

NO&T Thailand Legal Update

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Expected Amendments to Corporate Law

Background

As Thailand continues its strategy to attract and retain more investors and increase its current ranking under World Bank's Ease of doing Business, the government is planning to amend the current provisions of the general corporate laws in the Civil and Commercial Code (the "CCC") to be more investor-friendly and digitally-equipped. The highlights of the upcoming amendments include regulations allowing board of directors meetings to be held via electronic means (so called "e-meetings"), abolishment of the onerous local newspaper notice procedure regarding shareholder meetings, and simplifying the procedure for corporate registration.

On 9 June 2020, the Cabinet adopted the resolution approving a bill of amendment to the Civil and Commercial Code (the "Bill") governing partnerships and limited companies.

Based on the resolution summary, the Bill includes the following key amendments:

1. Allowing corporate registration of a partnership and a limited company to be made at any branch of the Department of Business Development (the "DBD") office

Currently, only the incorporation of a new partnership or company registration can be made in any province, e.g., regardless of whether a company's head office will be based in Rayong province, the incorporation can be submitted in Bangkok. However, any subsequent registration cannot be made in a province outside the head office location, e.g., change in shareholders or capital increase registration could only be submitted in Rayong province. The Bill plans to change this by allowing submission of the application for subsequent registration of a partnership and limited company at any branch of the Limited Company and Partnership Registration Office of the DBD, as determined by the Minister of Commerce, however, the details of the conditions under such change have yet to be available.

2. Reduction or exemption of certain official fees

The cost of the official fees for registration, official data search, and request of a copy or certified copy of corporate documents may be exempted or reduced in accordance with the Minister's decision. Details of which will be announced in the ministerial regulation later.

3. Reducing the validity period of the Memorandum of Association (the “MOA”) from ten (10) years to three (3) years

As a general rule, the law has previously required MOA to be registered prior to the incorporation of a company. Currently, there are two (2) options for the procedure to incorporate a company, i.e., (i) registration of the MOA at least seven (7) days prior to the registration of the company incorporation, or (ii) registrations of the MOA and the incorporation of the company on the same day.

In case of (i) above, such registered MOA are valid for the incorporation of the company for up to ten (10) years. According to the Bill, such ten (10) year validity period will be reduced to three (3) years only. However, the government will allow a grace period for the registered MOA which will become ineffective by virtue of this amendment, making it so that such registered MOA can still be used to incorporate a company for up to 180 days from the date upon which the Bill becomes effective, i.e., from the Government Gazette publication date.

4. Clarification of requirement to affix company seal on share certificates

Currently, the CCC stated that only the signature of a director is required on a share certificate.

The Bill will further clarify that only a company having a registered seal is required to affix the seal on its share certificates. As such, a company without a registered seal remains not be required to affix a seal in order to authenticate share certificates.

5. E-meetings of Board of Directors

Meetings of boards of directors held via electronic means will be allowed as a general rule as long as the Articles of Association does not prohibit such e-meetings, provided that it shall align with the criteria, procedures, and conditions prescribed in the ministerial regulation. In addition, the directors attending via electronic means will be counted towards the necessary quorum and are entitled to vote in the meeting.

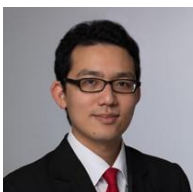
Regardless of the proposed amendment above, currently, meetings of the board of directors and shareholder meetings are allowed to be held via electronic means under certain criteria, procedures, and conditions described in the Emergency Decree on Electronic Meeting of 2020 (“Emergency Decree”). However, subject to the details of the amendment, it seems that the Bill may confirm what was previously only stipulated by the Emergency Decree.

6. Cancellation of the requirement to publish invitations to shareholder meetings in newspapers

Currently, when a company issues an invitation notice to a shareholder meeting, it is required to (i) publish such notice in a local newspaper once; and (ii) send the notice to shareholders by post or by hand. Under the Bill, sending the invitation by way of mail with a return receipt, without newspaper publication, will be sufficient. However, this does not apply to the case where the company has a share certificate issued to the bearer. In such case, the publication in a local newspaper is still required.

It is expected that the Bill will now be introduced to the National Assembly for further consideration and it will come into force after it has been submitted to the King for His Royal Signature and published in the Government Gazette. The exact timeline cannot be fixed at this moment, however, we assume that it may take as little as a year or less.

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Personal Data Protection Act's Postponement and our Remarks

Amidst many of the urgent Coronavirus-related legal reforms, the postponement of the enforcement of the Personal Data Protection Act of 2019 ("**PDPA**") came less than a week before its expected effective date, to the relief of many business operators and investors. On 21 May 2020, the 'Royal Decree Prescribing the Data Controller's Organizations and Businesses to which Personal Data Protection Act of 2019 shall not be applied of 2020' ("**Royal Decree**") has been issued in the Government Gazette.

1. Postponement for one (1) year

The Royal Decree exempts a 'data controller'¹ ("**Data Controller**"), the business types of which are prescribed therein (*see the list below*), from the application of the PDPA Chapters 2 (General provisions on data protection), 3 (Rights of the data subject), 5 (Complaints), 6 (Civil liability) and 7 (Penalties) and Section 95 (Protection of personal data that was collected before the PDPA takes effect) (collectively, "**Exempted Provisions**") for one (1) year, i.e., from 27 May 2020 (the date on which the Exempted Provisions were originally scheduled to take effect) to 31 May 2021.

This means that the Royal Decree has essentially postponed the application of the PDPA for Data Controllers for around one (1) year because the Exempted Provisions cover essentially all duties (e.g., duties to obtain consent, provide a privacy notice, provide security measures, etc.), liabilities and penalties (i.e., civil, administrative and criminal liabilities) relevant to the Data Controllers.

2. Potentially applicable to all businesses in all sectors

According to the 'remarks' section of the Royal Decree, the official reason behind this de facto postponement is that numerous Data Controllers in both public and private sectors all over Thailand are not ready to comply with the PDPA because the criteria, procedures and conditions set out in the PDPA are detailed, complex, and require a high level of technology.

As a result, the Royal Decree was legislated to grant a de facto postponement of the application of the PDPA to the 22 types of businesses ("**Exempted Businesses**") listed in its Annex. Although, officially, the Exempted Businesses are limited to 22 types, it can be assumed that the Royal Decree was drafted with the intention of covering all businesses existing in the market. The reason that the Royal Decree explicitly covers only the Exempted Businesses instead of covering all businesses is that, technically, the wording of the PDPA Section 4 paragraph 2², under which the Royal Decree was issued, only allows for the exemption to be applied in a certain manner, to a certain business or to a certain entity. Hence, the drafters may have listed seemingly specific sectors when in fact the intention was to cover all businesses.

For example, even though the hotel business and advertisement business are not expressly provided in the Exempted Businesses, by their nature, the former may fall under "Commercial business" and "Tourism business" in (6) and (12) (*see the list below*), and the latter may fall under "Commercial business" and "Communications, telecommunications, computer and digital business" in (6) and (13) below. Therefore, Data Controllers of such businesses could also possibly enjoy the de facto postponement of the PDPA.

For your information, the Exempted Businesses are as follows:

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- 1 Natural or juristic person having the power and duties to make decisions regarding the collection, use or disclosure of personal data, e.g., service providers, or employers.
 - 2 "...The exceptions to the application of all or parts of the provisions of the PDPA to any Data Controller in any manner, in any business or in any form of entity ...shall be promulgated in the form of the Royal Decree..."

- (1) State agency;
- (2) Foreign state agency and international organization;
- (3) Foundation, association, religious institution and non-profit organization;
- (4) Agricultural business;
- (5) Industrial business;
- (6) Commercial business;
- (7) Medical and public health business;
- (8) Energy, steam, water power and waste management business, including business relevant thereto;
- (9) Construction business;
- (10) Repair and maintenance business;
- (11) Transport, logistics and warehouse business;
- (12) Tourism business;
- (13) Communications, telecommunications, computer and digital business;
- (14) Financial, banking and insurance business;
- (15) Real estate business;
- (16) Professional business;
- (17) Management and supporting service business;
- (18) Science and technology, academic, social welfare and art business;
- (19) Educational business;
- (20) Entertainment and recreational activity business;
- (21) Security guard business; and
- (22) Household business and community enterprise whose activities cannot be clearly categorized.

In case of doubt, where your business is not expressly listed as one of the Exempted Businesses, the Royal Decree designates that such Data Controller shall consult with the Data Protection Committee (the “**Committee**”), a regulatory authority under the PDPA that is empowered to determine which businesses fall into the Exempted Businesses. Unfortunately, as of the date hereof (June 2020), the members of the Committee have not yet been officially announced in the Government Gazette, but may be announced in the near future.

3. Duty to maintain the security standard

Notably, not all duties and obligations of Data Controllers are postponed. The Royal Decree provides that Data Controllers of the Exempted Businesses must provide security measures for the protection of personal data in accordance with the standard to be prescribed by the Ministry of Digital Economy and Society. However, as of the date hereof (June 2020), such standard has not yet been officially issued.

4. Whether a ‘data processor’ is covered by the Royal Decree?

The Royal Decree expressly exempts only Data Controllers and is silent on whether a “data processor” is also exempted. The legal reason that only Data Controllers are exempted is due to the limitations under PDPA Section 4 paragraph 2, which only allows for the exemption of Data Controllers, not other entities. Therefore, the drafters were only able to exercise the exemption power under such limitation.

However, the PDPA:

- (i) defines a “data processor” as one who operates in relation to the collection, use or disclosure of personal data *per the instruction of or on behalf of* a Data Controller; and
- (ii) provides that a ‘data processor’ must operate in relation to the collection, use or disclosure of personal data per the instruction given by a Data Controller and that a violation thereof will cause the ‘data processor’ to be deemed as a Data Controller for such operation - which may be somewhat similar to the relation between a principal and agent.

Therefore, it can be expected that the Royal Decree will, effectively, exempt a ‘data processor’ from the application of the Exempted Provisions in light of a data processor’s main duties to adhere to a Data Controller’s instructions, and given that all that a ‘data processor’ does is limited to operations that are instructed by or conducted on behalf of a Data Controller.

5. Conclusion

On balance, it can be concluded that the objective of the Royal Decree is to postpone the enforcement of the PDPA for around one (1) year (until 31 May 2021) only and give breathing room to many of the already-struggling business operators to ensure compliance and not risk hefty fines for non-compliance. Prudent business operators should not view this Royal Decree as an ultimate exemption from the PDPA, instead, they should, with the support of a professional legal advisor, view it as an opportunity to make or continue with necessary preparations and ensure to not let another year pass by without any progress.

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BOI: Summary of incentives and promotions during the 2nd Quarter of 2020

According to the resolution of the Board of Investment of Thailand (the “BOI”) committee No. 2/2563 (2020) dated 13 April 2020, the BOI approved multiple measures against the COVID-19 outbreak in order to mitigate the impact on business operators and boost the investment in medical device and medical supplies industries. In addition, a couple of measures were issued to encourage numerous investments ranging from the competitiveness of the grassroots economy to support of the use of technologies for modernization in agriculture sector initiated by local start-ups as well as research and development in a wide range of sectors.

For your easy reading, we categorize the highlighted BOI measures into three (3) main types, as follows:

1. To support existing promoted projects during the COVID-19 outbreak

1.1 Extension of corporate income tax filing for tax exemption³

Corresponding with the nationwide extension of the due date of corporate income tax (CIT) filing this year⁴, the BOI extends the deadline to submit the application for corporate tax exemption from 30 April 2020 to 31 July 2020 or at least 30 days before filing the corporate income tax return (PND. 50 Form).

1.2 BOI’s New Normal

To continue supporting investors during the COVID-19 situation, the BOI has launched the following systems:

- A new online document submission service system named E-Submission. This E-Submission system aims to replace old-time physical submission system. From 30 March 2020, the entire submission of BOI documents and applications (either fresh applicants or current promoted companies) can be done online.
- New online meeting services apart from regular e-services, calls, emails to investors who wish to hold a meeting with the officer.

2. To boost investments in medical device and medical supplies industries⁵

2.1 Incentives for the existing project wishing to manufacture medical devices

For those current BOI promoted companies who are interested in modification of their production line to manufacture medical devices or parts, including Personal Protection Equipment (PPE) etc., the BOI is accepting applications until the end of September 2020 to add a new promoted activity and modify the production line for medical devices under the following conditions:

- A current BOI promoted company can request to add the activity to an existing promoted project in the medical sector to cover the production of medical devices, even the project for which the BOI has already approved the commencement of operation.
- Additional investment for machines or equipment necessary for modification of the production line will be entitled to the extra import duty exemption despite the lapse of the original exemption period. However, the new machines and equipment must be imported within 2020.

2.2 Upgraded incentives for manufacturers of raw materials of medical supplies

Upgraded incentives are granted to certain activities as follows:

- 8-year CIT exemption to BOI activity 1.16: Manufacture of pharmaceutical grade alcohol from agricultural products, including agricultural scrap or garbage or waste (previously, the eligible activity did not cover the manufacture of pharmaceutical grade alcohol); and

³ BOI Announcement No. Por.3/2563 (2020)

⁴ Ministry of Finance Announcement on the extension of deadline to file Corporate Income Tax dated 31 March 2020

⁵ BOI Announcement No. 7/2563 (2020)

- 5-year CIT exemption to BOI activity 3.2: Manufacture of non-woven fabric or hygienic products from non-woven fabric used as materials for production of surgical masks or medical devices (previously, the CIT exemption period was three (3) years).

3. Other interesting measures (not related to COVID-19)

3.1 Measures to support grassroots economy⁶

In order to encourage business operators to participate in and support local administration for the holistic management of water resources, e.g., help preventing flood and alleviate the impact of drought in the country, the BOI has revised some incentive schemes for eligible activities covering connecting water sources to reservoirs, installing plumbing systems, digging wells to store water, and the installation of wastewater recycling plants provided that the scheme must be approved by the Office of the National Water Resource. Promoted projects submitted within 2021 can enjoy tax benefits for up to three (3) years (i) up to 120% of the amount invested in projects, or (ii) a CIT exemption of up to 120% of financial support, whichever is applicable.

3.2 Measures to support research and development⁷

The BOI broadens the scope of activities eligible for import duty exemption of materials used in research and development to cover all activities as follows:

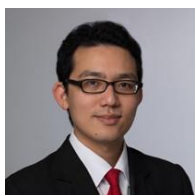
- Research and development activities such as research and development, biotechnology and core technologies development;
- Activities that require research and development to be conducted;
- Activities eligible for higher privileges in the case of having investment or research and development expenditure;
- Merit-based incentives activities focusing on research and development; and
- Promoted activities according to investment support measures by research and development to enhance productivity.

3.3 Measures to encourage the development of smart farming⁸

The BOI has added some conditions on the investment promotion of smart farming service under BOI activity 1.23: Manufacture of modern agricultural products or services related to modern agriculture which allow local start-up companies to develop their own digital platform. The conditions of projects have been simplified while the tax privileges remain the same.

Should you require more details of any measures or would like to have further updates, please feel free to contact us.

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⁶ BOI Announcement No. 6/2563 (2020)

⁷ BOI Announcement No.8/2563 (2020)

⁸ BOI Announcement No. Sor.3/2563 (2020)



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Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, associated local law firms in Jakarta and Beijing where our lawyers are on-site, and collaborative relationships with prominent local law firms throughout Asia and other regions. The approximately 500 lawyers of the firm, including over 30 experienced foreign attorneys from various jurisdictions, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

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