

THAILAND

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I INTRODUCTION

The broad framework of capital markets in Thailand is governed by the Securities and Exchange Act BE 2535 (1992) (the Securities and Exchange Act), which provides for the establishment of the Securities and Exchange Commission of Thailand (the Thai SEC) and empowers it to introduce policies for the development and supervision of the securities markets and related activities, including the governing of the offering of securities, governance of an issuing company, and securities business in Thailand. The Thai SEC's organisation extends to the Capital Market Supervisory Board and the Office of the Securities and Exchange Commission (the Office of the SEC), a regulatory body established by the Securities and Exchange Act, which supervises securities businesses including day-to-day operations, public offerings and business takeovers, and includes implementing policies, inspecting licensed or approved companies and individuals, and developing financial products.

The Securities and Exchange Act also established the Stock Exchange of Thailand (SET), which is the principal stock exchange in Thailand consisting of securities companies that are the SET's members. The SET is responsible for, among other things, processing all listing applications, ensuring that disclosure requirements for listed companies are fulfilled and monitoring all trading activities in connection with listed securities.

In addition, a public limited company must comply with the Public Limited Companies Act BE 2535 (1992) (PLCA), which governs the corporate matters and relationships between the issuing company, its directors, executives and shareholders.

Additionally, there are several other laws and regulations that specifically govern certain types of financial transactions, for example, derivatives transactions that are governed by the Derivatives Act BE 2546 (2003) and trusts governed by the Trust for Transactions in Capital Markets Act BE 2550 (2007).

Another regulatory body involved in the country's financial system is the Bank of Thailand (BOT), which is Thailand's central bank whose main goals are promoting Thailand's monetary stability, formulating and implementing monetary policies as specified by the Monetary Policy Committee by way of, *inter alia*, mobilising deposits, determining the interest rate for loans to financial institutions, trading foreign exchange and exchanging for future cash flow, borrowing foreign exchange in order to maintain monetary stability,

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trading securities as necessary and exchanging for future cash flow in order to control the money supply in the country's financial system and borrowing or lending securities with or without returns.

The BOT also provides banking facilities to the government in terms of depository for the Ministry of Finance (MOF) and acts as the government's custodian of deposits, securities or other valuables. Its roles include acting as the government's representative in trading gold and currency and as the registrar of the government's bond transactions in terms of purchasing and selling government bonds and paying principal and interest to bondholders.

The role of the BOT vis-à-vis financial institutions includes supervision and examination of the financial institutions' financial status and performance, as well as their risk management systems with the aim of promoting financial stability. When necessary, the BOT is the lender of last resort for financial institutions. Thailand's payment systems, including the electronic clearing system, are supported and administered by the BOT in order to ensure safety and efficiency.

Another main function of the BOT is to manage Thailand's foreign exchange rate under the foreign exchange system and manage assets in the currency reserve according to the Currency Act BE 2501 (1958) and control the foreign exchange under the Exchange Control Act BE 2485 (1942).

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Equity

In Thailand, only a public limited company can offer shares to the public. Public offering of shares requires the approval from the Office of the SEC and requires that the filing of the registration statement and draft prospectus must be submitted with the Office of the SEC and must become effective before conducting the offering. The appointment of a financial advisor is also required to undertake the application for approval and the filing of the registration statement and a prospectus. As for the solicitation, advising and offering of the securities, the issuing company of equity type (i.e., shares and warrants to buy shares) requires appointing an underwriter who must comply with selling restrictions under relevant regulations issued under the Securities and Exchange Act. In respect of the offering, the Thai SEC aims to protect investors by, among other things, granting an approval based on certain criteria. Mainly, the shareholders' rights must be protected and they must be treated fairly. The board of directors and executives must have a system of checks and balances in which a clear and fair structure must be put in place, and there must be no conflict of interest between the company and its directors, executives or major shareholders (otherwise, there shall be a valid mechanism to cope with any conflict of interest), including that disclosures must be sufficient, especially that financial statements must be prepared in accordance with the accounting standards.

In terms of regulations regarding the offering, there are certain exemptions to going through the process of asking for an approval from the Office of the SEC and exempted from filing the registration statement and draft prospectus with the Office of the SEC, for example, issuing the rights offering to the shareholders of the issuing company proportionately to the shareholding, or private placement of shares to: (1) no more than 50 persons in a 12-month period; (2) any person with an aggregate value not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation; or (3) an institutional investor

(as defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. KorChor 17/2551 on the definition of the issuing and offering of securities regulation). The number of investors referred to in (1) or the aggregate value of the offering referred to in (2) shall exclude the value of any offer made to the institutional investors referred to in (3), regardless of whether such offering is made simultaneously or at different time (private placement (PP)). However, the Thai SEC has tightened the issuance of PP shares of a listed company by imposing an approval process prior to the sales of PP shares. Deemed approval for PP shares issued by a listed company is granted only in the case of offering the PP shares at market price (discount of not more than 10 per cent may be granted if necessary, subject to the discretion of the board of directors considering that it is in the best interest of the listed company).

Offering of offshore shares

The Office of the SEC provides an option for an offshore company to offer its shares to investors in Thailand and be traded on the SET, subject to the Office of the SEC's approval and filing of a registration statement in the prescribed form and a prospectus with the Office of the SEC that must become effective prior to commencing the offering. The main regulation for the offshore company to comply with is divided into (1) the dual listing case, which is the Capital Market Supervisory Board's announcement No. TorChor 14/2558 on rules on offering of securities issued by an offshore company that has or will have its shares listed on one or more offshore exchanges; and (2) an offshore company not having its shares listed on any offshore exchange, the Capital Market Supervisory Board's announcement No. TorChor 3/2558 shall be applied. There are certain exemptions from obtaining an approval from, and filing a registration statement in the prescribed form and a prospectus with the Office of the SEC, among others, the offering of such shares is made to: (1) no more than 50 persons in a 12-month period; (2) any person with an aggregate value not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation; or (3) an institutional investor (as defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. KorChor 17/2551 on the definition of the issuing and offering of securities regulation). The number of investors referred to in (1) or the aggregate value of the offering referred to in (2) shall exclude the value of any offer made to the institutional investors referred to in (3), regardless of whether such offering is made simultaneously or at different time.

Debt

The Thai debt market is relatively small compared to the market for bank loans and equity. Nonetheless, it is active and developing with various types of debt instruments available. Debt securities in Thailand mainly comprise bonds (issued by the government, state agencies or state-owned enterprises) or debentures (issued by private companies). Corporate debentures may be issued by both public limited companies and limited companies.² Other varieties of debt securities in Thailand include convertible debentures, exchangeable debentures,

2 In Thailand, a public limited company is a company incorporated under the PLCA with the aim of offering its shares to the public, while a limited company is incorporated under the Civil and Commercial Code, whose shares are privately owned and restricted to being offered to the public (unless it has been converted to a public limited company).

Basel III subordinated debentures, securitised debentures, perpetual debentures and foreign debentures. While a wide range of issue types is possible, typical corporate domestic issues are fixed-rate with bullet repayment at maturity.

The MOF and the Office of the SEC are the main authorities that have key roles in formulating policy and regulating the Thai bond markets. The MOF is responsible for national fiscal policy and the management of public debt, which relates directly to the structure of government bonds. Tax laws are one of the key mechanisms used by the MOF to influence Thai bond markets. The Office of the SEC is the regulator of the capital markets, supervising the offering of securities and regulating those carrying on securities businesses, such as underwriters and financial advisers. The Thai Bond Market Association (the Thai BMA) has been established with the objective to establish a basic system of trading debt securities among traders in the secondary market providing information regarding market data to investors, and encourage the development of the market. The Thai BMA promotes and supports study and research of debt securities and establishes debt market standards.

An offer of debentures on a public offering basis requires approval from the SEC Office and can obtain a shelf approval for a period of two years, including the filing of a registration statement and draft prospectus with the SEC Office, which must become effective before an offer can be made.

A private offering³ of debentures is granted a deemed approval from the Office of the SEC, provided that the issuer registers transfer restrictions with the Office of the SEC. Except for an offering made to an institutional investor or high-net-worth investors, an offering on a private placement basis does not require a filing, and nor does an offering where the entire issue is to foreign investors.

Investment unit

The alternative types of investments other than equity and debt instruments can be offered in Thailand (i.e., the investment unit of a mutual fund, where its establishment and management are subject to the Thai SEC's approval and are under its supervision). Types of mutual funds vary depending on their choice of investments, for example, securities, real estate or infrastructure.

Generally, offering of units or soliciting for the purchase of units does not have a private placement regime as in the cases of offering of equity or debts, and requires a securities licence to operate fund management. It is also not possible to offer and solicit offshore investment units to Thai investors in Thailand, unless certain exemptions apply, for example, the operators are qualified for the ASEAN Collective Investment Scheme (ASEAN CIS), or the offshore securities operator solicits the institutional investors (defined under relevant regulations under the Securities and Exchange Act) for a private fund management operating as a separate account of the offshore fund manager.

3 A private offering in this context means an offering to an institutional investor and high-net-worth investors; an offering to not more than 10 investors in any four-month period; an offer to creditors in a debt restructuring; and an offering made with a waiver from the Office of the SEC.

ii Developments affecting derivatives, securitisations and other structured products

Derivatives

The Derivatives Act BE 2546 (2003) was promulgated because of a call for improvements in Thailand's derivatives market, particularly to increase investors' protection, whereby the Thailand Futures Exchange (TFEX) was also established in 2004 as Thailand's derivatives exchange under the supervision of the Thai SEC. The goals of the TFEX are to provide investors, fund managers, financial institutions and the general public with the necessary tools to manage their portfolios effectively. TFEX offers comprehensive product offerings of derivatives in futures and options forms, namely SET50 index futures, SET50 index options, gold futures, rubber futures, currency futures, interest rate futures and single stock futures, and the TFEX continually develops new products for the market. The recent development of the TFEX to serve as a global derivative exchange includes block trading and extended trading hours for precious metals futures. Derivatives trading on the TFEX rises every year, with a rise of 43 per cent from 2015 to 2016.⁴

The term 'derivatives' is defined under Section 3 of the Derivatives Act as a contract having one or any combination of the following characteristics:

- a a contract in which one party is obliged to deliver goods as specified in the contract to the other party at a given time in the future, and the other party, in turn, is obliged to make payment for such goods in the amount and at a price specified therein;
- b a contract in which one party is obliged to make payment to the other party, or vice versa, in the amount that is equivalent to the difference between the price or value of goods or variable specified in the contract and the price or value of such goods or variable prevailing at a given time or period of time in the future as specified in the contract; and
- c a contract in which one party is entitled to demand the other party to deliver goods, or make payment for goods, or make payment in the amount that is equivalent to the difference between the price or value of goods or variable specified in the contract and the price or value of such goods or variable prevailing at a given time or period of time in the future as specified in the contract, or to demand the other party to enter into a contract under subsection (a) or (b).

Derivatives businesses, for example, derivatives dealers and derivatives brokers, are licensed businesses governed by the Thai SEC. Prior to engaging with clients, relevant licences must be obtained. However, derivatives business operators that deal only with clients who are institutional investors are only required to be registered with the Thai SEC, and no licence is required.

Securitisation

Thailand's securitisation transactions are governed by the Royal Enactment on Special Purpose Juristic Persons for Securitisation BE 2540 (1997), with the aim of financially supporting businesses, especially those that lack working capital in the real estate business owing to the direct effect on the liquidity of Thailand's financial institutions. However, since the enactment of such law, this financial innovation does not seem to encourage much growth in Thailand.

4 TFEX's Annual Report as of 2016.

During the period from 1999 to 2009, only 47 securitisation debt instruments were issued, with the total outstanding value of 37,770.63 million baht, which equals only 4.5 per cent of the private bond market's outstanding value in Thailand during that period.⁵

Other developments

A recent significant development in the Securities and Exchange Act is the introduction of civil sanctions for offences in connection with unfair securities trade. Examples of this are insider trading; presenting false statements; concealing material facts that should otherwise be disclosed; or letting another person use his or her securities or bank account for the payment of securities trading to conceal the identity of the account user to commit an unfair act (the person using such person is subject to this offence as well), including fiduciary duty of directors. These criminal offences will now be captured without the claimant going through the traditional criminal procedure where proof must meet the beyond-reasonable-doubt standard; instead, the civil sanction will be upon the Thai SEC's discretion if sufficient evidence is presented. Civil sanctions vary depending on the types of offences, for example, payment of compensation or suspension from trading securities on the SET or a bar from serving as director or executive in a listed company or securities company, as the case may be.

iii Cases and dispute settlement

Judicial systems

Thailand has a three-tiered judicial system consisting of the Court of First Instance, the Court of Appeal and the Supreme Court.

Several options of dispute settlements are available in Thailand; one is the traditional court, which is the fundamental justice system available for all, another is out-of-court arbitration,⁶ which is agreement-based (Thailand has used the UNCITRAL Model Law on International Commercial Arbitration as a model for the Thai arbitration system). The use of arbitration for private dispute resolution is growing owing to its being a quicker and more relaxed process than the traditional court system in terms of the choice of language used in the arbitration process (to be agreed by the parties) and the venue of arbitration.

The role of the court will be limited in the presence of an arbitration agreement. If a claim is brought to court, the defendant can request that the court dismiss such claim owing to the arbitration clause in the relevant agreement. Upon the court having completed an inquiry and having found that there are no grounds for rendering the arbitration agreement void, unenforceable or impossible to perform, the court shall issue an order striking the case.

Enforcement of judgment

Aside from the traditional enforcement of court judgment, an arbitration award can be enforced by the court upon request.

Currently, Thailand does not provide for enforcement of a foreign court judgment because Thailand is not a party to any relevant treaty where Thailand would otherwise be bound to recognise and enforce a foreign court judgment.

5 The Thai Bond Market Association's publication on Securitisation.

6 The Arbitration Act BE 2545 (2002). However, In-court arbitration is also available in Thailand and is provided for in Thai Civil Procedure Code, though its use is much less frequent.

Foreign arbitration awards on the other hand are recognised and may be enforced in Thai courts of competent jurisdiction because Thailand is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), also known as the New York Convention. Since the Thai legal system is dualistic, treaties do not automatically come into force until they have been enacted as domestic laws. The Arbitration Act provides for the recognition and enforcement of foreign arbitration awards. For the commencement of legal proceedings before Thai courts against the other party where there is an arbitration as an alternative dispute resolution, Thai courts issue an order striking the case, provided that the conditions specified in Section 14 of the Arbitration Act are complied with, namely the party against whom the legal proceedings are commenced files a motion requesting the court to issue an order striking the case with the competent court, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court issues an order striking the case. The enforceability of an arbitration award is subject to challenge and may be refused in Thai courts if one of the grounds for refusing enforcement as specified in the Arbitration Act applies or to do so would be contrary to public policy or good morals of the people of Thailand.

iv Relevant tax and insolvency law

Taxation of dividends

Dividends in respect of ordinary shares are subject to Thai withholding tax at a rate of 10 per cent, whether paid to non-resident corporate holders or to non-resident individual holders.

Taxation of capital gains

Gains realised by an individual holder, both resident and non-resident, on a sale of ordinary shares on the SET are exempt from Thai personal income tax and withholding tax. Gains realised by a non-resident corporate holder from the sale or other disposition of ordinary shares outside Thailand in connection with which payment is made neither from nor within Thailand and where neither the purchaser nor the seller resides or does business in Thailand are not subject to Thai withholding tax. A non-resident corporate holder will be subject to a Thai withholding tax of 15 per cent on gains realised on any sale or other disposition of ordinary shares in Thailand (including a sale on the SET) in connection with which payment is made from or within Thailand, unless such holder is entitled to an exemption under an applicable tax treaty. Gains realised by a non-resident individual holder from the sale or other disposition of ordinary shares outside Thailand in connection with which payment is made neither from nor within Thailand and where neither the purchaser nor the seller resides or does business in Thailand are not subject to Thai withholding tax. Gains realised by a non-resident individual holder on a sale of ordinary shares on the SET are exempt from Thai personal income tax and withholding tax. Unless exempt under an applicable tax treaty, gains realised by a non-resident individual holder from a sale or other disposition of ordinary shares made other than on the SET and in which payment is made from or within Thailand are subject to Thai withholding tax at a rate of 15 per cent. Any such withholding tax is creditable against the Thai personal income tax if the non-resident individual files a personal income tax return in Thailand reporting the gain realised from the sales of ordinary shares.

For Thai withholding tax purposes, the amount of gain realised is equal to the difference between the sale price of a share and the shareholder's cost for the share (as justifiably established by the shareholder). This determination is made on a share-by-share basis. In the foregoing cases, where withholding tax applies, the purchaser of such ordinary shares (or in the case of a sale on the SET, the broker executing such sale on behalf of the purchaser) is required under Thai law to withhold the applicable amount of Thai withholding tax from the sales price and make payment thereof to the relevant Thai tax authority.

Stamp Duty

Generally, a stamp duty of 0.1 per cent or fraction thereof of the higher amount of the paid-up value of shares and the selling price of the shares which is payable within 15 days of the date of execution of a share transfer instrument in Thailand, or within 30 days of the date the share transfer instrument is brought into Thailand if executed outside Thailand. No stamp duty is payable on a transfer of shares so long as the TSD acts as a company's share registrar.

Insolvency including set-off and netting

The Bankruptcy Act BE 2483 (1940) provides for substantive and procedural provisions governing bankruptcy and reorganisation matters in Thailand. Further to the Bankruptcy Act, bankruptcy and reorganisation procedural matters are stipulated in the Establishment of and Procedures for the Bankruptcy Court Act BE 2542 (1999) and the Regulations for Bankruptcy Cases BE 2549 (2006). Insolvency is mainly tested by whether a debtor's indebtedness is greater than his or her assets.

Regarding Section 102 of the Bankruptcy Act in relation to set-off and netting, it provides that if a creditor that is entitled to claim for repayment of its debt is indebted to the debtor when the court issues the order placing the asset under receivership, even if the grounds for the debt of the two parties are not the same, or are subject to conditions or terms, such debts may be offset against each other, unless the creditor's right of claim against the debtor accrued after the order of receivership of the asset. In reorganisation proceedings, if the creditor who is entitled to apply for the repayment of debt for reorganisation is indebted to the debtor at the time of issuance of the reorganisation order, such creditor may exercise the right of set-off, unless the creditor acquires the claim against the debtor after the court issues a reorganisation order.

v Role of exchanges, central counterparties (CCPs) and rating agencies

While primary responsibility for the regulation of new securities issues has shifted to the Thai SEC,⁷ the SET continues to operate the stock exchange and is responsible for listing application approvals once the Thai SEC registration, prospectus and related requirements have been met for Thai public offerings.

Thailand Securities Depository Company Limited

Thailand Securities Depository Company Limited (TSD) acts as a securities depository, dividend paying agent, transfer agent and registrar for Thai listed companies, and the Thailand Clearing House Company, Ltd acts as a clearing house. Securities companies, commercial

7 www.set.or.th.

banks, finance companies, life or non-life insurance companies, financial institutions established by specified legislation and other persons as prescribed by the TSD may become members of the TSD for depository services.

Thailand Clearing House Company, Ltd

All settlement and clearance of transactions effected on the SET must be handled by Thailand Clearing House Company, Ltd on the third business day following the day of the contract date. Thailand Clearing House Company, Ltd offsets sales and purchases of each member and only the net balance of securities and cash delivered or received by the member through the company is credited.

Rating agencies

In order to issue new bonds with the purpose of selling them to the general public, it is required by the Thai SEC that the credit of each bond be rated by approved rating agencies (this is not the case for a private placement where credit rating is unnecessary). Currently, the rating agencies approved by the Thai SEC are TRIS Rating Co, Limited and Fitch Ratings (Thailand) Limited.

III OUTLOOK AND CONCLUSIONS

The Amendment to the Civil Procedure Code (the Amendment), which effectively allows class action proceedings in Thailand, was promulgated on 8 April 2015 and took effect on 4 December 2015. The main purpose of allowing class action proceedings in Thailand is to allow for individuals, especially those who do not have the means to bring a claim by themselves or those whose damages would not be worth the time, cost and effort to pursue the case independently, to join as part of the same 'class' to commence legal proceedings and receive shared compensation. The Amendment defines 'class' to mean a group of persons having identical rights arising from common issues of facts and law as well as possessing identical characteristics that are specific to the class even if there is variation in the types of damage suffered by each person. Those suffering damage arising from the Securities and Exchange Act can bring class action to the court. Since its promulgation, no class actions in connection with the Securities and Exchange Act have yet been brought to court. Possible class action claims under the Securities and Exchange Act can be claims relating to disclosure arising from information disclosed in the prospectus at the initial public offering stage or periodic and episodic disclosure, for example, disclosure of annual financial status.

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Patcharaporn Pootranon is a partner in the capital markets practice group at Weerawong, Chinnavat & Partners Ltd, with substantial experience in securities markets, mergers & acquisitions and tax-related laws, as well as experience in laws and regulations in relation to Thailand's Securities and Exchange Commission and the Stock Exchange of Thailand. She has served clients in various industries in IPO deals, share acquisitions and corporate restructuring, such as Credit Suisse (Singapore) Limited in a prominent share acquisition in Thailand, and TPI Polene Power Public Company Limited in the spin-off and offering of shares under Thailand's Securities and Exchange Commission regulations and international offering under Regulation S of the US Securities Act and listing of its shares on the Stock Exchange of Thailand. She also led the asset sales for property funds under the management of Krung Thai Asset Management Public Company Limited (KTAM), where the value of the assets sold was approximately 125.58 billion baht (approximately US\$3.77 billion).

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Nattaya Tantirangsi is an associate in the capital markets practice group at Weerawong, Chinnavat & Partners Ltd. Nattaya advises clients on capital markets, corporate laws, mergers & acquisitions and taxation and has expertise in the energy, telecommunications, and medical industries. She recently assisted Krung Thai Asset Management Public Company Limited (KTAM), a prominent asset management company in Thailand, in the sale of the assets of Thai Commercial Investment Freehold and Leasehold Fund (TCIF), Thai Hotel Investment Freehold and Leasehold Property Fund (THIF) and Thai Retail Investment Fund (TRIF) to the group companies of Asset World Company Limited and facilitated the delisting and dissolution process of these funds. The value of the assets sold was approximately 125.58 billion baht (approximately US\$3.77 billion), and these included well-known Bangkok landmarks such as the Plaza Athenee Bangkok, the Okura Prestige, and Empire Tower. The funds, which were delisted on 18 July 2017, consisted of a tender offer of the investment units, which was an innovative approach for property fund unitholders in Thailand.

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