

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), under which the Securities and Exchange Commission of Thailand (SEC) was established. The SEC is empowered to introduce policies for the development and supervision of the securities markets and related activities, including governing the offering of securities, and the governance of issuing companies and securities businesses in Thailand. The SEC's organisation extends to the Capital Market Supervisory Board and the Office of the Securities and Exchange Commission (SEC Office), a regulatory body established by the Securities and Exchange Act that supervises securities businesses on their day-to-day operations, public offerings and business takeovers, as well as 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 SET 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 2019, the composition of the board of directors of the SET was amended, and an appointment procedure was specified under the Securities and Exchange Act that will induce transparency regarding the composition of the board of directors of the SET.

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

There are several other laws and regulations that specifically govern certain types of financial transactions: for example, derivatives transactions are governed by the Derivatives Act BE 2546 (2003), and trusts are 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 the country's central bank, whose main goals are:

- a* promoting Thailand's monetary stability;
- b* formulating and implementing monetary policies as specified by the Monetary Policy Committee by way of, inter alia, mobilising deposits;

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- c* determining the interest rate for loans to financial institutions;
- d* trading foreign currencies and exchanging them for future cash flow;
- e* borrowing foreign currencies to maintain monetary stability;
- f* trading securities as necessary and exchanging them for future cash flow;
- g* controlling the money supply in the country's financial system; and
- h* borrowing or lending securities with or without returns.

The BOT also provides banking facilities to the government in terms of being a depository for the Ministry of Finance (MOF), and acts as the government's custodian of deposits, securities and other valuables. Its roles include acting as the government's representative in trading gold and currencies, 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 as regards financial institutions includes supervision and examination of institutions' financial status and performance, and 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 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 assets in the currency reserve according to the Currency Act BE 2501 (1958), and to 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

Only a public limited company can offer shares to the public. A public offering of shares requires approval from the SEC Office, and the filing of a registration statement and submission of a draft prospectus to the SEC Office before conducting the offering. The appointment of a financial adviser is also required to undertake the application for approval and the filing of a registration statement and a prospectus. As for the solicitation, advising and offering of the securities, the issuing company of the equity type (i.e., shares and warrants to buy shares) is required to appoint an underwriter, who must comply with the selling restrictions under the relevant regulations issued under the Securities and Exchange Act. In respect of the offering, the SEC aims to protect investors by, among other things, granting approvals based on certain criteria. Mainly, shareholders' rights must be protected, and shareholders must be treated fairly. The board of directors and executives must have a system of checks and balances under which a clear and fair structure is 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). Any disclosures must be sufficient, and financial statements must be prepared in accordance with the relevant accounting standards.

In terms of regulations regarding an offering, there are certain measures to avoid going through the process of requesting an approval from the SEC Office and to be exempted

from filing a registration statement and draft prospectus with the SEC Office; for example, issuing the rights offering to the shareholders of the issuing company proportionately to the shareholding, or private placement of shares to:

- a* no more than 50 persons in a 12-month period;
- b* 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
- c* an institutional investor (as defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. KorChor 17/2551 on the definitions in the issuing and offering of securities regulations).

The number of investors referred to in (a) or the aggregate value of the offering referred to in (b) shall exclude the value of any offer made to the institutional investor referred to in (c), regardless of whether the offering is made simultaneously or at a different time (private placement (PP)). However, the SEC has tightened its control over the issuance of PP shares of a listed company by imposing an approval process prior to the sale 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 the market price (a discount of not more than 10 per cent may be granted if necessary, subject to the discretion of the board of directors, provided that this is in the best interests of the listed company).

Furthermore, effective from 1 April 2018, with respect to the offering of shares to the cornerstone investors in an initial public offering (IPO), there is a regulation governing the offering and allotment of shares to the cornerstone investors whereby the offering is made during the period between the submission of applications for approval by, and the registration of statements and a prospectus with, the Office of SEC until the shares have commenced trading on the SET, in which case the following are required:

- a* the offering must be approved by the shareholders' meeting of the issuer, and the board of directors shall be authorised to offer and allocate portions of shares to the cornerstone investors, which must be separate portions from the newly issued shares to be offered to the public;
- b* a cornerstone investor shall have the following characteristics:
 - he or she will be an institutional investor;
 - he or she will not be a person related to the issuer;²
 - he or she will not be a patron of the issuer;³ and
 - he or she will not be an underwriter for the offering;
- c* the total amount of the newly issued shares offered to the public, and the portions offered to cornerstone investors and the portions offered by the existing shareholders of the issuer (selling shareholders), shall not be below 5,000 million baht; and
- d* the price of shares prescribed in the relevant cornerstone investment agreements shall be identical to the IPO price shown in the final prospectus. In addition, the names of the cornerstone investors and the approximate number of shares to be purchased by each cornerstone investor must be specified in the registration statements.

2 Includes directors, executives and major shareholders of the issuer.

3 Includes customers or suppliers of the issuer.

Offering of offshore shares

The SEC Office provides an option for an offshore company to offer its shares to investors in Thailand and be traded on the SET, subject to the SEC Office's approval and the filing of a registration statement in the prescribed form and a prospectus with the SEC Office that must become effective prior to commencing the offering. The main regulations with which the offshore company must comply are divided into the following:

- a* for a dual listing, the Capital Market Supervisory Board Notification No. **TorChor** 14/2558 on rules on the offering of securities issued by an offshore company that has or will have its shares listed on one or more offshore exchanges; and
- b* for an offshore company not having its shares listed on any offshore exchange, the Capital Market Supervisory Board Notification 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 prospectus with, the SEC Office, such as when the offering of shares is made to:

- a* no more than 50 persons in a 12-month period;
- b* any entity with an aggregate value not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation; or
- c* an institutional investor (as defined in Clause 2(4) of Notification of the Securities and Exchange Commission No. **KorChor** 17/2551 on the definitions in the issuing and offering of securities regulations.

The number of investors referred to in (a) or the aggregate value of the offering referred to in (b) shall exclude the value of any offer made to the institutional investors referred to in (c), regardless of whether the offering is made simultaneously or at different times. In addition, an offshore company that offers the shares under these exemptions must submit the result of the sale after the offering to the SEC.

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 mainly comprise bonds (issued by the government, state agencies or state-owned enterprises) and debentures (issued by private companies). Corporate debentures may be issued by both public limited companies and limited companies.⁴ Other varieties of debt securities include convertible debentures, derivatives debentures (including exchangeable debentures), Basel III subordinated debentures, securitised debentures, perpetual debentures and foreign debentures. While a wide range of issue types are possible, typical corporate domestic issues are plain vanilla debentures with fixed-rate coupons and bullet repayment at maturity.

The MOF and the SEC Office are the main authorities with 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

⁴ In Thailand, a public limited company is a company incorporated under the Public Limited Companies Act BE 2535 (1992), with the aim of offering its shares to the public, while a limited company is incorporated under the Civil and Commercial Code, and its shares are privately owned and restricted to being offered to the public (unless it has been converted to a public limited company).

bonds. Tax laws are one of the key mechanisms used by the MOF to influence Thai bond markets. The SEC Office 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 (Thai BMA) was established with the objective of creating a basic system of trading debt securities among traders in the secondary market, providing information regarding market data to investors and encouraging market development. The Thai BMA promotes and supports the studying of and research into 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 that must become effective before an offer can be made.

A private placement⁵ of debentures is granted a deemed approval from the SEC Office provided that the issuer registers transfer restrictions with the SEC Office. An offering of debentures on a private placement basis, which includes an offering to foreign investors, does not require a filing of registration statements and prospectus to the SEC Office (except if the offering is made to Thai institutional investors, in which case registration statements and a prospectus are still required to be filed with the SEC Office). The current regulations regarding the issuance and offer of plain vanilla debentures no longer provide any exemption of deemed approval for offering debentures to high-net-worth investors⁶ (i.e., the offering of debentures to high-net-worth investors requires approval from the SEC Office) where the period of the SEC Office's consideration for granting approval in such case will be shorter than the period in the case of a general public offering.

Investment unit

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 SEC approval and are under its supervision). Types of mutual funds vary depending on their choice of investments: for example, securities, real estate or infrastructure.

Under the Securities and Exchange Act, a mutual fund is incorporated as a juristic person under the Securities and Exchange Act. The mutual fund shall be established (by raising funds and registering the fund with the SEC Office) and managed by the securities company obtaining a mutual fund management licence from the MOF under the recommendation of the SEC Office (asset manager), and the management of the mutual fund by the asset manager will be supervised by a registered fund representative registered with the SEC Office.

5 A private placement in this context means an offering to not more than 10 investors in any four-month period, an offering to creditors in a debt restructuring and an offering made with a waiver from the SEC Office.

6 High-net-worth investor means, in the case of an individual, that individual has total net assets exceeding 50 million baht, excluding his or her regular residences, or annual income exceeding 4 million baht, or investments in securities or derivatives exceeding 10 million baht (or exceeding 20 million baht if the investment is aggregated with the deposit); or, in the case of a juristic person, that person has shareholders' equity exceeding 100 million baht or investments in securities or derivatives exceeding 20 million baht (or exceeding 40 million baht if the investment is aggregated with the deposit), the thresholds being considered from the latest audited financial statements of the juristic person.

In 2019, the Securities and Exchange Act was amended, imposing additional duties on asset managers. Prior to the amendment, the Securities and Exchange Act required asset managers to comply with the fund scheme and conditions between asset managers and unitholders (which are signed by a mutual fund supervisor). However, the amendment to the Act additionally imposes a fiduciary duty on asset managers in the management of a mutual fund: that is, in managing a mutual fund, an asset manager must proceed with loyalty and care to preserve the interests of all unitholders, using his or her knowledge and competence as a professional. If the asset manager breaches his or her fiduciary duty, he or she will be liable to a fine not exceeding 500,000 baht and a further fine not exceeding 10,000 baht for each day on which the offence occurs. In cases where such offence of an asset manager is the result of an order or an act of any person, or a failure to order or act in accordance with the duties of directors, managers or any persons responsible for the operation of such asset manager (collectively, responsible persons), such person shall be liable to imprisonment for a term not exceeding two years or a fine not exceeding 500,000 baht, or both.

The asset manager must also have a policy on the prevention of conflicts of interest in managing a mutual fund, as well as monitoring and overseeing acts that may cause conflicts of interest, unfair characteristics or acts that cause unitholders to lose the interest that they should receive. Failure to provide such policy by an asset manager may subject the asset manager to criminal liability in addition to the responsible persons.

Furthermore, the amendment prescribes unitholder meeting requirements, such as a quorum, and the voting terms to be complied with by the asset manager.

For foreign fund units to be offered in Thailand, generally neither offerings of units nor soliciting for the purchase of units has a private placement regime comparable to that for offerings of equity or debt, and a securities licence to operate fund management will be required. However, there is a channel for foreign collective investment scheme (CIS) operators to offer CIS units in Thailand. In summary, only the following eligible CIS operators can make an offering in Thailand: CIS established in certain countries (i.e., Association of Southeast Asian Nations countries or Asia Pacific Economic Cooperation countries), or foreign exchange trade funds established under foreign laws⁷ and regulated by members of the International Organization of Securities Commissions (IOSCO).

Services relating to offshore products to investors

Despite the limitations on the offering of offshore capital market products to investors in Thailand, there are channels for Thai investors to invest in offshore capital market products. Apart from investing in units of mutual funds registered under the Securities and Exchange Act and having a scheme to invest outside Thailand, Thai investors are able to invest in offshore capital market products through licensed securities businesses⁸ that are permitted

7 An exchange trade fund shall have objectives to create returns for its holders in direct correlation with the changes of the following underlying: price of gold, index having components as crude oil in whole or in part, commodity index, or index of basket of securities acceptable to a foreign exchange that is a member of the World Federation of Exchanges (WFE), that index having components as the securities listed in the foreign exchange that is the WFE member in whole, or debt instruments in the organised market

8 Currently, there are four main types of licences for conducting a securities business under the Securities and Exchange Act: for a broker, dealer or underwriter of securities, investment advisory, mutual fund management, private fund management, securities lending and borrowing, and venture capital fund management; for a broker, dealer or underwriter of debt instruments, investment advisory and securities lending and borrowing; for a broker, dealer or underwriter of units, investment advisory, mutual fund

to offer services in relation to investment in offshore capital market products (i.e., securities or derivatives denominated in a foreign currency), provided that the offshore capital market products have characteristics and conditions similar to what can be issued and offered in Thailand (e.g., units of mutual funds, plain vanilla debentures), are under the supervision of a recognised regulator⁹ and are offered in countries where a recognised regulator is situated. Most importantly, offshore issuers or offerors shall not conduct any public distribution of capital market products in Thailand (e.g., have public roadshow activities with investors in Thailand).

ii Digital assets control

Cryptocurrencies and digital tokens have been used globally by corporates as tools for raising funds, specifically by fintech companies. Until recently there were no Thai laws or regulations governing these activities. However, the actions of one company have led to an important change.

A Thai fintech company successfully raised funds from the public in a very short time. The Cabinet of Thailand was concerned that activities of this kind could potentially affect the nation's financial stability, the economic system and the general public. On 10 May 2018, the Royal Enactment on Digital Assets Business BE 2561 (2018) (REDA) was introduced to set out a framework for fundraising via the offering of digital tokens. Furthermore, the aim of the REDA is to regulate businesses undertaking digital asset-related activities.

Assets regulated by the REDA

The purpose of the REDA is to regulate two types of digital assets: cryptocurrencies and digital tokens. Cryptocurrencies are defined as electronic data to be used as a means of exchange for products, services, or other rights (e.g., bitcoins or ripples), while a digital token is an electronic data unit that enables the holder to participate in an investment in any project or business under an agreement between the holder and the issuing company. The public offering of digital tokens is commonly known as an initial coin offering (ICO).

Overview of ICOs

An ICO is permitted by issuers that are companies incorporated under the laws of Thailand. Prior to the offering, an issuer is required to obtain approval from the SEC Office. The issuer must also prepare a registration statement and a draft prospectus, which must comply with the minimum contents that are required by, and must be filed with, the SEC Office.

The registration statement and draft prospectus must, as a minimum, include the following:

- a a factsheet showing an overview of the issuer and the digital tokens to be offered;
- b information about the issuer (including the use of proceeds);
- c the business plan of the issuer;

management, private fund management or venture capital fund management; and for a broker, dealer or underwriter of units. Other types of licences, apart from the four main licences, are investment advisory, securities lending and borrowing, and venture capital.

9 Recognised regulators are members of IOSCO, which must also be Signatory A members of the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information; countries that are party to the Organisation for Economic Co-operation and Development; or countries within the Association of Southeast Asian Nations Economic Community).

- d* information about the digital tokens to be offered, including any special characteristics and risks;
- e* information about the offering; and
- f* the required certification, namely the execution of signatures as follows:
 - if the issuer is not a listed company, all directors, the chief executive officer (CEO) and the chief financial officer (CFO) of the issuer; or
 - if the issuer is a listed company, the authorised director or directors, or the CEO, as authorised by the authorised director or directors.¹⁰

If the registration statement and prospectus for digital tokens contain false statements or fail to disclose material facts that should have been stated therein, the issuer and the authorised directors who placed their signatures therein shall be required to jointly compensate the persons who purchase the digital tokens.¹¹ The rights to claim for compensation shall have a limitation period of one year from the date on which the fact that the registration statement and prospectus contained false information became known or should have been known, but not exceeding two years from the effective date of the registration statement and draft prospectus. In addition, there is criminal liability for false statements or failure to disclose material facts in the registration statement and prospectus of digital tokens. Sanctions that may be imposed on an issuer, directors and management in charge of a company are imprisonment for a term not exceeding five years, or a fine not exceeding twice the value of the offering, or both.

Under the Notification of the Securities and Exchange Commission No. KorJor 15/2561 Re: the Offering and Sale of Digital Tokens to the Public, issued under the REDA, digital tokens can only be offered to a limited group of qualified investors.¹² Retail investors are permitted to invest in digital tokens, subject to a threshold of 300,000 baht for each offering.¹³

The SEC Office will consider granting approval only for digital tokens that meet its requirements (i.e., they must be investment tokens or utility tokens only, and the business plan relating to them and the mechanism for exercising rights under them by the holders through a ‘smart contract’ must be enforceable and must not exploit investors). The offering of the digital tokens must be done through a business operator known as an ICO portal, which has a role similar to that of a financial adviser in a conventional shares public offering.

The eligibility criteria for a business to act as an ICO portal business include, inter alia:

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- 10 If the authorised director is not the CEO or the CFO, the signature of the CEO or the CFO shall be required as well.
 - 11 The liability for damages shall be equivalent to the difference between the amount that the person who exercises the right to claim compensation has paid for purchasing the digital tokens and the price that should have been paid had the disclosure of information been correctly made as specified by the SEC Office. The interest at the maximum average rate payable for a fixed deposit of one year or more from at least four commercial banks specified by the SEC Office shall be added to the difference.
 - 12 Institutional investors, ultra-high-net-worth investors, private equity funds or venture capital funds (qualified investors).
 - 13 In the event of an offering to an investor that is not a qualified investor (retail investors), each retail investor can purchase digital tokens under each offering not exceeding 300,000 baht, and the maximum amount of the digital tokens to retail investors in each offering shall not exceed the higher of an amount equivalent to four times the issuer’s shareholders’ equity and 70 per cent of the amount of the offering.

- a* being a company established under the laws of Thailand;
- b* having registered capital of at least 5 million baht;
- c* not having directors or executives with prohibited characteristics;
- d* establishing issuer due diligence and product screening systems;
- e* examining issuers' business plans and the source codes of smart contracts;
- f* conducting know your customer (KYC) and customer due diligence (CDD); and
- g* providing suitability tests for retail investors.

After the completion of an offering, issuers of digital tokens shall be subject to the requirements of continuous disclosure. They are required to prepare and submit reports to the SEC Office with regard to their financial condition, business operations or any other information that may affect the rights and interests of digital token holders, making investments or the price or value of the digital tokens.

Overview of private placement of digital tokens

Recently, the SEC issued regulations to apply the private placement concept to digital token offerings, in which a deemed approval is granted from the SEC Office, and the offeror is therefore exempted from filing a registration statement and draft prospectus with the SEC Office.

Under Notification of the Securities and Exchange Commission No. GorJor 12/2562 Re: Private Placement Offering of Digital Tokens, the private placement of digital tokens means:

- a* the offering of digital tokens to an institutional investor or ultra-high-net-worth investor (as defined in Notification of the Securities and Exchange Commission No. Kor Jor. 4/2560 re: the Definition of Institutional Investor, Ultra-high Net Worth Investor and High Net Worth Investor), or venture capital or private equity (as defined in Notification of the Securities and Exchange Commission No. Kor Jor. 15/2561 Re: the Offering and Sale of Digital Tokens to the Public);
- b* the offering of digital tokens to no more than 50 investors in a 12-month period, provided that the investor must be a person related to an issuer of the digital tokens; or
- c* an aggregate value of the offering not exceeding 20 million baht in a 12-month period, using the offering price as a basis for calculation.

The number of investors referred to in (b) shall include the investors who receive the digital tokens by ways other than offering. The number of investors referred to in (b) or the aggregate value of the offering referred to in (c) shall exclude the value of any offer made to the institutional investors referred to in (a), regardless of whether the offering is made simultaneously or at a different time from the private placement.

The private placement of digital tokens must be made through the digital tokens offering portal approved by the SEC. In addition, if the private placement is not simultaneously made with the public offering of such digital tokens, the offeror must ensure that the purchaser in the private placement shall not be able to transfer any digital tokens before the public offering of such digital tokens, unless the transfer is made within the private placement regime.

Digital assets business operators

Another purpose of the REDA is to regulate business operators who are intermediaries for digital assets that are classified into three types: digital asset exchanges, digital asset brokers

and digital asset dealers. Entities that intend to operate a digital asset business must be Thai companies and licensed by the Minister of Finance upon the recommendation of the SEC. In undertaking digital asset businesses, operators shall comply with the rules, conditions and procedures set out by the SEC, which include having adequate sources of capital to cover business operations and other risks, segregating client assets from their own assets, and conducting KYC and CDD.

Services relating to offshore investment in digital assets

Furthermore, since 2018, the SEC has allowed licensed business operators to offer services to Thai investors in relation to offshore digital assets, provided that the offshore digital assets are offered in a country where a regulator is a member of IOSCO and a Signatory A member of the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. In addition, offshore issuers or offerors shall not demonstrate an intention to offer digital assets in Thailand. In the case of offshore investment in an ICO, there are requirements that the digital asset must be offered to retail investors in such country, a client that is a retail investor¹⁴ must pass an examination regarding the risk of investment in the ICO, and the digital asset business operator must monitor clients' investment portion to be appropriated.

Traceable transactions and anti-money laundering

In addition, to preserve the integrity of markets by ensuring that transactions relating to digital assets are traceable, cryptocurrencies that are acceptable to issuers of digital tokens or business operators must be obtained from, or deposited with, business operators regulated under the REDA only.¹⁵ Furthermore, business operators and ICO portals are subject to the Anti-Money Laundering Act¹⁶ to prevent the exploitation of digital assets as a channel for money laundering.

Other significant issues under the REDA

Similar to the Securities and Exchange Act, the REDA prescribes offences of unfair trading relating to the purchase, sale or exchange of digital assets taking place in a digital asset exchange such as false dissemination, insider trading, front running and market manipulation.

iii Cases and dispute settlement

Judicial systems

Thailand has a three-tier judicial system consisting of the courts of first instance, the Court of Appeal and the Supreme Court.

14 A retail investor in this context means an investor that is not an institutional investor (as defined in Notification of the Securities and Exchange Commission No. Kor Jor. 4/2560 Re: Determination of the Definitions of Institutional Investor, Ultra-high Net Worth Investor and High Net Worth Investor), or venture capital or private equity (as defined in The Notification of the Securities and Exchange Commission No. Kor Jor. 15/2561 re: Offer for Sale of Digital Tokens to the Public).

15 Section 9 of the REDA.

16 Section 7 of the REDA.

Several options for dispute settlement are available. One is the traditional court, which is the fundamental justice system available for all. A second option is out-of-court arbitration,¹⁷ which is agreement-based (Thailand has used the UNCITRAL Model Law on International Commercial Arbitration as a model for its arbitration system). The use of arbitration for private dispute resolution is increasing due to it being a faster and more relaxed process than the traditional court system in terms of the choice of language used during the process (to be agreed by the parties) and the venue.

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

Enforcement of judgments

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

Currently, there is no provision for the enforcement of a foreign court judgment because Thailand is not a party to any relevant treaty under which the country would be bound to recognise and enforce a foreign court judgment.

On the other hand, foreign arbitration awards 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 in Thai courts without first presenting a dispute to arbitration despite an arbitration clause, Thai courts will issue an order striking the case, provided that the conditions specified in Section 14 of the Arbitration Act are complied with, namely that 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 its inquiry and finding no grounds for rendering an arbitration agreement void or unenforceable or impossible to perform, the court will issue 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 where enforcing the award would be contrary to public policy or the 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.

¹⁷ The Arbitration Act BE 2545 (2002). However, in-court arbitration is also available in Thailand and is provided for in the Civil Procedure Code, although its use is much less frequent.

Taxation of capital gains

Gains realised by an individual holder, either resident or non-resident, from 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 Thai withholding tax of 15 per cent on gains realised from 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 the 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 from 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 for which payment is made from or within Thailand, are subject to Thai withholding tax at a rate of 15 per cent. Any payment of withholding tax is creditable against the Thai personal income tax payable if a non-resident individual files a personal income tax return in Thailand reporting gains realised from the sale of ordinary shares.

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

Taxation of digital assets

With respect to the withholding tax applicable to digital assets, gains realised by a holder on a sale of digital assets shall be subject to Thai withholding tax at a rate of 15 per cent in all cases. In addition, there is no exemption similar to that applied in the case of a sale of shares on the SET by individuals. Furthermore, benefits from holding digital assets (e.g., profit-sharing from holding digital tokens) shall be subject to Thai withholding tax at a rate of 15 per cent, which is higher than the 10 per cent rate applicable in the case of dividends from shares paid to individuals or foreign companies.

Stamp duty

Generally, stamp duty of 0.1 per cent, or a fraction thereof, on the paid-up value of shares or the selling price of the shares – whichever is the higher – 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 as long as Thailand Securities Depository Company Limited (TSD) acts as the 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 rehabilitation matters in Thailand. Further to the Bankruptcy Act, bankruptcy and rehabilitation 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.

Section 102 of the Bankruptcy Act allows for insolvency set-off and netting, provided 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, the 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 rehabilitation proceedings, under Section 90/33 of the Bankruptcy Act, if the creditor who is entitled to apply for the repayment of debt for rehabilitation is indebted to the debtor at the time of issuance of the rehabilitation order, the creditor may exercise the right of set-off, unless the creditor acquires the claim against the debtor after the court issues a rehabilitation order.

v Role of exchanges, central counterparties and rating agencies

While the primary responsibility for the regulation of new securities issues has shifted to the SEC,¹⁸ the SET continues to operate the stock exchange and is responsible for listing application approvals once the SEC registration, prospectus and related requirements have been met for Thai public offerings.

TSD

TSD acts as a securities depository, dividend-paying agent, transfer agent and registrar for Thai listed companies, and Thailand Clearing House Company Ltd acts as a clearing house. Securities companies, commercial banks, finance companies, life and non-life insurance companies, financial institutions established by specific legislation and other persons as prescribed by the TSD may become members of the TSD for depository services.

Thailand Clearing House Company Ltd

All settlements and the 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. Companies offset sales and purchases of each member, and only the net balance of securities and cash delivered or received by each member through the company is credited.

Rating agencies

To issue new bonds with the purpose of selling them to the general public, the SEC requires that the credit of each bond be rated by approved rating agencies (this is not the case for private placements, for which a credit rating is not necessary). Currently, the rating agencies approved by the SEC are TRIS Rating Co, Limited and Fitch Ratings (Thailand) Limited.

18 www.set.or.th.

III OUTLOOK AND CONCLUSIONS

The amendment to the Civil Procedure Code, 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 amount of damage would not be worth the time, cost and effort to pursue through a 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 fact and law, and 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 a class action to court. Possible class action claims under the Securities and Exchange Act can be claims relating to disclosure arising from information included in a prospectus at the IPO 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 and acquisitions and tax-related laws, and advising on the 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 initial public offering 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 the 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, where the value of the assets sold was approximately 125.58 billion baht.

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Appendix 2

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