

# Project Finance

*Contributing editors*

**Phillip Fletcher and Aled Davies**



2017

GETTING THE  
DEAL THROUGH

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# Project Finance 2017

*Contributing editors*

Phillip Fletcher and Aled Davies

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# Thailand

David Doran and Kraisorn Rueangkul

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## Creating collateral security packages

### 1 What types of collateral and security interests are available?

Thailand's Civil and Commercial Code BE 2468 (1925) and Business Collateral Act BE 2558 (2015) governs the types of collateral available for secured transactions. The four main forms of security are the mortgage, pledge, business collateral and assignment. A mortgage is defined as a non-possessory security, available for all kinds of immoveable assets and for moveable assets for which the law requires registration. Coming into force on 2 July 2016, business collateral is defined as non-possessory security available for certain kinds of moveable assets and immoveable assets used in business. A pledge is defined as a strictly possessory security (whether secured assets are physically delivered to the pledgee directly or kept by a third party). It is of note that where the secured asset is intangible and represented by a written document, effectiveness of the pledge shall require delivery of the relevant document.

In principle, any asset can be used as collateral. The following are the most common assets that are used as collateral to obtain finance for projects:

- land, plants, buildings, registered machinery, registered motor vehicles (specifically cars, steamrollers or tractors) and ships, over which security may be created in the form of a mortgage;
- shares, stock or inventory, vehicles and other moveable property over which security may be created in the form of a pledge;
- rights to receive money and interest in bank accounts, accounts receivables, leasehold interests, intellectual property and other intangible assets, over which security may be created in the form of an assignment; and
- a business.

It is of note that the enforceability of a pledge of bank accounts is a subject of debate in the Thai legal community. However, once the Business Collateral Act comes into force, bank accounts will be able to be used as business collateral. A Thai security package may also include security in the form of guarantee or cost overrun agreements, by shareholders.

Coming into force in July 2016, the Business Collateral Act introduces a new type of security to the Thai legal system in the form of a business collateral. The law will allow a person, called a collateral provider, to use certain types of assets and rights as a security in favour of a collateral taker without having to deliver possession of such property to the collateral taker.

Under a business collateral contract, a security provider grants security over property to a security receiver in return for the performance of an obligation without the need to deliver the property to the security receiver. The security provider can be an individual or a juristic entity, but the security receiver must only be a financial institution or any other person as provided under ministerial regulation (albeit, no further regulation has yet been issued in this respect). The Business Collateral Act defines the term 'financial institution' to mean:

- a financial institution under the Financial Institution Business Act, which includes a commercial bank, a finance company or a credit financier company;
- a licensed life and non-life insurance company; and
- a bank or financial institution established under specific laws.

Pursuant to the Business Collateral Act, types of collateral include a business, a claim, moveable property used in the security provider's business

(eg, machinery, inventory or raw materials), immoveable property in the event the security provider is directly engaged in the real estate sector, intellectual property, or any other asset as provided for in the Ministerial Regulations issued under the Business Collateral Act. Further, the Act also makes it clear that any asset that a security provider will receive in the future, in accordance with the business collateral contract, could be used as collateral.

### 2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

#### Registration

Perfection of a mortgage in freehold land, registered (factory) machinery, and ships or barges requires registration with the registrar responsible for the relevant category of assets. Security over land is registered at the relevant land office that has jurisdiction over the secured land. Machinery and any security over registered machinery is registered at the Central Office for Machinery Registration under the Department of Industrial Works, Ministry of Industry, provided that, prior to the registration of the mortgage, the machinery is installed or located at the premises of the owner of such machinery and first registered for ownership at the Central Office for Machinery Registration. Ships and barges (and security over them) can be registered at the Marine Department or the relevant regional registry office. Security over registered motor vehicles is registered at the Department of Land Transport, Ministry of Transport.

Security over shares is recorded in the shareholders' register of the relevant company, as the Ministry of Commerce does not maintain a general registry of security interests.

A security created by way of a pledge generally requires delivery of the pledged item to the pledgee or security holder. The pledged items must be kept under the control of the pledgee or security holder. The pledge is automatically extinguished when the secured obligation is extinguished or the pledged item is returned to the possession or control of the pledgor.

With respect to business collateral, a business collateral contract is required to be made in writing and registered with the Business Collateral Registration Bureau under the Ministry of Commerce. Currently, the registration can be made only by way of the Ministry of Commerce's online registration system to which only qualified security takers will have access. It is worth noting that presently, the security taker is limited to financial institutions licensed in Thailand only (additional types of entities can be added by ministerial regulations announced ad hoc by the Ministry of Commerce). There is no registration required for assignment of rights under contracts. However, the assignment agreement must be signed by the assignor and the assignee. Consent must be obtained from the obligor of the assigned receivables or written notice of assignment must be given to the obligor. If not, the assignment will not bind the obligor.

An assignment of obligations under the Civil and Commercial Code BE 2468 (1925) is invalid unless the assignment is made under a novation agreement between the assignor and the assignee and provided that consent is obtained from the person to whom the obligation is owed.

### Fees

A mortgage registration will be complete only upon full payment of the required registration fee. To perfect a mortgage on land and buildings, official registration fees of 1 per cent of the mortgage amount, up to a maximum fee of 200,000 baht must be paid. The official registration fee payable for a mortgage of machinery is 1 baht per 1,000 baht of the mortgage amount up to a maximum fee of 100,000 baht. Stamp duty shall be affixed on the mortgage agreement. Stamp duty for guarantees ranges from 1 to 10 baht, and the guarantor is liable to pay the duty.

A business collateral registration will be complete only upon full payment of the required registration fee. However, it is worth noting that, after the registration fee payment is made, the time of the registration will be retroactive to the time when the business collateral registration application is filed to the Ministry of Commerce. To perfect a business collateral registration, an official registration fee of 0.01 per cent of the collateral amount up to a maximum of 1,000 baht must be paid, except for business collateral registration over land where the fee is equal to the mortgage registration fee.

### Other requirements

A mortgage must be in writing, duly executed and registered with the competent official. A Thai-language version (which may be a translation attached to a foreign-language executed version) of the mortgage must be provided to the relevant mortgage registry (see above details of competent authorities subject to the relevant category of assets). Written notification must be provided to the parties of an assigned contract.

With respect to business collateral registration, the online registration must be made available in Thai by security takers.

### Priority

Priority is given to the interest that was registered earliest. A registered interest will have priority over an unregistered interest. Priority in relation to unregistered interests is given to the unregistered security interest that was created earliest. Note that tax and labour wage claims have priority over security interests.

### Security trustee

As the common law concept of trust is not recognised under Thai law, the concept of a 'security trustee' is also not recognised and is unenforceable under Thai law. Certain limited exceptions do exist, in particular under the Trust for Capital Market Transaction Act BE 2550 (2007). However, Thai law does recognise the principal-agent relationship and allows project lenders to appoint a security agent (rather than trustee) to hold and register collateral on their behalf. As a result, the names of the project lenders must also be included as principals in the mortgage agreement registered with the land registry or in the business collateral agreement as the case may be.

### 3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

In relation to mortgages, the relevant registration record (Land Office, Department of Industrial Works, etc) can be searched to discover the existence of any registered security interest. Likewise, the share register of a company can be searched for any registered interests, and such a search is deemed to be conclusive as to the existence of any security interest in the relevant shares.

Possession of a pledged item must be granted in order for a pledge to be perfected, and physical inspection of the item (or inspection of documentary title) is necessary.

Business collateral registration information is also made available in a limited manner for public search through the Department of Business Development's website.

### 4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Prior to enforcing a mortgage, written notice at least 60 days prior to the mortgage enforcement must be given to the debtor or assignee. In the event that a mortgagor is not a debtor, the lender is required to notify the

mortgagor in writing within 15 days from the date that the lender issued a notice to the debtor. Failure to do so will release the mortgagor from all liabilities relating to accumulated interest and compensation in which the debtor is liable, as well as other accessory expenditure. If the debtor fails to comply with its obligations within the said reasonable notice period, the lender is entitled to request a court to enforce the mortgage and subsequently order a seizure and sale of the mortgaged property by way of public auction. Private sales are not permitted, but a lender may participate on an arm's-length basis. The sale must be made in baht only. Foreclosure may be ordered if interest is in arrears for a period over five years; and the value of the property does not exceed the redemption value; and there is no other registered mortgage or preferential claim over the same property.

With regard to the enforcement of a pledge, the pledgee must first serve written notice to the debtor requiring it to perform its obligations within a reasonable time. Failure to comply will enable the pledgee to sell the pledged property by way of public auction following notification to the pledgor of the time and place of the auction. The Civil and Commercial Code BE 2468 (1925) prohibits parties of a pledge agreement from entering into any agreement made prior to the date in which the obligation is due, stating that the pledgee shall become the owner of the pledged item or the pledged property by any way other than through public auction. Any agreement made in violation of the aforesaid provision shall be deemed invalid.

If it is impracticable for reasonable notice to be provided to a pledgor, the pledgee may sell the pledged property one month from the date the obligation became due by way of public auction. Again, private sales are not permitted and a pledgee may participate in the auction on an arm's-length basis. The sale must be made in baht. If the sale proceeds are inadequate to settle the entire debt, the debtor remains liable for any shortfall. The creditor must obtain a court order to enforce a claim for the amount of the shortfall.

Prior to enforcing a business collateral, reasonable written notice must be given to the security provider to declare a collateral enforcement event; the security provider can then give possession of the business collateral or provide written consent to the security taker to allow a public sale or foreclosure of the business collateral, or both. In the event that the security provider refuses to give possession of the business collateral to the security taker, the security taker is entitled to file a lawsuit and request the court to give an enforcement order. Once the security taker obtains possession of the collateral, it is then required to notify the debtor and the security within 15 days of the date of possession to perform the secured obligations. The debtor or the security provider will then have 15 days from receipt of such notice to perform secured obligations. The security taker is required to incorporate in the said notice the enforcement option (either public sale or foreclosure) it will take in the event that the debtor security taker fails to perform the secured obligations within the required period. The security taker is also required to issue a copy of the said notice, which has security over the same assets as appears on public records, to the other security takers and creditors. The rights over any deposits with financial institutions are exempt from the above requirements; however, a security taker that is a financial institution or a security agent financial institution can immediately set off the secured obligations. A security taker that is a financial institution is required to notify the security provider within seven days of the set-off date. The enforcement of business collateral that is a business will also be exempted from the above requirements, and the enforcement process has specific requirements regarding involvement of a licensed security enforcer. In the enforcement of collateral that is a whole business, the security provider must issue a written notice to the licensed security enforcer listed in the business collateral agreement. The security enforcer will then be required to determine and set up the hearing date and place within seven days of receipt of the notice from the security taker. Within 15 days of the first date of the hearing, the security taker must issue a ruling on the request for enforcement of the collateral by issuing its ruling to a debtor, the security taker and the security provider and other secured creditors having the security over the collateral as appears on the registration record. If the ruling is to enforce the collateral, a copy of the ruling must also be delivered to the registrar. The ruling can be challenged by a relevant party within 15 days of receipt of the ruling by submitting the case to the court. The court's order on this issue will be deemed final.

**5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?**

Under the Bankruptcy Act BE 2483 (1940), an insolvent borrower can commence an informal restructuring, which largely relies on the agreement of the borrower and its creditors to formulate a restructuring plan. Alternatively, a court-supervised restructuring process can be entered into if the borrower's creditors are owed more than 10 million baht. The creditors will then be subject to the court's processes. The drafting of a restructuring plan must be completed within three months from the appointment date of a planner, with two possible extensions of one month each. Approval of the restructuring plan will generally require a special resolution (namely, a resolution passed by creditors owning 75 per cent of the debt owed present at the meeting) from either each group of creditors (ie, each secured creditor who has security over debt equivalent to not less than 50 per cent of all debt claimed, other secured creditors and unsecured creditors); or a group of creditors owed at least 50 per cent of the total debt.

Any transfer or other act that is prejudicial to the other creditors or that shows a preference to a particular creditor can be cancelled by the court if it took place up to three months prior to the date of the bankruptcy petition. Likewise, an act of fraud can be rescinded if it took place up to one year prior to the date of the bankruptcy petition. As noted above, tax and wage claims must be satisfied before any payment to the general creditors (whether secured or unsecured).

Thailand's Bankruptcy Act BE 2483 (1940) only applies to individuals and corporate entities. However, the Bankruptcy Act does not apply to Thai state agencies as the dissolution or liquidation of a state agency requires a legislative act.

Generally a court order will be required to enforce security over assets, except in the case of pledged securities where self-help remedies may be available.

#### **Foreign exchange and withholding tax issues**

**6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?**

The Exchange Control Act BE 2485 (1942) regulates the exchange of currency and delegates the authority to the Bank of Thailand. The basic control rules are as follows:

- any person wishing to remit foreign currency abroad must apply to the Bank of Thailand for prior approval; and
- any person receiving foreign currency from overseas must report the importation of currency to the Bank of Thailand.

Unless the relevant account is denominated in a foreign currency, the foreign currency must be converted into baht within the time prescribed by the Bank of Thailand (ie, 360 days from the date of remittance into Thailand). The Bank of Thailand relaxed its control on the remittance of foreign currency abroad by authorising commercial banks to approve applications for foreign currency remittance and to collate reports on the importation of foreign currency on behalf of the Bank of Thailand.

Thailand imposes no specific restrictions on project finance deals with offshore financial institutions. There are no taxes, duties or other government charges applicable to foreign currency exchange transactions. With prior approval by the Bank of Thailand, a project company may establish an offshore bank account for the purpose of paying for supplies and services acquired overseas.

**7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?**

Remitting funds from Thailand to repay principal and interest requires prior approval from the Bank of Thailand. The commercial bank acting on behalf of the Bank of Thailand will require evidence of the payment obligations, such as a copy of the credit agreement or, in the case of overseas dividend payments, a copy of the dividend declaration notice together with a list of shareholders.

Dividends can only be paid out of profits, and 5 per cent of each dividend distribution must be withheld to be paid into a reserve fund until the fund reaches 10 per cent of the company's capital. No dividends can be paid if accumulated losses exist.

Withholding tax rates range from 10 to 15 per cent for payment of dividends, capital, interest or premiums. Where a double taxation treaty is in force, the withholding tax may be reduced.

#### **For transfer of foreign currency or Thai currency abroad**

##### **Foreign currency**

To purchase or transfer foreign currency, the purchaser must transfer the foreign currency to an authorised bank and submit documentary evidence of the international trade or investment. However, in the event that the purchase, sale, deposit or withdrawal of foreign currency with an authorised bank involves an amount of US\$50,000 (or its equivalent) or more, the purchaser is required to report the foreign exchange transaction to the authorised bank in the prescribed form (the Foreign Exchange Transaction Form or Forex Form).

##### **Thai currency**

There is no restriction on the amount of Thai baht banknotes that may be brought into the country. A person travelling to Thailand's bordering countries (including Vietnam) is allowed to take out up to 500,000 baht without further authorisation. For other countries the maximum amount of currency that can be exported is 50,000 baht.

**8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?**

Thailand does not require project companies to repatriate foreign earnings. On the contrary, Thailand encourages foreign investors and lenders to reinvest their earnings in activities such as business expansion or project extensions.

However, if repatriation of investment funds is required, it will require the submission of supporting documents (eg, evidence of sale or transfer of such investment) to an authorised commercial bank. The repatriation of profit is subject to a 10 per cent withholding tax on the gross amount and to any applicable double tax agreement.

**9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?**

Subject to the regulations imposed by the Bank of Thailand noted above, project companies may maintain foreign currency accounts in both Thailand and other jurisdictions. The deposit of foreign currency from abroad into a Thai bank is unrestricted. Any person in Thailand can purchase, exchange or borrow foreign currency from an authorised currency dealer and deposit such an amount into a foreign currency account with a bank in Thailand.

Where there is an obligation to pay a foreign creditor in foreign currency, proof of the obligation (eg, a credit agreement) is required. A Thai obligor can then obtain the foreign currency as required and deposit an amount that does not exceed the underlying obligation. The maximum amount of foreign currency that can be deposited in Thailand (notwithstanding the amount of the underlying obligation) is US\$1 million for a natural person and, for a corporation, US\$100 million or the total foreign currency obligations due in 12 months; whichever is greater. Such obligations can also include a repayment of a foreign currency loan to an authorised bank.

In other cases (namely, where there are no underlying foreign currency denominated obligations), the total outstanding balance of all foreign currency (obtained in Thailand) of a depositor shall not exceed US\$500,000 for both natural persons and for corporations.

In addition, it is not permitted for an individual or company to deposit foreign currency in notes or coins in an amount exceeding US\$10,000 per person per day.

A project company must obtain prior approval from the Bank of Thailand before establishing a foreign currency account outside Thailand and must submit details of the transaction together with the related documents. In addition, the Bank of Thailand must be notified of each foreign currency transaction.

### Foreign investment issues

**10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?**

There are several laws and regulations governing participation by foreign investors in business activities in Thailand. The main governing law is the Foreign Business Act BE 2542 (1999) (FBA). The FBA limits the rights of foreign nationals to engage in certain restricted business activities unless a foreign business licence is obtained prior to the operation of the restricted business. A corporation is considered 'foreign' if 50 per cent or more of its share capital is owned by a foreign individual or corporation.

The FBA also lists three categories of controlled business activities:

- activities that fall under List 1 are strictly prohibited to foreign nationals, such as newspapers, land trading, rice farming and animal farming;
- businesses that may affect national security or safety, art, culture, customs and native manufacturing are covered by List 2 and are prohibited for operation by foreign nationals unless permission is granted by the Ministry of Commerce; and
- businesses that are covered by List 3 may not be carried out by foreign nationals unless permission is granted by the director-general of the Department of Business Development of the Ministry of Commerce with the approval of the Foreign Business Board. Such businesses include retail and wholesale of goods, hotel businesses, engineering services, legal services and other services.

In some instances, foreign nationals may be exempt from certain requirements imposed by the FBA. These include the following:

- foreign nationals operating a business allowed under the protection of a treaty to which Thailand is a signatory, such as the Thailand-US Treaty of Amity and Economic Relations;
- foreign nationals who engage in regulated businesses with the permission of the Thai government for a specific duration; and
- foreign nationals who engage in businesses with permission granted by the Board of Investment (BOI) and the Industrial Estate Authority of Thailand.

Further, the Ministry of Commerce does not regard the operations of a holding company (ie, a parent company that merely holds shares in another company) as a restricted business under the FBA.

The Land Code BE 2497 (1954) (LC) is the main act governing the ownership of land for both Thai and foreign nationals. Under the LC, any corporation that is more than 49 per cent foreign-owned or has foreign shareholders that number more than half of the total number of shareholders, is prohibited from owning land, except in certain cases (namely BOI-promoted investments). If a foreign national obtains land in violation of the LC, the land must be sold to a qualifying buyer within one year from the date the violation was discovered. A foreign company can lease land or obtain a concession from the government. The maximum lease term is 30 years, and a lease term can be increased to a maximum period of up to 50 years if it is for the purposes of operating certain industrial or commercial businesses as specified.

**11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?**

Insurance for projects in Thailand must be placed with a Thai-licensed insurer. Thai-licensed insurers are permitted to reinsure portions of their underwriting exposure with overseas reinsurers.

As Thai law permits the assignment of insurance proceeds, a project company may assign its right to receive compensation from an insurer to its lenders, foreign or domestic.

**12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?**

The Immigration Act BE 2522 (1979) and the Working of Aliens Act BE 2551 (2008) (WAA) are the main acts governing the hiring of foreign nationals in Thailand. Under the WAA, a foreign national is allowed to perform 'necessary and urgent work' in Thailand for a period not exceeding 15 days by submitting a notification to the Ministry of Labour. However, apart from this exception, foreign nationals generally cannot perform any service unless they have obtained a work permit from the Ministry of Labour. In addition, certain occupations are reserved exclusively for Thai citizens.

The granting of a work permit is discretionary. In general, a Thai corporate employer must have a registered paid-up capital of not less than 2 million baht for each foreign worker it has hired. In addition, an employer must maintain a ratio of four Thai employees for each foreign employee hired. Further, if the employer is foreign as defined under the FBA, it must invest no less than 3 million baht for each foreign worker. However, where government contracts, upstream oil and gas companies, or BOI-promoted companies are involved, work permits are readily granted. In addition to a work permit, any foreign national entering Thailand for employment purposes must obtain a non-immigrant visa type 'B'. Any spouse or dependant wishing to enter Thailand must obtain a non-immigrant visa type 'O'. Multiple-entry options are available for an extra fee. These visas are subject to annual renewal.

**13 What restrictions exist on the importation of project equipment?**

The Export and Import Act, BE 2522 (1979) and the Customs Act, BE 2469 (1926) and their related implementing regulations are the main acts governing import and export controls. However, the importation of project equipment is subject to a wide range of laws and regulations. Thailand restricts the importation of any equipment that is available domestically from manufacturers promoted by the BOI, such as electrical cables and cars. The restrictions also apply to equipment that could be hazardous to public and personal health or national security, including radioactive sources, concentrated oxidation agents and explosive materials. Such restrictions range from a total ban on imports to the imposition of importer compliance rules, such as requiring specified import permits and setting import quantity limitations.

**14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

Thailand is a signatory to many multinational, regional and bilateral trade or investment agreements that limit nationalisation and expropriation except on a non-discriminatory basis for public interest purposes. In such cases, fair compensation based on the assessment of the market value of the investment must be paid to the affected investors. While treaty protection from expropriation applies only to the signatory country investors, all foreign investors enjoy protection under the Constitution BE 2550 (2007) (and impliedly continued under section 4 of the Interim Constitution BE 2557) and the Expropriation of Immoveable Property Act BE 2530 (1987), which provide that the state can exercise its right to expropriate immoveable property only for the purposes of public utilities, national defence, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, conservation of ancient monuments and historic sites or other public interests. In all cases, fair compensation must be paid. In addition, BOI-promoted companies and petroleum concessionaires are provided with explicit guarantees against nationalisation.

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**Fiscal treatment of foreign investment**


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**15 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

Foreign and Thai investors are eligible for the same tax incentive schemes. Thailand's present tax incentives include: corporate income tax holidays of three to eight years; reduced or zero-rated import duty on capital goods, specialised construction equipment, tools and instruments; value added tax refunds for materials imported for export manufacturing; and zero-rated value added tax on exports.

Other incentives include the right to repatriate equity and profits in foreign currency, entitlement to hold freehold land titles for the project, and eligibility to hire foreign experts to work in Thailand during the execution of the project and thereafter.

Interest on foreign loans is normally subject to a 15 per cent withholding tax. Thailand is party to various treaties related to the avoidance of double taxation (usually based on the OECD model agreement) with 57 countries, including Australia, Bahrain, Belgium, Canada, Chile, Denmark, France, Germany, India, Italy, Japan, the Netherlands, South Africa, South Korea and the United Kingdom. The withholding tax on interest under these treaties may be different from the Revenue Code in terms of various rates for recipient categories. To this extent, the rate that is more favourable to the taxpayer or as specified under the treaties shall prevail. The Thai withholding tax amount may be credited against the corporate income tax due in a treaty country.

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**Government authorities**


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**16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?**

Government agencies with authority over projects in Thailand vary by sector. For oil and gas projects, a concession to explore, produce, store, transmit and sell must be granted by the Department of Mineral Fuels, Ministry of Energy. Mineral extraction and chemical refining projects are subject to Ministry of Industry regulation. Water treatment projects are supervised and controlled by the Department of Water Resources, Ministry of Natural Resources and Environment. Electric power generation and transmission projects as well as gas transmission by pipelines are subject to regulation by the Energy Regulatory Commission. All public transport and ports are subject to regulation by the Ministry of Transport.

State-owned or controlled enterprises include: PTT Public Company Limited, which operates oil, gas and petrochemical projects; the Port Authority of Thailand, which is responsible for managing and developing ports; the Airports of Thailand Plc, which owns and operates all public airports; the Expressways Authority of Thailand, which owns and operates (by itself or through concessionaires) all expressways in the Greater Bangkok Area; the Electricity Generating Authority of Thailand, the Metropolitan Electricity Authority and the Provincial Electricity Authority, which together monopolise the retail, distribution and sale of electricity; the State Railways of Thailand, which owns and operates the railway system; and the Metropolitan Water Works Authority and Provincial Water Works Authority, which are responsible for operating the water supply. The state-owned telecommunication enterprises, TOT Plc and CAT Incorporation Plc, provide the operating backbone of the telecommunications systems in Thailand.

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**Regulation of natural resources**


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**17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?**

Under Thai legal principles all natural resources belong to the state. Any person wishing to exploit natural resources must obtain a concession or licence. The granted concession may not infringe upon fundamental rights such as landownership of third parties. Under these principles, a landowner has no inherent mineral or other natural resources rights, and rights may be granted by the state to third parties under a concession or licence.

However, the concessionaire must seek permission from the landowner in order to carry out mineral exploitation activities and compensate the landowner for losses, such as loss of land use and crop damage.

The government, in the public interest, may expropriate private property for use in natural resource exploration and production. Mitigation measures concerning the affected population must be implemented by the government. Such mitigation measures may include relocation, occupational training and monetary compensation.

Thailand does not recognise any special rights of aboriginal, indigenous or tribal peoples. All Thai citizens, including tribal peoples, have equal rights.

The Foreign Business Act generally prohibits a foreign individual or entity from operate a business relating to the exploitation of natural resources except for certain exceptions that are permitted under the list of BOI-approved investments.

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**18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?**


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Concessions granted for natural resource exploration and production generally require payment of both royalties and specified taxes. Under the standard petroleum and mineral mining concessions, concessionaires are subject to monthly royalties on gross revenue and an annual income tax. There is no distinction between royalties and taxes payable by domestic or foreign concessionaires. However, the total amount of royalty that the concessionaire paid during a fiscal year can be credited against the amount of petroleum income tax (profit-based tax) that is payable by the concessionaire at the end of the relevant fiscal year.

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**19 What restrictions, fees or taxes exist on the export of natural resources?**


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Thai law permits the imposition of restrictions on natural resource exports in cases of national security. For example, the Energy Minister is authorised to prohibit the export of indigenous petroleum as necessary to ensure adequate supply for domestic consumption. Thailand also complies with natural resource export restrictions as mandated by UN sanctions. Export duties are imposed per tariff schedules.

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**Legal issues of general application**


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**20 What government approvals are required for typical project finance transactions? What fees and other charges apply?**

Thailand has restructured and liberalised its finance and banking industry. As a result, project finance transactions with foreign parties are not restricted. There are no project finance specific approvals required other than those imposed by general law.

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**21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?**


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Loan agreements must be in writing in order to be enforceable. Share transfer instruments must be signed and witnessed by a third party where the shares being transferred relate to shares in a limited company. A mortgage or business collateral agreement must be registered with the competent authorities. A pledge of shares can only be enforced against a company or a third party if the pledge of shares is registered in the share register book of the company (and provided, again, that the share certificates are possessed by or under the control of the creditor or any of its agents). While agreements can be in any language, if the agreements are to be enforced in a Thai court of law or require approval from the Bank of Thailand, they will need to be translated into the Thai language. Notarisation of typical project documents and finance documents is not required.

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**22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?**


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Thailand's Arbitration Act BE 2545 (2002) adopts the core of the UNCITRAL Model Law. The Act allows the parties the choice of arbitration



### Update and trends

In the past, certain provisions of the Thai Civil and Commercial Code related to guarantees and mortgages had caused stringent burdens on guarantors and mortgagors who are not the primary debtors in a financing transaction. In that context, the Thai National Legislative Assembly passed an Act on Amendment to the Thai Civil and Commercial Code (No. 20) on Guarantees and Mortgages that came into force on 11 February 2015. Such amendment aims at providing strengthened protection and fairness to third-party guarantors and mortgagors. The key amendments include the requirement of a notice to be sent to the debtor's guarantor within 60 days of the default; a loan agreement must now include the objectives of the secured obligation, a description of the debt, the maximum amount secured and the period of the debt to be secured; and the most important one is that the provision that the guarantor shall be liable jointly as a joint debtor or primary obligor is void. Thai banks have expressed their dissatisfaction with this amendment as the security they will receive for a financing will be more limited. Partly addressing their concerns, the Act on Amendment to the Thai Civil and Commercial Code (No. 21) comes into force on 15 July 2015. The Act amends the previous amendment to allow a juristic person guarantor (eg, a corporate entity guarantor) to be a primary obligor. Further, another key amendment is to allow a financial institution to grant a pre-approved waiver of consent required in the case of an obligation postponement in a bank guarantee. For the mortgage, the mortgagor shall not be liable for more than the value of the mortgaged assets under the new amendment and the provision that the mortgagor shall be liable as

the guarantor is void. Further, prior to enforcing the mortgage, the law also requires the mortgagee to inform the mortgagor in writing within 15 days from the date it issues a demand notice to the debtor in circumstances where the mortgagor is not a debtor.

In addition, the Business Collateral Act BE 2558 (2015) comes into force on 2 July 2016. The law introduces a new type of security to the Thai legal regime in the form of business collateral, which shares a lot of similarities with many common law countries where non-possessory security can be created over moveable and immoveable assets. The new law also aims to launch a swift collateral enforcement system, which will require less involvement from the courts as the security taker or security enforcer (where collateral is a whole business) can enforce the collateral directly. However, implementation of the law is subject to a lot of debate among practitioners and relevant authorities on various issues, such as new registration provisions, which merely require a form to be completed instead of submission of a full contract in order to be acceptable for registration (even though the Act may require the actual contract to be registered), the interpretation on the period required for a hearing to be done by a security enforcer (the private sector is of the view that the law requires the security enforcer to determine the hearing date within seven days from the date of enforcement event notice receipt from the security taker. However, the authorities are of the view that the security enforcer requires to complete the hearing within seven days from the notice date). Hence, it remains to be seen whether the Business Collateral Act BE 2558 (2015) will succeed in achieving its goals.

rules, language and venue. Any enforcement of arbitration and awards in Thailand must proceed in compliance with this Act.

Thailand has been a party to the New York Convention on Arbitration since 1959. Arbitration awards that have been awarded in the Convention member states can be enforced in Thailand.

Thailand also recognises ICSID as well as the ICC Arbitration Rules. Arbitration and awards using the ICSID and ICC arbitration processes are enforceable in Thailand through the process outlined in the 2002 Arbitration Act.

Dispute resolution through arbitration is limited to civil issues such as business, trade and commercial disputes. State enterprises may agree to have disputes with private sector counterparties resolved through arbitration. In some instances, disputes with state agencies may be resolved through arbitration, such as oil and gas royalty disputes.

### 23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

With certain exceptions, contracting parties may freely choose the governing law of their contract and the choice of foreign law will be enforceable.

However, the choice of foreign governing law must not be contradictory to the national law or the good morals and public order of the people of Thailand. The general rule on severance of contract terms applies to contract provisions that contradict the law. For example, if a contract provision requires a borrower to repay its loan in foreign currency without first obtaining an approval for remitting foreign currency from the Bank of Thailand, in violation of the Exchange Control Act BE 2485 (1942), such a clause would be void and unenforceable.

Project documents such as concession agreements, domestic power purchase agreements and construction agreements (with Thai contractors) are typically governed by Thai law. Finance agreements, such as facility agreements, generally apply English law in large syndicated transactions, whereas smaller projects that are wholly domestically funded may use Thai law as the governing law. Security agreements apply a mix of Thai law for 'onshore' assets and English law for 'offshore' assets.

### 24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Thai law is silent on the legal effect of submission to the jurisdiction of foreign courts. At present, there is no legislation or provision explicitly specified in the Civil Procedural Code or in the Act on Conflict of Law of Thailand BE 2481 (1938) that deals with the recognition and enforcement of a judgment made in a foreign country. A foreign court judgment has

never before been recognised or enforced in Thailand, but a final judgment made in foreign countries is admissible as supporting evidence in legal proceedings in Thailand. However, Thai courts do not take the context in the foreign judgment for granted. A waiver of sovereign immunity is effective provided that such waiver has been explicitly stated in writing.

## Environmental, health and safety laws

### 25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

General and specific laws govern each sector. Various government departments, committees or state enterprises oversee the granting of concessions and licences to project companies, the prescription of rules, issuance of regulations and the collection of royalties. The key environmental, health and safety laws are as follows.

The Environmental Conservation and Protection Act establishes the National Environment Board with the Prime Minister as chairperson and the Office of Natural Resources and Environmental Policy and Planning as the board secretariat to ensure the protection, conservation and promotion of the natural environment. If the investment requires an environmental impact assessment (EIA) and a report on the impact of proposed mitigation measures, the project company must conduct a study and submit an EIA report for approval before embarking on the project work. In addition to the EIA requirements, any project or activity that may seriously affect the community with respect to the quality of the environment, natural resources and public health must have a Health Impact Assessment completed and approved before commencing the project work.

The Workplace Health and Safety Act BE 2554 (2011) deals with health and safety for workers, and its implementing regulations provide guidelines on the required safety protocols, health measures, and standards for employees. The Labour Department is the secretariat office for the Labour Committee.

The Building Control Act BE 2522 (1979) deals with construction safety and public safety through the provision of ministerial regulations and directives. The Department of Public Works and Town and City Planning is the secretariat office for the Building Control Committee.

The Public Health Act BE 2535 (1992) regulates public sanitation by empowering the Health Minister to issue ministerial regulations and directives. The Department of Public Health is the secretariat office for the Public Health Committee.

For sectors with greater impact on the environment, health, and safety, the minister in charge may impose additional measures to ensure proper protection for both workers and the public through the following Acts:

- the Petroleum Act BE 2514 (1971), which governs the upstream oil and gas sector and the implementation of regulations on operational

environment, health and safety for petroleum concessionaires and contractors;

- the Factory Act BE 2535, which governs downstream manufacturing activities, including oil refining, gas separation and petrochemical manufacturing;
- National Executive Decree No. 28 of 1972, which authorises regulation of gas storage construction, gas filling plant operations and gas dispensing facilities; and
- the Fuel Oils Control Act BE 2542 (1999) and the Fuel Oils Control Act (No. 2) BE 2550 (2007), both authorise regulation of the construction and operation of large oil storage facilities.

### Project companies

#### 26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies in Thailand generally take the form of a private limited liability company. The shareholding structures are dictated largely by the nature of the pursued business; subject to the constraints of the FBA. Concessions for projects of major national economic significance typically include state participation in the equity. Riskier ventures, such as upstream petroleum concessions, are often wholly foreign-owned in the exploration phase with state equity participation following commercial production.

Major projects are generally funded with sponsor equity such as domestic and foreign loans. Projects under government sponsorship are often financed in part through funding from international financial institutions such as the World Bank, ADB and JBIC. Thai banks frequently participate in syndicate lending with foreign project lenders acting both as the security agent for the syndicate and as providers of local currency (baht) loans to the borrower.

The issuance of publicly traded securities for the financing of new ventures is not possible as listing rules prohibit it. Similarly, new project companies would also be restricted from taking advantage of securitisation and borrowing from the domestic capital market. It is possible for a project company to raise capital in an initial public offering after a sufficient project operating and earnings history has been established in accordance with listing rules.

### Public-private partnership legislation

#### 27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Thailand first enacted public-private partnership legislation through the Act of Private Participation in State Undertakings, BE 2535 (1992). The Act was not industry-specific but applied to any public-private partnership for any project venture that had an investment level at or above a threshold of 1 billion baht or as prescribed by royal decree. The enforcement of the Act during its effective period had been inconsistent due to lack of clarity in its interpretation and to inconsistencies of standard terms in a typical PPP agreement. As a result, the Act of Private Participation in State Undertaking Act BE 2556 (2013) (the 2013 PPP Act) has been enacted; repealing the 1992

PPP Act. The 2013 PPP Act became effective on 4 April 2013. The main objectives of the new Act are to streamline the project approval procedures and establish a national PPP Committee (the Committee of Private Investment in State Undertaking) to act as the single oversight agency for all facets of approved PPP projects, including procedural and promotional activities. The PPP Committee also considers aspects such as whether or not the project can provide more efficient services to the public, compliance with fiscal discipline and ensuring appropriate risk allocation between the public and private sectors.

To avoid conflict among government agencies, the 2013 PPP Act applies to all public-private partnerships projects that are at or above the specified threshold; except the operation of petroleum concessions under the petroleum law and the operation of mining concessions under the mining law as well as other specific projects stipulated ad hoc by royal decree.

### PPP – limitations

#### 28 What, if any, are the practical and legal limitations on PPP transactions?

Any PPP venture with an investment level of 1 billion baht or more is subject to the requirements and procedures prescribed in the 2013 PPP Act. Nevertheless, the Act also allows flexibility for the PPP Committee to decide that a PPP with an investment value of less than 1 billion baht can also qualify under the stipulations of the 2013 PPP Act by issuing specific legislation that is subject to the provisions of the Act. The 1992 PPP Act did not provide a framework for PPPs, whereas the new PPP Act shortens the procedures required for project approval to a seven to 12-month time frame.

The 2013 PPP Act also provides additional incentives for the private sector by creating a government project development fund for the purpose of surveying information in relation to the preparation and improvement of a strategic plan relating to private participation in state undertakings; engagement of a project adviser; and payment of the relevant expenditures of the project.

The 2013 PPP Act is certainly more in line with the recent policies of the Thai government by focusing on 'mega projects', including the upcoming high-speed train project and the roll out of mass rapid transportation projects in Thailand's major cities. However, the success of the 2013 PPP Act remains to be seen as it has not yet been fully implemented.

### PPP – transactions

#### 29 What have been the most significant PPP transactions completed to date in your jurisdiction?

The independent power producer (IPP) project initiative was well executed and is considered one of the most successful PPP project initiatives in Thailand. The key to its success was mainly the efficient allocation of risk between EGAT and the IPPs, as well as the power purchase payment structure, which collectively provided the right incentives for IPPs to meet their obligations and deliver a high-quality service to the public. To date, IPP power projects have a combined capacity of some 12,742MW. Similarly, the VSPP programme for producing and selling electricity generated from alternative energy sources such as solar energy and agro-industry waste



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attracted investment applications totalling over 1,585MW, with 412 projects currently in the pipeline expected to add another 2,142MW, well above the 500MW programme target. Over 476 power plants are now operational and the construction works of over 412 such power plants are currently under way.

Other significant projects include the:

- telecommunications networks by AIS Mobile, DTAC, Thaicom and others (BTO);
- the Laem Chabang Port expansion (BOT);
- the Si Rat Expressway (stage 2) (BTO); and
- the Bangkok Skytrain Expansion (BOT).

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
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Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
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Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
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