

THE INTERNATIONAL  
HOTEL LAW  
REVIEW

THIRD EDITION

Editor  
Karen Friebe and Graeme Payne

THE LAWREVIEWS

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HOTEL LAW  
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# PREFACE<sup>1</sup>

The hotel sector has evolved. A lot.

It is now a far cry from the coaching inn and the ‘Mom and Pop’ motel, and those who wish to own a hotel no longer have to be involved in its operation. There is no need to put a mint on the pillow, fill the ice buckets or even visit the property. If an investor so chooses, a hotel can remain a line on a balance sheet and no more. This apparent cut in complexity is not, however, reflected in the sector’s legal demands.

What enabled this hands-off approach for the most hands-on of sectors was the move from asset-heavy to asset-light, a trend that began in the 1960s with the franchising of the Holiday Inn brand. This gained traction in the United States with the popularisation of real estate investment trusts, and in Europe with the adoption of various investment models, including sale and leaseback.

The largest hotel companies embraced the chance to sell assets and use them to fund expansion. In 2018, Hilton was one of the last groups to shed its assets: making good on a three-way split announced two years earlier, spinning off its timeshare business and moving 70 of its owned hotels into a REIT. Simplifying the businesses would, it was hoped, result in a higher net valuation multiple.

Part of the motivation behind selling off the family jewels was the need for valuation simplicity. Another was the growing appetite for the sector from investors – an increasing number of them being institutions, whose structure prevented participation in operations.

With companies such as Marriott International and Hilton freed from the rigours of ownership, focus turned to the rapid growth of their brand stables, embracing a wave of branding that has permeated every aspect of commercial life. At the last count, Marriott International had more than 30 brands, illustrating the expanded scope of the hotel sector, moving past those motels and reaching deep into luxury resorts, serviced apartments and even private residences. As the customer asserts the right to ‘their stay their way’, the number of flags available to owners will only multiply, with the new model less a stable of separate entities and more a big happy family, united by a loyalty programme.

When it came to franchising, size mattered. Marriott International, Hilton Worldwide, Wyndham Hotels & Resorts, Choice Hotels International and Intercontinental Hotels Group – the top five franchisors by total room count in the United States – collectively represent 82 per cent of the total franchised branded rooms according to STR and JLL Research.<sup>2</sup>

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1 The information in this Preface was correct as at October 2021. The editors gratefully acknowledge the contribution of Mark Abell in previous editions.

2 <https://www.jll.co.uk/en/trends-and-insights/investor/why-more-hotels-are-owned-by-franchisees>.

Branding a hotel may look as simple as branding a chocolate bar, but the expansion of franchising out of the US was merely the start of the options for hotel owners, and the number of players involved in each hotel has expanded with the number of brands. These players now include third-party operators, asset managers, franchisors and franchisees, managers, operators and, of course, owners in their many forms. Unlike a chocolate bar, a hotel night is a passing commodity: if you don't sell that room tonight, it, and its potential revenue, no longer exist.

Regional variances have grown within the hotel stack. Leases are popular in Germany, but much less so in other countries. It is a minefield for those companies that want to act globally but are forced to act locally. Owners and their demands also vary. The family office looking for a multi-generational hold has very different aspirations to the private equity house looking to flip an asset in five years.

A brand is no longer just reassurance that the shower will work and the breakfast will be the same. The customer wants more; wants experience; wants something unique backed by the security of the standard. Delivering this has become ever-more demanding.

There are those who buck the trend, including CitizenM in the Netherlands and Whitbread in the United Kingdom. They see their strength in the ability to control all aspects of the company, see assets not as a dead weight, but as the solid core that they can rely on and the source of their ability to act nimbly.

The considerations in every contract have expanded exponentially. With more brands come more concerns from owners about competition on their patch. Differences between flags must be defined to protect against accusations of cannibalisation and brand owners playing favourites with their new toys. The cost of the brand has grown past marketing; there are issues around investment and refreshing the offering. Just because an unseen person in HQ 5,000 miles away wants a new type of mattress as a new brand standard, is the owner required to pay for it? And a new neon sign? And a coffee machine in every room? The brands' insatiable appetite for expansion, and to enter into amenity wars with their rivals, threatens owners' returns and often leads to conflict.

Marketing a property is an art and a skill that comes at a cost, and distribution is now a hotel department in its own right. Hotels have been taught to fear the high fees of the online travel agents, but owners have complained that the response of the globally branded players – to fight fire with loyalty programmes – has also come at a cost. When the asset is properly aligned, a hotel can deliver glorious rewards as well as a wonderful stay.

Aligning the parties has become the priority for those helping to build the relationship and create an asset that works. Hotels have edged their way into the mainstream asset classes, joining retail, office and residential. With that has come increased scrutiny from investors and the need for thorough contracts between parties – not just a handshake at the bar. The skill involved in this search for balance has never been more demanding, nor the depth of knowledge required greater.

**Karen Friebe and Graeme Payne**

Bird & Bird



# THAILAND

*Peerasanti Somritutai and Chavisa Jinanarong<sup>1</sup>*

## I INTRODUCTION

From a local regulatory perspective, the governmental policies and legislation in connection with the hotel sector in Thailand have substantially remained unchanged since the covid-19 pandemic. However, after the relaxation to the covid-19-related measures by the Thai government in early 2022, a number of visitors from other nations (including China, the United States, the United Kingdom and many European countries) has surged. As a result, Thailand's hotel sector is gradually recovering. Following one of the greatest global financial struggles in history for the hotel sector around the world, many hotels in Thailand are attentively pursuing a diverse source of funds to maintain their operations and to regain their footing and growth. Despite fewer M&A transactions in Thailand's hotel sector so far in comparison to before the pandemic, we anticipate a great number of hotel-related or hotel-backed financing transactions, both in debt and equity levels.

## II MARKET ENTRY

### i Foreign ownership over land

Unless specifically permitted by law, foreigners are restricted to own land in Thailand. 'Foreigner' means (1) a non-Thai national individual, (2) a foreign-registered entity, (3) a Thai-registered entity in which foreigners hold more than 49 per cent of the total ownership interests (e.g., shares), and (4) a Thai-registered entity with more than half of the number of the holders of its ownership interests (e.g., shareholders) are foreigners.<sup>2</sup>

However, foreigners may be permitted to own land subject to certain requirements and criteria. For example, the following legislation sets out exceptions and criteria of before covid-19 for foreigners to own land.

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1 Peerasanti is a partner and Chavisa is an associate at Kudun and Partners. The authors would like to thank Thamonwan Koosuwan and Pimklao Kanchanakom for their invaluable assistance in the preparation of this chapter.

2 The Land Code and the Foreign Business Act B.E. 2542 (1999).

### **Land Code**

A foreigner may own up to one rai (i.e., 1,600 square metres) of land for residential use, provided that such foreigner brings in not less than 40 million baht from abroad to invest in specified businesses in Thailand and obtains permission from the Ministry of Interior. This permission is subject to the criteria, procedures and conditions prescribed in the relevant ministerial regulations.

#### **ii Investment Promotion Act B.E. 2520 (1977)**

A foreigner who receives investment promotion from the Board of Investment (BOI) may be permitted to own land for the purpose of the operation of a promoted business as the BOI deems appropriate. One of the BOI promoted activities is the operation of a newly constructed hotel. However, if a foreigner ceases to operate such promoted business, the plots of land owned by a foreigner must be disposed of within one year.

Due to the restrictions on foreign ownership over land, some foreigners would consider partnering with Thai nationals (either individuals or companies) to invest in a real estate project (including a hotel project). In such case, a foreigner would normally own 49 per cent of the total shares in a company and the other two Thai nationals would own 51 per cent of the total shares in the company. Moreover, the parties may enter into a joint venture agreement or a shareholders agreement to memorialise the terms and conditions relating to the investment, including arrangement for voting and economic interests in the company.

#### **iii Foreign ownership over building**

In Thailand, the ownership of a building (including any construction) can be separated from the ownership of the land on which such building is situated. Even though a foreigner is generally not permitted to own land, a foreigner is allowed to own a building. Therefore, it is somewhat common in Thailand for a foreigner to lease the land to construct or operate a building (including a hotel or a villa) that is owned by a foreigner.

#### **iv Foreign exchange**

All transactions involving foreign exchange (for all business sectors) must be conducted through commercial banks or authorised non-banks, such as authorised money changers and authorised money transfer agents. Such transactions include: (1) remittance of a foreign currency (to be converted into Thai baht) into Thailand for a sale and purchase transaction; and (2) remittance of Thai baht (to be converted into a foreign currency) out of Thailand for a payment of fee, dividend to non-Thai shareholders or royalty.

There is no general limitation imposed on the remittance of foreign currencies into Thailand. However, depending on the value of each remittance, the remittance of Thai baht (to be converted into a foreign currency) out of Thailand may be subject to limitations and legal requirements. If the amount of funds to be remitted out of Thailand exceeds the amount specified in the exchange control regulations, prior approval of the Bank of Thailand will be required and must be obtained before the relevant remittance.

### III LEGAL STRUCTURES

#### i Operation

The common structures for the operation of a hotel in Thailand are similar to those applied internationally. Such common structures include:

- a* owner-operated hotel;
- b* leased hotel;
- c* managed hotel;
- d* franchised hotel; and
- e* real estate investment trust (REIT).

#### ***Owner-operated hotel***

An owner will directly (and by itself) manage, control and operate a hotel (including day-to-day operation and brand recognition). This structure would provide an owner with the most freedom and flexibility to operate its own hotel. However, this also means that an owner would need to bear all risks associated with a hotel, which include the branding recognition and continuing (or growing) stream of revenues.

#### ***Leased hotel***

In support of the owner-operated hotel structure, this leased hotel structure separates the ownership over a plot of land from the ownership over a hotel (i.e., a building). A hotel owner will construct a hotel on a plot of land leased by a hotel owner from a landowner, and thus, the ownership over a hotel will belong to a hotel owner (but not the plot of land on which a hotel is situated). In other words, a hotel owner does not need to own any land plot in Thailand to own and operate a hotel. The term of the lease of this arrangement would usually be a long-term lease (e.g., 30 years or 50 years, to the extent permitted by law).

A foreigner who would like to operate its own hotel in Thailand may choose this structure for operation. This is because, under Thai law, even though a foreigner is not permitted to own land, the foreign ownership restriction does not apply to a building.

#### ***Managed hotel***

This structure is one of the most common structures for hotel operations in Thailand. A hotel manager (appointed by a hotel owner on a contractual basis) will, mostly in all respects, manage and operate a hotel (including day-to-day operation and brand recognition). A hotel manager will be entitled to management fees and other agreed fees in exchange. As is the case in many other countries, a hotel owner with limited hotel management experience would rather prefer hiring a hotel manager with strong presence and network than managing a hotel by itself, as the latter would entail greater operational risks and extremely limited branding recognition and exposure. Hotel management agreements used in Thailand may or may not impose a performance guarantee on the hotel managers.

#### ***Franchised hotel***

This structure has become somewhat gradually more interesting for hotel owners with a certain level of management experience who prefer not to be financially responsible for higher fees incurred by the managed hotel structure. That said, this franchised hotel structure is perceived by more and more hotel owners in Thailand as being able to strike a balance between the owner-operated hotel and managed hotel structures. This is because a hotel

owner would be able to enjoy the brand recognition and network of the branded hotel of its choice (i.e., the franchisor), while retaining the operational control and management under the brand standards.

### ***Real estate investment trust***

A real estate investment trust (REIT) (the only type of real estate-related trust recognised under Thai law) is an investment vehicle regulated by the Securities Exchange Commission and the Stock Exchange of Thailand.

REIT will invest in real estate (including a hotel) for the benefit of the unit holders – the unit holders will receive the profit gained from the investment. REIT may invest domestically or internationally in any freehold or leasehold real estate for the main purpose of rental collection, which in turn majorly becomes the profit available to the unit holders. As REIT's property is managed by the REIT manager, the profit received by REIT (through rental collection) will be partially used to pay the REIT manager in exchange for the management of REIT's property before having distributed to the unit holders. REIT is subject to the test of foreigner-ship under the Land Code, and as such, REIT must comply with the unit-holding restrictions (between Thais and foreigners) required by the Land Code if REIT is to own any freehold interest over land.

In the Thai market, REITs may work with hotel managers or franchisors (as applicable) in operating the hotels.

### **ii Licensing requirements**

While a construction permit and a construction certificate are key licences for the construction of a hotel, a hotel licence is a key licence for the operation of a hotel in Thailand.

However, the operation of a full-service hotel would involve various licences, which include a licence for the operation for hazardous business for the operation of a swimming pool, licences for selling alcoholic beverages, selling food and storing food for the operation of a restaurant.

## **IV LEASES**

From a local regulatory perspective, a lease of a plot of land or a building for the operation of a hotel does not substantially deviate from a lease for other purposes.

Under Thai law, the maximum lease term for a lease of real estate is 30 years or the life of a lessor or a lessee (applicable for an individual only).<sup>3</sup> However, a lease for qualified commercial or industrial purposes may have a lease term of up to 50 years.<sup>4</sup>

In any case, any lease for a period longer than three years must be registered at the competent land office to be enforceable; otherwise, such lease would be enforceable only for the first three years. Unless agreed otherwise by the parties, under a normal lease arrangement, a lessee's right cannot be inherited, sub-let or transferred to any third party. However, a lessee's right under a lease for qualified commercial or industrial purposes can be inherited, sub-let or transferred to any third party.

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3 The Civil and Commercial Code.

4 The Lease of Immovable Property for Commerce and Industry B.E. 2542 (1999).

## V INTELLECTUAL PROPERTY AND BRANDING

### i Trademark

Hotel brand is one of the most important components for the operation of a hotel. When entering into the Thai hotel sector, most brand owners would register with the Department of Intellectual Property, Ministry of Commerce of Thailand (DIP) their respective hotel brands each as a registered trademark under the Trademark Act B.E. 2534 (1991). Such registration would provide a brand owner with legal protections from any unauthorised use of its registered trademark.

Following the registration of a trademark, when a brand owner enters into a hotel management agreement or a franchise agreement, a brand owner would grant a hotel owner rights to use its registered trademark for the operation of a hotel (i.e., trademark licensing). In such a case, a brand owner will normally charge royalty from a hotel owner. However, one of the key considerations for the relevant parties when implementing this arrangement is the failure to register the trademark licensing with the DIP, resulting in the licensing of a registered trademark being null and void under Thai law.<sup>5</sup>

For any trademark licensing to become effective and enforceable under Thai law, a trademark licensing agreement must be registered with the DIP. The registration process could take approximately three to six months from the date on which the application and all supporting documents have been submitted to the DIP. Due to the time-consuming registration process, some brand owners and hotel owners may decide not to proceed with the licensing registration. In such case, a trademark licensing agreement would be null and void.

### ii Other intellectual property rights

In addition to trademarks, the operation of a hotel may also involve other intellectual property rights – such as copyright and trade secret.

The Copyright Act B.E. 2537 (1994) provides protections over, among others, literary works, musical works, artistic works, audio-visual works and computer software. Literary works include advertisements, websites, brochures and books and artistic works include paintings, drawings and architecture works. Based on the scope of copyright-protected works, blueprints of buildings, interior designs and marketing materials are also protected under copyright laws.

## VI DATA AND HOTEL TECH

In Thailand, personal data is protected by the Personal Data Protection Act B.E. 2562 (2019) (PDPA) which became fully effective on 1 June 2022. The PDPA provides comprehensive regulatory framework on the protection of personal information in Thailand.

Generally, a hotel operator in Thailand would act, and as such, qualify as a data controller, and thus, such hotel operator would be subject to the requirements under the PDPA regarding the collection, use and disclosure of personal data. Such requirements include the obligations to:

- a prepare records of processing activities; and

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<sup>5</sup> Decision of the Supreme Court No. 1223/2549.

- b* inform data subjects of details required under the PDPA, for example, (1) how their personal data will be collected and used by a data controller or a data processor, (2) whether their personal data will be disclosed to any third party, and (3) the data subject's rights in personal data.

### **Data protection in the Thai hotel sector**

As substantially influenced by Europe's General Data Protection Regulation (GDPR), the consent from each data subject (such as hotel customers) given to a data controller (such as hotel operators) for any type of data processing can be revoked by a data subject at any time (and without any cause). A data controller, therefore, needs to avail itself of other legal bases on which a data controller can process personal data in light of its business without any consent; examples of such other legal bases include a legitimate interest. The PDPA also substantially adopts the tests of the legitimate interest basis guidelines in accordance with the GDPR.

Because the hotel operation (almost) inevitably involves multiple transfers of customers' data whether to other data controllers or data processors or to intermediaries or platforms for both operational and marketing purposes (including reservations), the implementation of the PDPA practically obligates all hotel operators in Thailand to rely on legal bases other than the consents (e.g., a legitimate interest) and to re-evaluate all data-related touch points and data processing to ensure full compliance with the PDPA and its subsidiary rules. Accordingly, given the more cumbersome requirements, greater corresponding cost and expenses are to be borne by hotel owners.

## **VII FRANCHISING OF HOTELS**

Hotel franchising is not uncommon in the Thai hotel sector. There is no specific regulation regulating a franchise arrangement in Thailand. That is, a franchise arrangement is subject to the Civil and Commercial Code, laws relating to intellectual property rights (as discussed above) and other general laws, such as the following.

### **i Unfair Contract Terms Act B.E. 2540 (1997)**

In general, a franchisor would have its own standard franchise agreement that a franchisee can execute straight away. Depending on the bargaining power of a franchisee, a franchisee may be able to negotiate or change only certain terms of such standard franchise agreement. As such, subject to guidelines stipulated in the Unfair Contract Terms Act, the Thai court would have discretionary power to determine any unfair and unreasonable term under the standard franchise agreement. Any term that is unfair and unreasonable in the Thai court's view would be enforceable only to the extent that such term is fair and reasonable. For example, a contract term would be unfair if it exempts or limits a franchisor's liability arising from a breach of contract or renders greater performance or imposes greater burden on a franchisee.

### **ii Trade Competition Act B.E. 2560 (2017)**

Effective from February 2020 onwards, the Office of Trade Competition Commission has published a notification on the criteria to determine any unfair trade practice in the franchise business. The purpose of such notification is to promote freedom and fairness in franchise business and to protect franchisees from any damage caused by franchisors.

## **VIII HOTEL MANAGEMENT AGREEMENTS**

Similar to a franchise arrangement, there is no specific regulation regulating a hotel management agreement. The Civil and Commercial Code and other general laws (including laws relating to intellectual property rights and employment) would apply to a hotel management agreement.

Similar to the hotel management agreements in other jurisdictions, the hotel management agreements customary in Thailand would normally govern:

- a* funding requirements imposed on the hotel owners;
- b* hotel renovation or refurbishment;
- c* hotel operation (including the applicable waterfall);
- d* non-interference by the hotel owners or non-disturbance by the relevant lenders or creditors; and
- e* rights and entitlements of the hotel owners (including reserved matters that need to be deferred to the consideration of the hotel owners).

It is noteworthy that, in the past, hotel owners did not place as much emphasis on a 'performance guarantee mechanism' in the hotel management agreements as they do now. That is, unlike in the past, a manager-favoured hotel management agreement would not be easily accepted by a hotel owner. Many hotel owners would prefer not to let their respective hotel managers walk away with substantial amounts of management fees (and other fees) following a poor or under-expectation management performance. Therefore, the performance guarantee mechanism has become more controversial among the two sides, and sometimes ends up being a deal-breaker. In summary, even though many hotel owners in the Thai hotel sector would still accept a manager-friendly hotel management agreement, the trend is that they would not tolerate an unreasonable allocation of risks and rewards just because they would like their hotels to be managed by a well-known or global hotel manager.

The foregoing also supports why there are more and more hotel owners looking at the franchised hotel structure as an option to strike balance between the owner-operated hotel and managed hotel structures.

## **IX FINANCING**

Similar to international practice, a hotel owner would normally raise funds through equity financing or debt financing, or a combination thereof, from local or international players (or both).

### **i Equity financing**

Equity financing basically involves fundraising by offering shares to shareholders for subscription. Unlike a loan, a company will not need to repay the subscription price received from its shareholders. As a company would not have a repayment obligation, equity financing would not adversely affect a company's debt to equity ratio. However, if a shareholder does not want to lose its control, an equity financing may not be the most viable option as such a shareholder's voting and economic interests could be diluted as a result of the issuance of additional shares. Preference shares with, for example, fixed dividends are conceptually permitted under Thai law but are subject to certain restrictions.

## **ii Debt financing**

One of the most common (and arguably the cheapest) debt financing would be to obtain a so-called senior loan from a commercial bank. Generally, the types of loans involved in the Thai hotel sector include term loans and revolving loans. Commercial banks usually extend a revolving loan for working capital purposes, and a term loan for purposes other than working capital; for example, to pay for the land acquisition cost or the construction cost.

A loan used in the Thai hotel sector may be structured either as a project-level financing or as a corporate-level or sponsor-level financing, depending on the result of a feasibility study conducted by the relevant commercial bank.

Due to the covid-19 impacts, most hotels in Thailand are subject to a senior-lending position of the relevant commercial banks, who, given the debt holiday extended during the covid-19 pandemic, prefer not to extend additional amounts of loan. As a result, many hotel owners in Thailand are considering debt financing at the stretched-senior and mezzanine levels (most likely from offshore players, such as private equity funds) to obtain the operational funding they seek.

## **iii Security package**

In practice, a common security package would include the following:

- a* mortgage over project land (on which a hotel is located) and hotel building;
- b* pledge of shares in a hotel owner by its shareholders;
- c* business security over accounts receiving revenues from the hotel operation;
- d* business security over or conditional assignment of contracts or insurances relating to the hotel operation; and
- e* corporate guarantee by a parent company or personal guarantee by a director or major shareholders of a hotel.

In addition to the security package, a lender would normally require step-in rights to, either by itself or its designee, take over and continue to operate the underlying hotel to maximise the revenue, in parallel with the enforcement of all or select security interests. Accordingly, unless the commercial bank foresees that neither the commercial bank itself nor its designee can operate the hotel in a more profitable manner than the hotel manager (with whom the hotel owner has entered into the hotel management agreement), the bank would prefer not to subject itself to any non-disturbance agreement proposed by the hotel manager.

## **X EMPLOYMENT LAW**

### **i Employment trends in the Thai hotel sector**

In all existing structures for the hotel operation in the Thai market, a hotel owner would be the employer of hotel employees. For example, for a managed hotel, from most hotel management agreements, even though a hotel manager would act to hire hotel employees, a hotel owner would take an employer role and assume all statutory and other obligations toward each hotel employee as an employer.

From our observation (as an up-to-date, reliable survey is not yet available in our view), the hiring trend is leaning toward local employees. Notwithstanding such observed trend, the senior hotel managers of most internationally branded hotels in Thailand are still foreigners.



## **ii Relevant regulations**

The Civil and Commercial Code, the Labour Protection Act B.E. 2541 (1998) and the Social Security Act B.E. 2533 (1990) are the main regulations that govern labour matters and regulate relationship between an employer and an employee.

Under the Labour Protection Act, the employer having at least 10 employees must prepare work rules for its employees. The work rules shall cover at least the following issues:

- a* working days, normal working time and rest periods;
- b* holidays and rules for taking holidays;
- c* rules governing overtime and holiday work;
- d* the date and place for payment of wages, overtime pay, holiday pay and holiday overtime pay;
- e* leave and rules for the leave taking;
- f* disciplines and disciplinary actions;
- g* lodging of grievances; and
- h* termination of employment, severance pay and special severance pay.

Under the Social Security Act B.E. 2533 (1990), the employer shall contribute funds to the Social Security Fund at the rate specified by the Ministry of Labour. Such funds will be used to compensate employees for, among others, any injury, sickness, unemployment and death of employee.

In addition, based on the number of employees, the employer may have to comply with other relevant labour regulations (e.g., the Workmen Compensation Act B.E. 2537 (1994), the Skill Development Promotion Act B.E. 2545 (2002) and the Empowerment of Persons with Disabilities Act B.E. 2550 (2007)).

## **iii Termination and unfair dismissal**

If the employer terminates any employment, such employer must give notice to a terminated employee at least one full period of salary payment (but not more than three months). In addition, the employer is obligated to make mandatory payments to each terminated employee. Such mandatory payments consist of:

- a* payment in lieu of advance notice of termination – if the employer would like to immediately terminate the employment;
- b* severance payment – the rate of the severance payment depends on the employment period of each such terminated employee;
- c* unutilised annual leave; and
- d* unpaid overtime payment.

The employer may terminate any employment without paying any severance pay to a terminated employee if such terminated employee:

- a* dishonestly performs his or her duties or intentionally commits a criminal offence against the employer;
- b* intentionally causes damage to the employer;
- c* commits gross negligence that causes serious damage to the employer;
- d* violates work rules, work regulations or lawful orders of the employer and the employer has already issued a warning letter to such terminated employee, except for a serious violation for which no warning letter is required;

- e* is absent from work for a period of three consecutive working days without reasonable cause; or
- f* is sentenced to imprisonment by a final court judgment.

Following the employment termination, a terminated employee may submit a claim with the Labour Court claiming that the employer has unfairly terminated the employment. In such a case, the employer would have to prove to the Labour Court's satisfaction that the employer has suffered loss or damage from such terminated employee's actions.

In the worst-case scenario, if the Labour Court were to rule against the employer, the Labour Court would impose the employer to pay to a terminated employee severance pay and damages resulting from the unfair dismissal. In such worst-case scenario, the Labour Court would practically award the damages resulting from the unfair dismissal based on the employment period (i.e., a number of years of employment) of each terminated employee.

## **XI DISPUTE RESOLUTION AND MANAGEMENT**

Modes of dispute resolution for the Thai hotel sector are similar to other business sectors – courts, mediations and arbitrations. The parties usually select a mode of dispute resolution for the relevant transaction during the documentation stage.

In practice, the parties usually agree to resolve disputes relating to or involving business operation by way of arbitration. This is because, while a court proceeding for the court of first instance in Thailand may take up to approximately three years (depending on, among other things, complexity of the case, a number of witnesses) and evidence presented and availability of the relevant court), an arbitration proceeding may take only six months (the proceeding and arbitral award of which are generally recognised by the Thai court). In some cases, the parties may decide to resolve disputes using foreign law, a foreign court or foreign arbitration.

### **i Recognition of foreign judgment**

A judgment rendered by a non-Thai court would not be enforced by the Thai court without a re-examination of the merits of the case. A foreign judgment will only be accepted as evidence if duly authenticated and translated into the Thai language. Thailand does not have domestic legislation governing the enforcement of a foreign court's judgment or reciprocity of enforcement of a foreign court's judgment.

### **ii Recognition of foreign law**

If an agreement is governed by foreign law, the choice of such foreign law would be upheld by the Thai court as a valid choice of law, and thus, would be applied by the Thai court in any proceeding brought in Thailand, provided that:

- a* the relevant provisions of foreign law are proven to the satisfaction of the Thai court (within the absolute discretion of the relevant Thai court); and
- b* such foreign law is not contrary to: (1) any law of Thailand relating to the public order or good morals of the people of Thailand; and (2) the public order or good morals of the people of Thailand. The scope of the public order or the good morals of the people of Thailand has not been definitively established.

### **iii Recognition of a foreign arbitral award**

Alternatively, the parties may consider choosing arbitration as a mode of dispute resolution, as opposed to the courts (either in Thailand or in other countries). This is because Thailand is a contracting state (without reservation) to the New York Convention and domestically implements the New York Convention. Under the Arbitration Act B.E. 2545 (2002), foreign arbitral awards will be recognised as binding on the disputing parties and, upon petition by the party seeking enforcement, will be enforced by the Thai court if the award was made in a country that is also a contracting state to the New York Convention. Therefore, compared to a judgment rendered by a non-Thai court, foreign arbitral awards made in another contracting state to the New York Convention carry greater weight in Thailand.

To enforce a foreign arbitral award, the enforcing party must comply with requirements under the Arbitration Act by, among others, applying to the Thai court to enforce such arbitral award within three years of the date on which the award becomes enforceable.

Even though there are certain exceptions which the Thai court may invoke in order not to enforce a foreign arbitral award, due to Thailand's commitment to the New York Convention, in practice, the Thai court would apply any such exception in a restrictive manner. Accordingly, the risk of the Thai court denying to enforce a foreign arbitral award should be substantially lower than the risk of the Thai court disagreeing with a foreign court's judgment.

## **XII OUTLOOK**

The return of Thailand's hotel sector post covid-19 is interestingly attracting many foreign participants (including lenders and investors). Despite certain legal hurdles that may result in insufficient flexibility in terms of investment or financing structure, the potential growth of the hotel sector (hence, potentially greater returns) outweighs the regulatory obstacles. Following a significant number of financing transactions being extended to hotels in Thailand in 2022, we anticipate the full-scale operation and greater occupancy rate of the Thai hotels (especially in many tourist destinations across Thailand), and thereafter, a greater number of hotel-related M&A transactions later this year or the following year. In a nutshell, when compared to other jurisdictions in the region, our observations indicate that the price of properties in Thailand (including hotels) is becoming quite reasonable, and thus, we anticipate that in the next 18 months, the Thai hotel sector will see more transactions in financing, M&A and development levels.



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