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Beating the Legislation Lag: The Dynamic Development of Thailand's e-Commerce Industry
International Immersion Program 2018 – Thailand
The University of Chicago Law School
Tarra Theisen

In November 2014, Uber – the popular ride-sharing app with 40 *million* monthly active riders – was declared illegal by the Thai government.¹ Citing concern for Uber's low rates that were undercutting the local taxi market, Thailand's Department of Land Transport raised a myriad of concerns: Uber vehicles were not properly registered, drivers were not properly licensed, the transactions were unsecured, and the platform discriminated against people who did not possess credit cards.² Drivers thereafter faced a maximum 4,000-baht (approximately \$125) fine if caught by police.

The development of the Internet and other information-sharing devices has revolutionized how many experience modern society. From ridesharing and food delivery applications on mobile devices to the explosion of social media networks, new advances in technology are helping people to streamline processes and disseminate information in an unprecedented way. Such change – though not always viewed as a positive – is also affecting how developing nations are approaching economic growth and evolution. Sometimes, as with Uber, the interplay of new technologies with existing cultural norms and traditions leads to interesting conversations.

¹ "Uber Now Has 40 Million Monthly Riders Worldwide." *Fortune*. 20 Oct. 2016. Retrieved 30 May 2018. <http://fortune.com/2016/10/20/uber-app-riders/>.

² "Uber declared illegal in Thailand." *Bangkok Post*. 28 November 2014. Retrieved 30 May 2018. <https://www.bangkokpost.com/news/general/445978/uber-declared-illegal-in-thailand-drivers-face-heavy-fines>.

This paper will explore some recent advances in the Thai statutory framework surrounding electronic commerce (e-commerce) and the use of technology by the state. Given Thailand's governmental structure (currently under the guidance of the NCPO), it is an excellent example of a state that can enact legislation quickly in response to evolving technological advances.

I. What is E-Commerce?

Under Thai law, electronic commerce (e-commerce, for short) is defined as “the dispatch and/or receipt of a data message by electronic means to conclude a commercial transaction.”³ This often constitutes the online trading of goods and services.

Thailand is reported to be one of the fastest-growing e-commerce markets in Southeast Asia, following only Indonesia in terms of market size. Terence Pang, CEO of Singapore-based e-marketplace Shopee, recently noted that Thailand's e-commerce market is projected to total \$3.5 billion USD in 2018.⁴ This growth is being both recognized and capitalized upon by the Thai government, who sees an opportunity for both domestic and foreign entrepreneurs to buy in to Thailand's Internet economy.

As such, the government has sought to create an attractive investment climate for e-commerce to grow. Businesses seeking to participate in e-commerce within Thailand must

³ “Seven requirements for e-commerce businesses in Thailand.” *Pugnatorius*. 24 March 2018. Retrieved 30 May 2018. <https://pugnatorius.com/e-commerce/>.

⁴ Peng also noted that 39% of sales will be through mobile devices, highlighting not only the growth of the e-commerce market but also the mobile commerce (m-commerce) market. “Lagging e-commerce spending inches up in Thailand.” *South China Morning Post*. 20 Feb. 2018. Retrieved 30 May 2018. <http://www.scmp.com/news/asia/article/2133941/lagging-e-commerce-spending-inches-thailand>.

apply for an e-commerce business license, which requires compliance with security standards promulgated by the Bank of Thailand (BOT).⁵ The government has also adopted other security measures, like verified website trust marks akin to the https:// standard. These all function to provide a safe online shopping platform for Thai consumers.

II. Governmental Policy Initiatives

The Thai government has increasingly included the development of technology infrastructure as part of overarching economic policies and goals. One such policy initiative – aptly termed “Thailand 4.0” – is framed as an “economic model that...unlock[s] the country from several economic challenges resulting from past economic development models.”⁶ The Royal Thai Embassy in Washington, D.C. notes that such challenges include an inequality trap and a middle-income trap, common concerns of a developing economy.

There are four main objectives of Thailand 4.0:

1. Increase economic prosperity;
2. Emphasize social well-being;
3. Raise human values; and
4. Encourage environmental protection.⁷

Included within these goals is a pervasive notion of increasing technological competence amongst Thai producers and consumers alike. Sub-goals highlight an emphasis on creating a

⁵ “Royal Decree Regulating Electronic Payment Services.” *Bank of Thailand*. 17 Aug. 2008. Retrieved 30 May 2018.

https://www.bot.or.th/English/AboutBOT/LawsAndRegulations/SiteAssets/e_payment.pdf.

⁶ Past iterations of this policy include Thailand 1.0 (agriculture), Thailand 2.0 (light industry) and Thailand 3.0 (heavy industry). “Thailand 4.0.” *Royal Thai Embassy, Washington DC*. 7 June 2015. Retrieved 30 May 2018. <http://thaiembdc.org/thailand-4-0-2/>.

⁷ *Id.*

“value-based economy that is driven by innovation, technology and creativity,” and developing an inclusive society where Thais are “transform[ed]...into ‘[c]ompetent human beings in the 21st[] [c]entury.”⁸ Stated benchmarks include increasing research and development expenditure to 4% of GDP by 2032 and transforming at least 20,000 households into “Smart Farmers” by 2020.⁹

Beneath the overarching policy level lies an interconnected network of ministries and agencies that work together to achieve stated goals. Though the BOT acts as the central regulatory body overseeing the development and enforcement of e-commerce laws, an amalgam of other ministries and departments are involved in thinking about how to structure future economic growth.

The Ministry of Digital Economy and Society (MDES; formerly known as the Ministry of Information and Communication Technology) was originally founded in 2002 as the cabinet responsible for aggregating technology policy.¹⁰ The MDES heads agencies including the Electronic Transactions Development Agency and the National Statistical Office of Thailand. The MDES’s mission is to inform national policy on digital development, to manage Thailand’s telecommunication network, and to promote and support the business sector’s use of digital technology and innovation. They are currently planning on creating a cybersecurity agency and hacker training center to keep abreast of evolving counter-terrorism and technology strategies.

⁸ *Id.*

⁹ *Id.* For an explanation of Smart Farming, see <https://www.smart-akis.com/index.php/network/what-is-smart-farming/>.

¹⁰ “About MDES.” *Ministry of Digital Economy and Society*. 30 May 2018. Retrieved 30 May 2018. <http://www.mdes.go.th/view/10/home#>.

The Ministry of Finance (MOF) is also involved in the development of a national e-commerce system. In our meeting with the MOF, we discussed how e-commerce will be a boon for the ministry from a recording and collections perspective. Prior to the development of an online marketplace, it was difficult to maintain records of all transactions (which were often conducted without electronic software or with cash). This affected the government's ability to trace transactions for monitoring purposes and to collect relevant taxes on given exchanges. E-payments are useful because they produce a traceable electronic record, thus overcoming tracing issues and making tax collection more efficient.¹¹

In thinking through the application of such a policy and how to best develop enforcement infrastructure, one interesting area of development involves the taxation of foreign businesses. The Thai Revenue Department, an agency under the MOF, recently drafted legislation that would address the issue of taxing foreign (non-Thai) businesses who "may not have a presence in Thailand under domestic rules," but who may conduct online transactions in the growing online marketplace.¹² An initial draft released in 2017 intended to impose a new subset of taxes on foreign operators who met a certain set of criteria related to business

¹¹ "The Thai Revenue Department Introduces a New E-Commerce Tax Law." *Baker McKenzie Insight*. 7 July 2017. Retrieved 30 May 2018. <https://www.bakermckenzie.com/en/insight/publications/2017/07/thai-revenue-department-introduces-new-ecommerce>.

¹² "Thailand: New draft legislation on e-commerce taxation." *KPMG*. 6 July 2017. Retrieved 30 May 2018. <https://home.kpmg.com/xx/en/home/insights/2017/07/new-draft-legislation-thailand-6-july-2017.html>. For more information regarding the Thai Revenue Department, see <http://www.rd.go.th/publish/6001.0.html>.

conduct. However, an amended draft released in February 2018 proposes to bring e-commerce transactions within the scope of existing VAT infrastructure.¹³

The Ministry of Commerce (MOC) largely conceptualizes and understands e-commerce from a multinational trading perspective. In our meeting with the MOC, we discussed Thailand's role in ASEAN, a regional economic community in South East Asia, and AEC, the ASEAN Economic Community. The AEC develops a blueprint of stated policy goals that are continually updated to reflect regional economic goals. 2025 goals include developing:

1. A highly integrated and cohesive economy;
2. A competitive, innovative and dynamic ASEAN;
3. Enhanced connectivity and sectoral cooperation;
4. A resilient, inclusive, people-oriented and people-centered ASEAN; and
5. A global ASEAN.

As expected, these regional goals align nicely with the stated goals of Thailand 4.0. The MOC is committed to Thailand's efforts within ASEAN, likely thinking about positioning Thailand as a regional leader within the e-commerce and technology space. Example initiatives include developing infrastructure within the Thai telecommunications industry and supporting public/private partnerships to fund such infrastructure development. The MOC has also highlighted ten industrial areas for special attention and promotion as Strategic Economic Partnerships with other nations, which involve preferential trading rights in certain industries like robotics and smart electronics.

¹³ "Thailand: Revised legislative proposals, VAT and foreign e-commerce transactions." *KPMG*. 23 January 2018. Retrieved 30 May 2018.
<https://home.kpmg.com/xx/en/home/insights/2018/01/tnf-thailand-revised-legislative-proposals-vat-and-foreign-e-commerce-transactions.html>.

Finally, the National Council for Peace and Order (NCPO) and the Prime Minister recently established a variety of reform mechanisms to check corruption and ensure ministries' compliance with stated policy initiatives. One of these mechanisms is the Office of Law Reform Commission of Thailand (OLRCT), which is tasked with developing action plans and procedures for national reform on issues including politics, economics, and mass communication and information technology (among others).¹⁴ Within IT specifically, one reform goal is to develop an IT system for public access.

The development of e-commerce and technology policy within Thailand has led to the development and adoption of few key pieces of legislation. In sum, these laws aim to facilitate private sector involvement in the evolving e-commerce space while creating an infrastructure that supports an equitable information-sharing society for Thai citizens and consumers alike.¹⁵

III. Core E-Commerce Legislation in Thailand

a. Electronic Transactions Act (2001)

Originally enacted in 2001 and updated in 2008, the Electronic Transactions Act (ETA) is one of the core cyberlaws in Thailand. It was enacted to “provide legal recognition of electronic transactions by enabling them to have the same legal effect as that given to transactions made by traditional paper means.”¹⁶ This encompasses everything from the legal recognition of data

¹⁴ “About us.” *The Office of Law Reform Commission of Thailand (OLRCT)*. 30 May 2018. Retrieved 30 May 2018. <http://www.lrct.go.th/en/>.

¹⁵ “E-Commerce Law in Thailand.” *Thailand Law*, 16 June 2013. Retrieved 30 May 2018. <https://www.thailandlaw.org/e-commerce-law-in-thailand.html>.

¹⁶ “Laws Relating to Electronic Commerce.” *Thailand Journal of Law and Policy*. 1 Sept. 2013. Retrieved 30 May 2018. <http://www.thailawforum.com/articles/laws-and-policies-of-thailand-in-supporting-electronic-commerce-2.html>.

messages to the acceptance of electronic signatures and payments.¹⁷ It also outlines how online security measures should be implemented.

As with many other e-commerce laws in Thailand, the ETA was modeled off of international precedents. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce played an especially important role in the development of the ETA.¹⁸ Drawing on such precedents is an easy way for a developing nation like Thailand to efficiently match what other nations and leading industries are doing, thus creating a more equitable playing field with minimal legislative input cost.

b. Computer Crime Act (2007)

The Computer Crime Act (CCA) builds on the foundation developed by the ETA and defines three types of computer-related offenses punishable by either imprisonment or a fine. Offenses are statutorily divided into: (i) offenses related to computer systems; (ii) offenses related to computer data; and (iii) offenses related to providing tools used in committing a computer crime.¹⁹ The CCA ultimately acts as a consumer-protection mechanism and as a signal to the greater market that the Thai e-commerce platform is safe, secured, and effectively monitored by the state apparatus.

¹⁷ "Doing business in Thailand: E-commerce." *Practical Law*. 1 Nov. 2016. Retrieved 30 May 2018. <https://us.practicallaw.thomsonreuters.com/5-500-7895>.

¹⁸ "Review of e-commerce legislation harmonization in ASEAN." *United Nations*. 1 Mar. 2013. Retrieved 30 May 2018.

http://www.galexia.com/public/research/assets/unctad_asean_ecommerce_review_2013/unctad_asean_ecommerce_review_2013-THAILAND.html#Heading141. For more information on UNCITRAL and this Model Law, see

<https://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/history.background.html>.

¹⁹ *Id.*

Interestingly, the CCA imposes strict obligations (and concurrent liabilities) on internet service providers (ISPs). One such obligation is that ISPs must store transmitted computer traffic data for at least 90 days *and* be able to adequately identify the service users who transmitted such information.²⁰ These stringent data retention requirements and obligations are drafted as an incentive for ISP cooperation with Thai law enforcement.²¹

Analogous to the ETA, the CCA's key provisions are modeled after an international framework: the Budapest Convention on Cybercrime. This is not to say, however, that Thailand lacks the capability to individualize inherited templates and models. In December 2016, for example, the Thai National Legislation Assembly passed an amendment to the Computer Crime Act (which officially became law in May 2017). The amendment addresses the growing threat of online infringement of copyrights, trademarks, and other forms of intellectual property by empowering certain officials to effectively to block computer data that infringes on their IP rights.²² This reflects a "renewed commitment by the Thai legal system to address problems related to the increased consumption and exploitation of online content."²³

²⁰ "Laws Relating to Electronic Commerce." *Thailand Journal of Law and Policy*. 1 Sept. 2013. Retrieved 30 May 2018. <http://www.thailawforum.com/articles/laws-and-policies-of-thailand-in-supporting-electronic-commerce-2.html>.

²¹ "Doing business in Thailand: E-commerce." *Practical Law*. 1 Nov. 2016. Retrieved 30 May 2018. <https://us.practicallaw.thomsonreuters.com/5-500-7895>.

²² "Amendment to the Thai Computer Crime Act: Benefits for Intellectual Property Rights Owners." *Baker McKenzie*. 27 Jan. 2017. Retrieved 30 May 2018. <https://www.bakermckenzie.com/en/insight/publications/2017/01/amendment-thai-computer-crime-act>.

²³ *Id.*

c. Payment System Act (2017)

The Payment System Act (PSA) is arguably the most dynamic of recent Thai legislation in the e-commerce arena. It aims to synthesize existing payment regulations while synchronizing them with international standards. It also allows structural flexibility to regulate any new payment systems that may emerge in the future.²⁴

The hallmark of the PSA is its implementation of a new categorization system for the licensing and registration of e-payment service providers. Classification is split into three types of payment types: (i) “Systemically Important Payment Systems”; (ii) “Regulated Payment Systems”; and (iii) “Payment Services”.²⁵ A “Systemically Important Payment System” refers to the main payment infrastructure established and operated by the BOT, often including high-value money transfers. A “Regulated Payment System” refers to any system that is the center of a smaller network (e.g., inter-institution fund transfer systems and payment card networks). A “Payment Service” refers to the provision of a payment tool or service (e.g., credit/debit cards and online bill pay).

The PSA infrastructure is administered hand-in-hand by the MOF and the BOT, with the MOF handling classification designation and the BOT issuing information regarding ongoing compliance requirements. Providers of types (i) and (ii) are required to obtain a new operating license from the MOF, in addition to registering with the BOT.²⁶ These new requirements are

²⁴ “The Payment System Act: New Age of Payment Regulatory Landscape.” *Baker McKenzie*. 27 Oct. 2017. Retrieved 30 May 2018.

<https://www.bakermckenzie.com/en/insight/publications/2017/10/payment-system-act>.

²⁵ *Id.*

²⁶ A limited licensing exception is allowed for systems and services that are testing out new technologies via a regulatory sandbox.

justified as a way to provide for a “stable and reliable e-payment ecosystem,” and they are expected to “facilitate the offering of many new and innovative payment services in Thailand.”²⁷

d. Personal Data Protection Bill

The development of these regulatory regimes and the related security-based rationales begs the question: what happens to all of this new consumer data, and who has access to it? Personal data security has been a hot-button topic worldwide, especially with the recent enactment of the General Data Protection Regulation (GDPR) in the European Union and companies’ attempts to achieve compliance. Unlike the stringent consumer protections offered by the GDPR, there is no analogous data protection legislation in Thailand. Though a draft law – the Personal Data Protection Act (PDPA) – is currently under consideration, it has been debated for over a decade.

The most recent draft of the PDPA includes an interesting update. Section 20 of the PDPA states that consent from a Data Subject is required for the collection of Personal Data, subject to the following exceptions:

1. For conducting research, statistical analysis, or for the public interest, and the data is kept confidential;
2. For preventing emergencies or protecting others from danger;
3. From publicly available information;
4. In compliance with the law;
5. For other reasons as further prescribed by the Commission [NCPO];
6. For the public interest or in the exercise of a government authority, which is the Data Controller, provided that it does not violate the fundamental rights and freedom of the Data Subject; and

²⁷ “Thailand’s Payment Systems Act 2017: Electronic Payments and Bankruptcy.” *Tilleke & Gibbins*. 29 Nov. 2017. Retrieved 30 May 2018.
<https://www.tilleke.com/resources/thailand%E2%80%99s-payment-systems-act-2017-electronic-payments-and-bankruptcy>.

7. For the legitimate interests of the Data Controller or a third party, provided that it does not violate the fundamental rights and freedom of the Data Subject.²⁸

The extremely broad drafting of these exceptions poses numerous questions and concerns regarding the protection of Thai consumers' information. If the PDPA were to be enacted as drafted, it would leave open a tremendously large loophole for the government authority to retain swaths of consumer information for a "public" or otherwise "legitimate" purpose. Especially when considered in conjunction with other legislative obligations – like the CCA's onerous data retention requirement for ISPs – one may question the security structure that is being developed for the Thai e-commerce platform.

Only time will tell how Thailand chooses to implement privacy legislation for consumers. As of now, data protection policy guidelines for state agencies are modelled on OECD Privacy Guidelines.²⁹ Privacy principles also arguably underlie preexisting laws like the Official Information Act of 1997 and the Telecommunications Business Act.

IV. Impact on Thai Consumers

Privacy concerns aside, the other looming question regarding the development of new e-commerce regulations is how it will impact everyday Thai citizens and consumers. Though Thailand has historically been a cash-based economy, there has been a recent push towards e-

²⁸ "Thailand: Update on the Latest Draft of the Personal Data Protection Act." *Tilleke & Gibbins*. 13 Mar. 2018. Retrieved 30 May 2018. <https://www.tilleke.com/resources/thailand-update-latest-draft-personal-data-protection-act>.

²⁹ "Review of e-commerce legislation harmonization in ASEAN." *United Nations*. 1 Mar. 2013. Retrieved 30 May 2018. http://www.galexia.com/public/research/assets/unctad_asean_ecommerce_review_2013/unctad_asean_ecommerce_review_2013-THAILAND.html#Heading141.

commerce from the *consumer* side as Thai citizens and foreign tourists demand easier e-payment options to buy goods and services throughout the country.³⁰ Over the past few years, initiatives from both the Thai government and private parties have sought to meet this increasing demand.³¹

One example of such a service highlights an interesting phenomenon within the Thai economy: consumers' desire to engage in the e-commerce economy utilizing predominantly *mobile*-based technology. As *The Star Online* recently reported, there will soon be a new nationwide e-payment system utilizing QR codes operated by five commercial banks. The BOT recently approved the system, which was beta-tested in Bangkok's Chatuchak Sunday market. There, small vendors like motorcycle taxis accepted payment from customers using mobile devices. *The Star* notes that, "[T]he platform is a crucial element of Thailand's emerging digital economy and society in which the lifestyle of consumers increasingly is closely tied to mobile phones and other smart devices."

As highlighted by Thailand 4.0 and the AEC's 2025 blueprint, building out access for *all* Thai citizens is an important development goal. The rising use of mobile devices highlights a reality of many developing and developed nations regarding the limited reach of existing physical infrastructures: it is often too costly to build out physical cables and wirelines to more rural regions. To address this issue, the Thai government has announced a new facet of the Pracha Rat Project: a plan under the MDES to recruit at least 1,000 trainers to create "national

³⁰ "Nationwide push for cashless society in Thailand. *The Star*. 8 January 2018. Retrieved 30 May 2018. <https://www.thestar.com.my/business/smebiz/2018/01/08/nationwide-push-for-cashless-society-in-thailand/>.

³¹ One example, PromptPay, was launched last year by the Thai government as a way to initiate small, domestic bank transfers.

broadband villages.”³² These trainers will educate people in nearly 25,000 villages across Thailand on how to use information communication technology (ICT). The *Bangkok Post* heralds this project as a joint effort of over twenty ministries to “help villagers increase their income and boost the local economy by using e-commerce marketplaces called e-village projects.”³³ Such initiatives, if successful, could pave the way for future streamlined technology buildout in the future, and could serve as one mechanism to bridge the urban/rural social and cultural divide.

Such a divide is poignantly felt with regard to the current structure of Thai politics. Since the NCPO’s rise to power in 2014 (overthrowing what many believed to be a corrupt party platform), they have reorganized many bureaucratic functions of the state apparatus and are currently drafting a new national Constitution (such a Constitution will be Thailand’s twentieth). In our meeting with Mr. Vejjajiva, current leader of the Democratic Party and former Prime Minister of Thailand, we discussed how technology is a powerful tool not only for economic development but also for the maintenance of political power. Mr. Vejjajiva noted how the Democratic Party is attempting to utilize a mobile phone application to assist with new voter registration laws, but open concerns remain regarding the validity of the e-signatures and e-payments collected via the platform.³⁴ This is but one example of how political institutions – on both sides of the ideological aisle – can utilize technology to respond to changing circumstances.

³² “Digital Ministry plans cybersecurity agency.” *Bangkok Post*. 11 Jan. 2018. Retrieved 30 May 2018. <https://www.bangkokpost.com/business/news/1393674/digital-ministry-plans-cybersecurity-agency>.

³³ *Id.*

³⁴ *Id.*

V. Conclusion

Recent advances in Thai legislation and Thailand's regulatory structure have positioned the country to become a regional leader in the e-commerce industry. Utilizing common international precedents, Thailand has quickly developed a working framework to safely develop an infrastructure for online consumerism. However, the development of such a framework may come at some costs: namely, the inclusion of *all* Thai citizens and a framework that achieves a healthy balance of privacy and governmental oversight. How Thailand elects to grow and evolve moving forward will reflect the government's perspective on how important such a balance is for the country's short- and long-term success.