such documentation may take the form of an employment agreement or an official letter of confirmation from the employer confirming wages/salary.
- ii. If the registered capital of the entity hiring the foreigner is less than 2 million Baht then it can engage one foreigner if it's total corporate income tax payment has been at least 5 million Baht for the past three years. The entity can hire one foreigner for every 5 million Baht paid in tax.

- iii. The entity engaging the foreign national must have fully paid-up registered capital of 2 million Baht in order to hire one foreigner, plus a further 2 million Baht for each other foreigner (up to a maximum of 10 people).
- iv. The proposed employer of the foreigner has at least 50 Thai employees per foreign employee up to a maximum of 5 foreign nationals.
- v. If the employing entity has engaged in export activities which has brought into the Kingdom revenue of 3 million Baht in the previous fiscal year then It can engage one foreigner for every additional 3 million Baht up to a maximum of 3 foreign nationals.

Employers of foreign nationals should also be aware that the Department of Labour may also grant or renew a work permit irrespective of the above conditions, if a foreign national falls into one of the following groups

- i. They are to be hired as a contractor by state agencies or public enterprises on projects;
- ii. They are to be engaged as an international trade representative inspecting product quality, conducting market reviews or purchases;
- iii. They are hired to fill a position as an internal auditor or an management technology adviser;;
- iv. They are to be employed in the export sector of Thailand;
- v. They are to be work as a tour guide bringing overseas tourists into the Kingdom;
- vi. They are employed in a non-profit organization such as a charitable foundation on a non-permanent basis;
- vii. They are employed in a business introducing and transferring technologies to the Kingdom;
- viii. They are employed in a sector where qualified Thai employees cannot be sourced locally; and
- ix. They are to be engaged by an international financial institute officially endorsed by the Bank of Thailand.

What is the procedure to obtain a Work Permit in Thailand?

Upon entering into the Kingdom, the applicant or their appointed representative(s) (i.e. if applicant gives a representative a valid power of attorney) must apply for a work permit at the Ministry of Labour within their initial 90 day entry period.

One Stop Service Centre

Certain applicants are able to apply for their work permit and visa extension at the One Stop Service Centre.

The One Stop Service Centre is both efficient and convenient as it comprises both Immigration Bureau officers and staff from the Office of Foreign Workers Administration, Department of Employment, Ministry of Labour who can process applications for visa extensions and the issuance of work permits.

Documents Required from Applicant:

- i. Passport (copies of every page with each page must be signed in pen by the

- applicant).
- ii. Copy of Non-Immigrant B Visa.
 - iii. Copies of University degree(s) (signed copy) *
 - iv. Copies of academic certificates, qualification certificates or licenses held by applicant (signed copies) *
 - v. Applicant's Departure card (Form TM.6)
 - vi. Employment reference letter from the applicant's latest employer detailing the applicants role, start date/ finish date (if applicable). This letter should be on official stationary and signed.
 - vii. CV or resume – This needs to explain the applicant's past employment, length of service and places of employment, roles and responsibilities.
 - viii. Three (3) Photos, which are 3 x 4 cm in size (**Note:** not passport sized photos) showing the applicant's face and taken wearing suitable business attire (no hat & preferably wearing a suit and tie). This photo must have been taken within six (6) months of the submission of the work permit application).
 - ix. Medical Certificate issued by a Thai hospital showing that the applicant is medically fit and does not suffer from the prohibited diseases/ illnesses within the last six months. The six prohibited conditions are: leprosy, drug addiction, alcoholism, elephantitis, tuberculosis and stage 3 syphilis. The medical certificate will also need to state the applicants' particular blood group.
 - x. Signed and completed Work Permit application form.
 - xi. Applicant's marriage certificate (if the applicant is wed to a Thai National). This includes the original and signed photocopies.
 - xii. Letter confirming the applicant's / employment issued by the hiring Company and duly signed by the authorized Director(s) of the Company.

* Thai Government officials may require these documents to be certified by the applicant country's embassy (this requires bringing your documentation to your local embassy to state it is a true and original document. You could be liable required to pay a verification fee to your embassy. In addition, Ministry Officials accept documents in Thai and generally accept documents that are in English, however documents in other languages are normally required to be translated into Thai.

Documents Required from Employer:

- (3) VAT Certificate - (form 'Phor Phor 20')*
- (4) Map of workplace location in Thailand.
- (5) Commercial Registration Department Certificate evidencing that the organization for which the applicant is going to be employed has been duly registered as a juristic person.*
- (6) Shareholders List (form 'Bor Or Jor 5') this can be obtained from the Department of Business Development.*
- (7) Factory License (if applicable) issued by Factory Department at the Ministry of Industry.*
- (8) Audit report & balance sheet for the 3 preceding years (before the application).

* This documentation should have the seal of the company affixed on every page along with the signature(s) of the Managing Director and/or Directors next to the affixed seal.

How long will it take time to receive the work permit?

A normal timeframe for approval of the work permit for a company with 2 million baht registered capital is approximately seven (7) business days in Bangkok; however employers should be mindful that this can be considerably longer in the provinces.

Please note that the applicant must appear in person with their passport and sign for their Thai work permit in the presence of the Labor Department staff when collecting it.

Other Important Matters:

A holder of a work permit is only able to undertake the work detailed in their work permit. If they decide to shift jobs or change the location of their workplace, then this change must be notified to and approved by the Ministry Officials. Furthermore, once an applicant is granted a work permit, they need to keep it at their workplace during working hours to show to government officers should they inspect such workplace. A work permit holder who violates this rule can be fined.

If a person holding a work permit desires to continue working past their work permit expiry date then they must apply for an extension before the expiration date. Moreover, in case of changes in the name, nationality, address, or name of the working place, the work permit holder must notify the relevant officials to update their information as soon as possible. Finally, if a work permit holder decides to resign from their employment in Thailand then they must return and cancel their work permit with the Government within 7 days from the date of their resignation

Appendix A:

The schedules of businesses from which foreigners are restricted or prohibited.

Schedule 1 - Business activities for which foreigners cannot obtain a business license for “special reasons”:

Businesses foreigners are not permitted operate for special reasons:

- a. Newspaper, radio, and television businesses
- b. Lowland farming, upland farming, and horticulture
- c. Animal husbandry
- d. Forestry and wood fabrication from natural forests
- e. Fishery for marine animals in Thai waters or within Thailand’s exclusive economic zones.
- f. Extraction of Thai herbs.
- g. Trading and auction of ancient Thai objects or objects of national historic value
- h. Making or casting Buddha images and monk alms bowls.
- i. Dealing in land

Schedule 2 Business activities that affect national security or safety, art, culture, customs, native manufacturing/ handicraft production, natural resources, or the environment:

Business activities that affect national security or safety, art, culture, customs, native manufacturing/ handicraft production, natural resources, or the environment

Group 1. Businesses that affect national safety or security

- (1) Production, disposal, sale, repair or maintenance of-:
 - firearms, ammunition, gun powder, or explosives.
 - accessories of firearms, ammunition, or explosive
 - armaments, or military vessels, aircrafts or conveyances
 - any kind of war materials or components of war materials.
- (2) Domestic land, water, or air transportation, including domestic aviation business.

Group 2. Businesses that affect art, culture, customs, native manufacturing/ handicraft production

- Dealing in Thai antiques, objects of art, or handicrafts
- Production of wood carvings
- Silkworm farming, production of Thai silk yarn, weaving or printing patterns of Thai silk textiles
- Production of Thai musical instruments
- Production of goldware, silverware, nielloware, bronzeware or lacquerware.
- Production of crockery or terra-cotta ware that may be regarded as a form of Thai art

Group 3. Businesses that affect natural resources or the environment

- Manufacture of sugar from sugarcane;
- Salt farming, including extraction of salt from saline soil;
- Rock salt production;
- Mining, including rock blasting or crushing;
- Wood fabrication for furniture or wood articles.

Schedule 3 Business activities where Thais consider they are not sufficiently prepared to compete with foreigners.

- Foreigners must obtain permission (also referred to as a foreign business license) from the Director General with approval from the Foreign Business Board; but if permission is received the foreign juristic can be 100% foreign owned with no requirements regarding Thai directors.

Business which Thai nationals are not yet ready to complete with foreigners.

1. Rice milling and flour production from rice or farm plants
2. Fishery, limited to marine animal cultivation
3. Forestry, from replanted forests
4. Production of plywood, veneer boards, chipboards or hardboards.
5. Production of (natural) lime.
6. Accounting service business
7. Legal service business
8. Architectural service business
9. Engineering service business
10. Construction, excepting-:
 - (a) Construction of objects which render basic services to the public with respect to public utilities or transport requiring special tools, machinery, technology or construction expertise, provided the foreigner has a minimum capital of 500 million Baht.
 - (b) Other categories of construction as prescribed by Ministerial Regulations.
11. Brokerage and agent business, except for-:
 - (a) securities trading or services relating to futures trading in agricultural commodities, financial instruments, or securities.
 - (b) trading or procuring goods or services necessary for production by or providing services to an enterprise in the same group.
 - (c) trading, purchasing for others, distributing, or seeking both domestic and foreign markets for selling domestically manufactured or imported goods as an international trading business, with minimum foreign capital investment of 100 million Baht.
 - (d) other lines of business as prescribed by the Ministerial Regulations.
12. Auctioning, except-:

- (a) international bidding that does not involve Thai antiques, historical artifacts or objects of art, handicrafts, or objects of national historic value.
13. other types of auctioning as prescribed by the Ministerial Regulations.
 14. Domestic trading connected with native agricultural products or produce not yet prohibited by law.
 15. Retail trading of any goods with an aggregated minimum capital of less than 100 million baht, or with a minimum capital of each store of less than 20 million baht.
 16. Wholesale trading any goods with a minimum capital of each store of less than 100 million baht.
 17. Advertising business.
 18. Hotel business, except for hotel management services
 19. Tourism.
 20. Selling food or beverages.
 21. Plant cultivation and propagation business.
 22. Other service businesses, except those prescribed in the Ministerial Regulations

Application for permission (also referred to as a foreign business license) to undertake business in accordance to the Foreign Business Act; Department of Business Development, Ministry of Commerce

Exemptions to the legal restrictions may be granted as follows.

- Exemptions granted by the Thai Government by Treaty
- Exemptions for US Companies under the 1966 US-Thai Treaty of Amity
- Exemptions granted by the Board of Investment (BOI) and the Industrial Estate Authority of Thailand.

Appendix B:

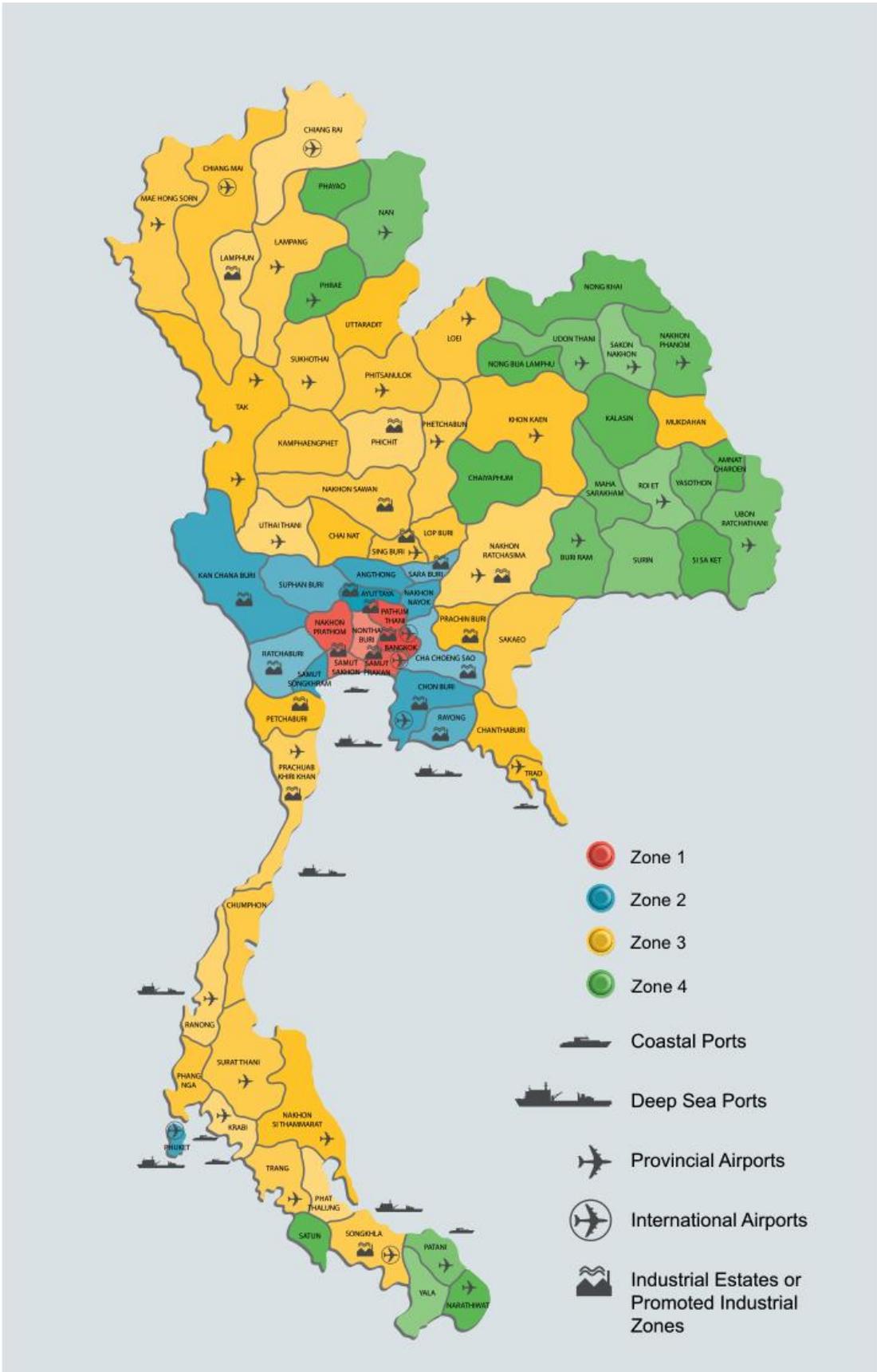
BOI Investment Promotion Zones

As decentralization is a major theme in devising the BOI incentive scheme, the country is divided into three zones based on economic factors (with earnings and primary facilities as criteria of each province.)

- Zone 1: Bangkok, Nakhon Pathom, Nonthaburi, Pathoum Thani, Samut Prakan, and Samut Sakhon
- Zone 2: Ang Thong, Ayutthaya, Chachoengsao, Chon Buri, Kanchanaburi, Nakorn Nayok, Ratchaburi, Samut Songkhram, Saraburi, Supanburi, Phuket, and Rayong.
- Zone 3: The remaining 59 provinces with low income and with less-developed infrastructure, which are designated as Investment Promotion Zones.

36 Provinces: Krabi, Kamphaeng Phet, Khon Kaen, Chanthaburi, Chai Nat, Chumphon, Chiang Rai, Chiang Mai, Trang, Trat, Tak, Nakhon Ratchasima, Nakhon Si Thammarat, Nakhon Sawan, Prachuab Khiri Khan, Prachin Buri, Phangnga, Phattalug, Pichit, Phitsanulok, Phetchaburi, Phetchabun, Mukdahan, Mae Hong Son, Ranong, Lop Buri, Lamphang, Lamphun, Loei, Songkhla, Sa Kaew, Sing Buri, Sukhothai, Surat Thani, Uttaradit, and Uthai Thani.

23 Provinces: Kalasin, Nakhon Phanom, Narathiwat, Nan, Buri Ram, Pattani, Phayao, Phrae, Maha Sarakham, Yasothon, Yala, Roi Et, Si Sa Ket, Sakhon Nakhon, Satun, Nong Bua Lamphu, Chaiyaphum, Nong Khai, Ubon Ratchatani, Udon Thani, Amnatcharoen, and Bueng Kan.



Appendix C:

Promotion eligibility criteria of seven activities

Section 1: Agriculture and Agricultural Products

<http://www.boi.go.th/upload/attachfile/investment/english/section1.pdf>

Section 2: Mining, Ceramics and Basic Metals

<http://www.boi.go.th/upload/attachfile/investment/english/section2.pdf>

Section 3: Light Industry

<http://www.boi.go.th/upload/attachfile/investment/english/section3.pdf>

Section 4: Metal Products, Machinery and Transport Equipment

<http://www.boi.go.th/upload/attachfile/investment/english/section4.pdf>

Section 5: Electronic Industry and Electric Appliances

<http://www.boi.go.th/upload/attachfile/investment/english/section5.pdf>

Section 6: Chemicals, Paper and Plastics

<http://www.boi.go.th/upload/attachfile/investment/english/section6.pdf>

Section 7: Services and Public Utilities

http://www.boi.go.th/upload/Section7_35960.pdf