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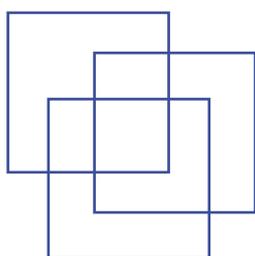


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Regulating recruitment of migrant workers:

An assessment of complaint mechanisms in Thailand



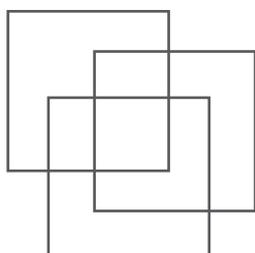
Tripartite Action to Protect the Rights of Migrant Workers
within and from the Greater Mekong Subregion
(GMS TRIANGLE Project)

Asian Research Center for Migration, Institute of Asian Studies,
Chulalongkorn University



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Foreword

Complaints relating to the recruitment of migrant workers have been documented by the Royal Thai Government and non-governmental organizations for many years, but few studies have been able to review the data related to outcomes of complaints and bring together interview research with legal analysis. This report, *Regulating Recruitment of Migrant Workers: An Assessment of Complaint Mechanisms in Thailand* achieves this, filling a vital gap in the understanding of the operation of complaints mechanisms for migrant workers in Thailand.

The report finds that the complaint mechanisms available for inbound and outbound migrant workers to address grievances related to their recruitment into work in Thailand are complex and are often inadequate. While the system is more comprehensive for outbound Thai migrant workers, challenges remain in providing for fair hearing and resolution of grievances. These challenges are further exacerbated for inbound migrant workers, as the current system was not designed specifically to address issues affecting inbound workers. Coordination with the criminal system and judiciary is not clearly defined and investigation of brokers remains difficult within the framework of the mechanisms available.

Through increased understanding of the process for lodging complaints, and the obstacles to access and just outcomes that occur for migrant workers attempting to navigate the system, policy-makers, service providers, non-governmental organizations and employers will be better able to make informed adaptations of policies and programmes. This report contributes to the evidence-base for what can be done to alleviate exploitation and abuse in economic sectors with significant proportions of migrant workers through providing mechanisms for complaints and related modifications to regulating recruitment practices.

The Asian Resource Center for Migration (ARCM) is hosted by Chulalongkorn University's Institute of Asian Studies and has been an important partner in migration research in Thailand for many years. The dedication shown by the researchers for this report demonstrate why ARCM is a leading research institute for migration issues.

The drafting of this report has only been made possible due to the longstanding and strong relationship between the Ministry of Labour in Thailand and the ILO. The ILO's GMS TRIANGLE project is grateful for the ongoing collaboration of the Ministry of Labour and the commitment to an independent analysis of government policies and processes related to recruitment complaints.



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This study has been prepared under the framework of the project 'Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion' (GMS TRIANGLE project). Views expressed in this report are those of the authors and contributors and do not necessarily represent those of the ILO or GMS TRIANGLE funding partners.

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We believe that this report provides useful recommendations for further policy development of more inclusive, effective and fair mechanisms for resolving migrant workers' grievances during the recruitment process.

Asian Research Center for Migration

Executive summary

Introduction

Labour migration has emerged as an important factor for sustaining the growth trajectory of economies in the Greater Mekong Subregion as well as alleviating the incidence and severity of poverty suffered in many areas. Over the past two decades, there has been a significant shift in migration patterns towards increasing levels of intraregional labour migration flows.

Thailand has been at the centre of economic development in the Greater Mekong Subregion and is also the major receiving country within the region. Estimates indicate that Thailand currently hosts as many as 3 million migrant workers within its borders (Huguet et al., 2011, p. 9). The majority of these migrants are low-skilled workers who are employed in the “3D jobs” (dirty, dangerous and demeaning) at wage levels lower than those paid to nationals.

The demographic transformation of Thailand has led to an older and better educated workforce increasingly unwilling to accept work in 3D jobs. This has necessitated the large-scale recruitment of workers from Cambodia, Lao People’s Democratic Republic and Myanmar, many of whom become vulnerable to labour exploitation.

At the same time, 450,000–600,000 Thai nationals are working abroad, frequently via recruitment by lightly regulated private employment agencies (McDougall et al., 2011, p. 39). Although the profile of Thai migrant workers is different from that of inbound workers, many of the problems encountered are similar. Despite their somewhat higher skill level and the more developed framework of laws designed to protect them, the potential for exploitation remains substantial.

Considerable efforts have been made to establish a system for legalizing the status of migrant workers in Thailand and to protect the rights of outbound workers. However, these recruitment and regularization regimes have yet to fulfil their promise for instituting a safe and orderly labour migration process. There are gaps in the legal framework and the complaint mechanisms that leave both foreign and Thai migrant workers without access to legal remedies for unfair and illicit recruitment practices by private employment agencies and unlicensed brokers. The absence of a clearly established legal basis for resolving migrant worker grievances further exacerbates the vulnerability of migrants to exploitation and abuse during recruitment.

The Thai Government and ILO collaborating to strengthen migrants’ access to justice

The Department of Employment in Thailand’s Ministry of Labour has been working with the International Labour Organization (ILO) to improve the effectiveness, expand the coverage and strengthen the complaint mechanisms available to migrant workers as part of efforts to make the recruitment process safer. This includes evaluating the compensation process for complainants and punitive actions taken against recruitment malpractice.

The report *Regulating Recruitment of Migrant Workers* provides the findings of an analysis of the legal framework and the complaint mechanisms (in relation to international standards) for workers with grievances to seek redress – and puts forward recommendations for strengthening the system.

The research for the analysis was carried out between October 2011 and January 2012 in Bangkok and three provinces of Thailand where there is a large population of inbound or outbound migrant workers: Petchabun, Rayong and Samut Sakhon. Qualitative methods were used to collect data from research subjects, including government officials, experts and field staff of non-governmental organizations (NGOs) and law firms, staff of private employment agencies and current and returned migrant workers.

International standards for regulation of private employment agencies

Although private employment agencies were generally looked upon unfavourably and banned in many countries during much of the twentieth century due to their potential for abuse and exploitation of workers, the changes in labour markets that occurred over the past several decades led to a reassessment of the potential for private employment agencies to make a positive contribution. A new perspective on the function and regulation of employment agencies was established in international law under the ILO Private Employment Agencies Convention, 1997 (No. 181).

Convention No. 181 was developed to improve the efficiency of labour markets by providing guidance on how private organizations could contribute towards greater matching of the supply and demand of labour and by establishing programmes for partnership with public organizations to assist unemployed workers in re-entering the labour market. The Convention also provides for the regulation of private employment agencies to ensure fair practices and help prevent human trafficking and other forms of exploitation. Ratification of the Convention, however, has been limited so far to 27 countries globally; in 2011, Japan became the only ILO Member State in Asia to ratify Convention No. 181 (ILO, 2011a). Thailand has yet to indicate any plans to accede.

A major obstacle to the signing of the Convention for many of the countries in Asia is the clause that indicates that employers rather than workers should bear the costs of recruitment. Some governments have opted to establish ceilings for the amount that recruitment agencies can collect in service fees, with the rates usually calculated as a proportion of a worker's monthly wages rather than a fixed figure. Nevertheless, the costs involved can still be extremely high for workers due to excessive fees that the agencies charge, costly bureaucratic procedures and/or corrupt government officials.

Thailand's legal framework for regulation of migrant worker recruitment

The primary legislation for protecting migrant workers during the recruitment process is the Recruitment and Job-Seekers Protection Act (1985) and the attendant ministerial regulations of the Ministry of Labour. By regulating the involvement of private employment agencies in the recruitment of workers and providing legal protections to jobseekers, the law allows licensed agencies to offer employment services for outbound Thai migrant workers. The Ministry of Labour's Department of Employment is the agency mandated to enforce the Act.

However, the law has become somewhat outdated for the effective regulation of private employment agencies. Limitations contained within the provisions of the Act and inadequate enforcement have allowed for frequent offences and infractions to take place. In the rare cases in which penalties against offenders have been enforced, the most commonly imposed sanction has been a temporary license suspension of 30–120 days, followed closely by a probationary period against the offender. Between 2004 and 2010, only six private employment agencies actually had their license permanently revoked for recruitment-related offences – despite evidence of widespread malpractice within the industry (Chantavanich et al., 2010, p. 103; DOE, 2011).

Another problem with the Act is that it was drafted with the intent of protecting outbound Thai migrant workers before large-scale in-migration had begun to take place. As a result, there are no specific provisions related to the protection of foreign jobseekers during recruitment. A corollary has been that no clear procedures or institutional frameworks have been developed to provide protection for inbound migrant worker recruitment. Thus, many labour authorities interpret the law as only applying to Thai workers. Likewise, the related ministerial regulations that were enacted do not contain any specific provisions related to the establishment of recruitment protections for inbound migrant workers.

Complaint mechanisms for outbound migrant workers

There is an established process for handling complaints of outbound Thai migrant workers. Under this mechanism, the responsible authorities have clearly delegated mandates and procedures for carrying out their regulatory duties in cases against both licensed and unlicensed private employment agencies and brokers. In this respect, Thailand has most of the law enforcement structures in place for an effective system to respond to grievances filed by Thai migrant workers.

But significant obstacles and constraints exist within the complaint process, relating to how the actors involved mismanage, disregard or attempt to sabotage its procedures. These can be roughly categorized as impunity of offenders through patronage and corruption; circumvention of laws by private employment agencies and migrant workers; and bias, capacity and resource constraints among authorities enforcing the law. Structural problems, in the form of a lack of fair and impartial alternatives to hearings in criminal courts for the resolution of complaints, are also a considerable constraint on access to justice for migrant workers.

These concerns, when taken as a whole, pose a major obstacle to the ability of outbound Thai migrant workers to receive a just and fair hearing of their grievances regarding abuses during the recruitment process.

The Department of Employment's statistics reveal a steady decline in both the total amount of compensation paid by recruitment agencies and in the proportion of the amount requested that workers actually receive. When also considering the small number of punitive actions taken against recruiters in recent years, the picture assembled through the field research appears to be one of a dysfunctional regulatory system that is biased against workers and jobseekers.

Complaint mechanisms for inbound migrant workers

The field research for this study revealed that although regular inbound migrant workers are theoretically covered by the same protections as native workers under the Thai labour laws, in practice there are no consistently available channels for them to file recruitment-related complaints with the Thai labour authorities. Formidable obstacles and constraints exist for migrant workers to even attempt to access such complaint mechanisms, including a general lack of awareness, language barriers and concerns about contacting government authorities out of fear of retaliation from employers and agents.

As a result, the primary complaint mechanism that exists for workers migrating under the Memorandum of Understanding (MOU) established process is through the Thai "labour consulting agency" that recruited them. However, there are major obstacles to a fair hearing of grievances through this channel because these agencies have very clear conflicts of interest in such disputes and generally seek to resolve them as quickly and quietly as possible. The frequent involvement of such agencies in exploitive recruitment and labour practices also calls into serious question their ability to act as a fair arbiter in resolving migrant workers' grievances.

For the remainder of the regular migrant workers who registered during the Thai Government's last registration window or who have completed the nationality verification process, the only channels available for filing complaints are through a local NGO or the diplomatic mission of their country of origin. There are also limitations to the effectiveness of those channels in that NGO staff members have no authority to conduct binding negotiations with private employment agencies or employers on these matters. As a consequence, they are generally consigned to providing basic assistance in the form of mediation, interpretation or information services for resolving disputes. Likewise, officers at the embassy or consulate of migrant workers' country of origin have little relevant authority over such conflicts and tend to refer cases to the Thai labour authorities and even directly to the private employment agency involved to resolve complaints.

Overall, limited substantive effort appears to have been made by government authorities to establish an institutional mandate, develop standard operating procedures or conduct awareness-raising activities to make the official complaint mechanism widely available and accessible to inbound migrant workers.

Conclusion

The conclusion reached through this study's analysis of the available complaint mechanisms is that the existing mechanisms are inadequate for regulating recruitment of inbound migrant workers in Thailand. There is no systematically available legal channel for inbound migrant workers to register complaints about recruitment abuses.

Even though some legal specialists contend that the complaint mechanism available to Thai workers who are recruited for work overseas under the Recruitment and Job-Seekers Protection Act should be interpreted as applying equally to inbound migrant workers, there are barriers in access to justice in practice that render such an opinion largely academic in nature. In one province visited during the field research, the head of the Department of Labour Protection and Welfare expressed his understanding that foreign workers simply do not fall under their protection mandate.

In addition to the legal and institutional barriers revealed during the research, the migrant workers who were interviewed were extremely reluctant to seek redress for abuses they experienced during their recruitment due to fears of discrimination from authorities and retaliation by agents and employers. In general, the workers appeared to view their continued residence and employment in Thailand as dependent upon keeping a low profile and maintaining deferential relationships with those in charge. Only in cases in which their well-being was clearly threatened did some migrant workers say that they would consider making a complaint. But even in those dire circumstances, migrant workers would need to file their complaints through informal channels.

To make progress on regularizing labour migration to Thailand, a vital element must be establishing substantive legal protections for workers within official migration channels and ensuring compliance by local employers and authorities. Fair and accessible complaint mechanisms for recruitment malpractice are a critical tool for challenging the impunity of offenders to exploit and defraud migrant workers.

For outbound Thai migrant workers, the complaint mechanism provided under the Recruitment and Job-Seekers Protection Act remains only moderately effective at deterring or addressing abuses. Many of the obstacles and constraints to a fair hearing and resolution of grievances described in the report have now become well entrenched within the complaint process. As a result, out-of-court settlements that provide inequitable compensation are the norm and further punitive measures applied for unlawful practices are a rarity, leading to a culture of impunity within Thailand's recruitment industry.

Although the long-term solutions for reducing the vulnerability of both inbound and outbound migrant workers to recruitment abuses must include initiatives on poverty reduction and improving livelihood options in countries of origin, establishing effective complaint mechanisms under a legal framework that is based upon international labour standards will help to ensure the protection of the rights of jobseekers. Such mechanisms not only support the rights of workers to access justice and receive fair compensation but also act as an important deterrent against unlawful practices by employers and private employment agencies.

While accounting for the context-specific scale, activities and problems of the recruitment industry in Thailand as well as the capabilities of the Government to implement the policy effectively and systematically, the complaint mechanisms established should be based upon the principles of international labour law contained within the Private Employment Agencies Convention No. 181 and its companion Recommendation No. 188. The practical guidelines for the institution of recruitment complaint mechanisms documented within the *Guide to Private Employment Agencies*, the *Handbook on Establishing Effective Labour Migration Policies* and the Multilateral Framework on Labour Migration also provide essential insights and lessons that can be used to strengthen Thailand's regulation of migrant worker recruitment.

Recommendations

The results of the field research analysis were used to distil 31 recommendations for improving the complaint mechanisms in Thailand.

Recommendations for the recruitment complaint mechanism for *inbound* migrant workers include:

1. Amendment of the Recruitment and Job-Seekers Protection Act should include provisions that explicitly state that the complaint mechanism to address grievances during recruitment must be equally available for inbound migrant workers and should clearly designate the institution responsible for administering the mechanism on their behalf.
2. Standard operating procedures for handling grievances received from inbound migrant workers should be developed and distributed to all provincial Department of Employment offices.
3. Provisions within the amended Recruitment and Job-Seekers Protection Act should be added to ensure the right to fair compensation of foreign jobseekers for victimization during recruitment. The amounts provided in compensation should reflect the actual expenses paid and wages promised to workers during recruitment.
4. Access to justice for inbound migrant workers should be ensured by classifying discrimination, intimidation or retaliation for registering a complaint as a violation of the law, with appropriate sanctions in the form of fines, penalties and compensation imposed.
5. Accessibility of the complaint mechanism to inbound migrant workers should be facilitated through the provision of translation services.
6. Capacity building and awareness-raising trainings should be provided to government officials responsible for the administration of the complaint mechanism to ensure a systematic and non-discriminatory policy implementation process.
7. To act as an effective deterrent against abuses during the recruitment process, further amendment to the Recruitment and Job-Seekers Protection Act should include provisions for appropriately severe penalties and sanctions to be taken against private employment agencies that fail to comply with regulations on inbound migrant worker recruitment. Conversely, the amendments should also include incentives for good practice, such as reduced fees or administrative requirements.
8. A provision should be included within the amended Recruitment and Job-Seekers Protection Act that allows migrant workers who register a complaint the opportunity to change employers without losing their legal status to work.
9. Private employment agencies should be obliged to provide migrants with information on the procedures for filing complaints as part of the pre-departure training. In addition, the Department of Employment should provide orientation training during the registration process, which also contains this information.

Recommendations for the recruitment complaint mechanism for *outbound* migrant workers include:

1. The rigour of the orientation course for all migrant workers recruited for overseas employment should be increased to ensure their understanding of their rights under the Recruitment and Job-Seekers Protection Act. This should include additional information about how to access the complaint mechanism for airing of grievances. The current pre-departure training of five hours should be extended and the curriculum refined to cover common abuses and forms of exploitation as well as resources and procedures for obtaining remedy.
2. Accessibility to labour attachés should be ensured at overseas embassy locations in countries where Thai migrant workers have been deployed in significant numbers.

3. A fairly apportioned system of penalties for private employment agencies that violate the laws that govern their operations should be established to accurately reflect the severity of the acts of malpractice committed. This should be coupled with transparent procedures that ensure that penalties are meted out impartially.
4. Recruitment agencies and brokers should not be allowed to escape prosecution for alleged offences by settling out of court with complainants. The Department of Employment and law enforcement authorities should follow through with prosecution on criminal charges or imposition of licensing sanctions regardless of any compensation paid.
5. For more serious offences, severe sanctions in the form of suspending or permanently cancelling a license to operate, prison sentences of significant duration and punitive damage fines should be imposed. The Department of Employment and law enforcement authorities need to be more aggressive in pursuing stringent disciplinary action against private employment agencies that violate the law, particularly for repeat offenders.
6. Relevant ministries and departments should work collaboratively to develop a shared database for monitoring private employment agencies and brokers who have been accused or convicted of malpractice.
7. Penal sanctions for government officials and politicians implicated in fraud or corruption cases related to recruitment should be treated as particularly serious offences, with correspondingly higher penalties imposed.
8. Public officials directly involved with labour migration, as well their immediate family members, should be prohibited from possessing a financial stake in any private employment agency while they hold their office or position and for five years afterwards.
9. Measures should be enacted to prevent circumvention of recruitment laws by private employment agencies and jobseekers. Strict sanctions should be enforced against private employment agencies that provide recruiting services to jobseekers but coerce them into reporting to authorities that they have been recruited directly by the employer. The levying of a departure tax on migrant workers departing for work overseas without contracts approved by the Thailand Overseas Employment Administration channels should also be considered.
10. The amounts provided to workers in compensation for fraud, exploitation and other abuses should fairly reflect the actual expenses paid and wages promised to workers during recruitment.
11. Greater efforts should be made to monitor compensation amounts paid to workers in complaint cases against unlicensed recruitment agencies. Accurate statistics are currently lacking for these cases, despite the fact that they make up the majority of complaints filed.
12. A joint and solidary liability principle for private employment agencies recruiting workers for overseas employment should be enacted so that the THB5 million security deposit required for private employment agencies licensing can be seized to provide compensation in cases of violation of employment contracts by employers or other parties.
13. A study tour should be arranged for Department of Employment personnel and other relevant government officials to the Philippines Overseas Employment Administration and the National Labor Relations Commission of the Philippines to learn about some of the regional good practices for the regulation of private employment agencies in Asia.

Recommendations for the regulation of private employment agencies include:

1. Consider ratifying the ILO Private Employment Agencies Convention No. 181, which will assist with establishing international standards for the regulation of private employment agencies to ensure fair recruitment practices, and prevent human trafficking and other forms of exploitation.

2. There is a need to clarify the services permitted as well the policies and procedures for the regulation of Thai private employment agencies and their sending-country counterparts who recruit inbound migrant workers under the MOUs. The MOU process has crystallized an ongoing market for such services but no regulatory framework has been put in place to monitor and supervise their operations. If private employment agencies providing “consulting services” on the recruitment of inbound migrant workers are allowed to continue to do business, they should be required to follow the same registration, licensing and operating procedures as those recruiting Thai workers for employment overseas.
3. The recruitment process under the MOU agreements remains too expensive, complex and protracted to be effective at encouraging regular migration. As a result, the benefits of the agreements are currently flowing primarily to private employment agencies. To prevent their capture of the process, the role of agencies under the MOUs should be reduced and further rent-seeking activities under the policy prevented.
4. A fair and impartial administrative grievance procedure should be established to avoid the necessity of adjudication in criminal courts for lesser infractions while retaining the ability to enforce sanctions against private employment agencies found guilty of malpractice. Instituting a tiered system, including the option of arbitration by a genuinely independent authority, will provide a differentiated approach for resolution of complaints that will allow for greater accessibility to justice for workers as well as the more timely adjudication of cases.
5. The Department of Employment should increase its awareness-raising activities among responsible authorities and jobseekers about the methods used by disreputable private employment agencies to manipulate and deceive migrant workers.
6. A tripartite governing board for overseeing the regulation of private employment agencies should be created in Thailand, providing equal representation for the interests of government institutions, employers and workers when adopting regulatory policies and procedures.
7. There should be an increase in the types of media used for dissemination and the amount of information disclosed by the Department of Employment’s public registry of licensed private employment agencies. This should include providing full information about those agencies that have been suspended or who have had their licenses revoked for regulatory violations.
8. Funds should be provided to support NGO programming that facilitates greater access to justice for migrant workers through the use of complaint mechanisms.
9. Additional personnel should be recruited for monitoring activities and enforcement of laws governing the operation of private employment agencies, with thorough and ongoing training provided. These supplementary staff members should be used to increase the frequency of field audits of private employment agencies offices (including through unannounced monitoring inspections) as well as to reduce the backlog of complaint cases.

Acronyms and abbreviations

ADB	Asian Development Bank
ARCM	Asian Research Center for Migration
ASEAN	Association of Southeast Asian Nations
BOFE	Bureau of Foreign Employment
CIETT	International Confederation of Private employment Agencies
COMMIT	Coordinated Mekong Ministerial Initiative against Trafficking
DPLW	Department of Labour Protection and Welfare
DOE	Department of Employment
DOL	Department of Labour
GDP	gross domestic product
GMS	Greater Mekong Subregion
ILO	International Labour Organization
IOM	International Organization for Migration
Lao PDR	Lao People's Democratic Republic
MOFA	Ministry of Foreign Affairs
MOL	Ministry of Labour
MOU	memorandum of understanding
NGO	non-governmental organization
NLRC	National Labour Relations Commission
NV	nationality verification
NVC	Nationality Verification Center
OFWA	Office of Foreign Workers Administration
PEO	Provincial Employment Office
POEA	Philippines Overseas Employment Administration
POLO	Philippines Overseas Labor Office
PEA	Private Employment Agency
RTG	Royal Thai Government
SLBFE	Sri Lanka Bureau of Foreign Employment
TWG	Regional Thematic Working Group on International Migration including Human Trafficking
THB	Thai baht
TOEA	Thailand Overseas Employment Administration
TPIO	Temporary Passport Issuance Office
UN	United Nations
3D Jobs	dirty, dangerous and demeaning jobs

Chapter 1

Research approach

1.1 Introduction

Labour migration has emerged as an important factor for sustaining the growth trajectory of economies in the Greater Mekong Subregion as well as alleviating the incidence and severity of poverty suffered in many areas. Over the past two decades, there has been a significant shift in migration patterns towards increasing levels of intraregional labour migration flows. Economies and societies within the subregion have become increasingly integrated through flows of workers, capital, goods, services and information, with the scale and constitution of these flows becoming instrumental in shaping the region's development.

Thailand has been at the centre of economic development in the Greater Mekong Subregion and is the region's major destination for migrants, currently hosting an estimated foreign worker population of more than 3 million (Huguet et al., 2011, p.9). The majority of them are low-skilled workers who are employed in "3D jobs" (dirty, dangerous and demeaning) at wage levels lower than those paid to nationals (ADB, 2009). With Thailand's demographic transformation resulting in an older and better educated workforce, Thai workers have been increasingly unwilling to accept work in these types of jobs. This has necessitated the large-scale recruitment of workers from Cambodia, Lao People's Democratic Republic (Lao PDR) and Myanmar, many of whom become vulnerable to labour exploitation.

At the same time, some 450,000–600,000 Thai nationals work abroad (McDougall et al., 2011, p. 39), largely via recruitment by lightly regulated private employment agencies. The overwhelming majority of these workers are male (approximately 84 per cent) and are employed in construction, manufacturing and agricultural jobs (DOE, 2010). Although the profile of Thai migrant workers is fairly different from that of inbound workers from neighbouring countries, consisting of slightly more skilled workers who migrate to stronger economies in East and South-East Asia, the Middle East and other regions, many of the problems encountered are similar. Despite their somewhat higher skill level and the more developed framework of labour laws designed to protect them, the potential for exploitation and abuse of Thai migrant workers remains substantial.

The regulation of recruitment for both inbound and outbound migrant workers in Thailand is based upon the Recruitment and Job-Seekers Protection Act, first passed in 1968 and amended in 1985, 1994 and 2001. The law requires that private recruitment agencies that send Thai workers abroad must register and pay a deposit of 5 million Thai baht (THB) to the Ministry of Labour as a security against illegal recruitment practices (Ministerial Regulation No. 8, 1993).

Although the Ministry of Labour has proposed amendments to the law to include agencies that recruit foreign workers for positions in Thailand, they have yet to be enacted. Recent research shows that recruitment agencies frequently find ways to circumvent the legal recruitment process – even for Thai workers who are already covered by the provisions of the Recruitment and Job-Seekers Protection Act. Workers recruited by these agencies face the significant possibility of exploitation through such means as deception through the use of dual contracts, fraud through requests for fee payments for non-existent jobs and overcharging through unlawful commission and fee structures or amounts (Chantavanich et al., 2010).

Between 2004 and 2008, a total of 16,157 Thai workers filed grievances against registered and unlicensed recruitment agencies, with a total of THB1.07 billion in compensation requested. However, less than 35 per cent of this amount was actually paid to the complainants, and only 63 recruitment agencies received any further disciplinary action as a result of their unlawful recruiting practices (Chantavanich et al., 2010, pp. 87, 102).

The infrequency of sanction is partly the result of the large number of private employment agencies that have either patronage or direct ownership links to politicians and government officials and are thus sheltered from disciplinary actions (Chantavanich et al., 2010). As one government official has explained, "Employment agencies usually have the connections to see that the case is settled out of court. Maybe the money is repaid and the matter is put to rest without further enforcement" (Chantavanich et al., 2010, p. 121).

Inadequate government oversight of private employment agencies has both directly and inferentially resulted in severely negative impacts on migrant workers, such as:

- Increased vulnerability of foreign workers to labour exploitation due to the use of irregular channels for migrating (TWG, 2008) and insufficient protections provided for regular migrants (Sciortino and Punpuing, 2009).
- Increased vulnerability of Thai workers to labour exploitation due to weak enforcement of regulatory legislation (Chantavanich, et al., 2010).
- A frequently unfair, non-transparent, inefficient and expensive recruitment process for migrant workers (ADB, 2009).

To redress the gaps in the legal framework and the complaint mechanisms that leave both foreign and Thai migrant workers without access to legal remedies for unfair and illicit recruitment practices by private employment agencies and unlicensed brokers, the International Labour Organization (ILO) and the Ministry of Labour's Department of Employment (DOE) are collaborating to strengthen the system. The goal is to improve the effectiveness, expand the coverage and strengthen the enforcement of the complaint mechanisms provided to migrant workers. This includes re-evaluating the compensation process for complainants and punitive actions taken against recruitment malpractice.

To provide evidence for the changes needed, a comprehensive analysis of the legal framework and the existing mechanisms (in relation to international standards) was conducted. The results of the analysis were then used to distil good practices for regulating migrant worker recruitment and recommendations for improving the complaint mechanisms.

1.2 Research objectives

The research activities of the project were expected to fill the gaps in knowledge on the recruitment complaint mechanisms in Thailand and thus contribute further empirical evidence to the cooperative efforts between the ILO and the DOE to ameliorate the concerns related to exploitation of migrant workers during recruitment. To reach this outcome, the study focused on the achievement of two main objectives:

1. Analyse the current complaint mechanisms for recruitment-related grievances available to both inbound and outbound migrant workers, including their legal basis, operation, use, limitations, constraints and enforcement.
2. Produce recommendations for more effective complaint mechanisms based upon the study's analysis of the existing system and the normative approaches provided by international laws and good practices on the regulation of migrant worker recruitment.

1.3 Research methodology

The research for the analysis was carried out between October 2011 and January 2012. The study primarily relied on qualitative research methods, making use of the following data collection tools:

- **Desk review:** A comprehensive review and analysis of relevant Thai Government legislation, international labour standards, good practices and lessons learned from other countries, research reports by local and international organizations and additional literature from both Thai and English language sources on the regulation of migrant worker recruitment through complaint mechanisms.
- **Key informant interviews:** Interviews with key staff of organizations and institutions engaged in the recruitment of migrant workers and/or resolving their grievances.
- **In-depth personal interviews:** Interviews with male and female migrant workers of different nationalities, employment sectors and legal statuses regarding their experiences during recruitment and with the filing of grievances.
- **Focus group discussions:** Discussions with targeted groups of migrant workers, representing the perspectives of different nationalities, sexes, employment sectors and legal statuses, on their recruitment experiences and the complaint process.

To protect the anonymity, safety and rights of the research subjects, the field research with migrant workers was conducted in accordance with the Chulalongkorn University Ethical Guidelines for Research on Vulnerable Groups and informed consent was obtained before proceeding with interviews.

1.4 Research sample

The data collection during field research comprised of a purposefully selected sample of focus group participants, key informants and in-depth personal interviews. The research was carried out in Bangkok and three provinces of Thailand where there is a large population of inbound or outbound migrant workers: Petchabun, Rayong and Samut Sakhon provinces. The research subjects targeted for data collection included government officials, experts and field staff of non-governmental organizations (NGOs) and law firms, staff of private employment agencies and current and returned migrant workers.

Table 1.1. Research sample

Research site	Migrant workers	Government officials	NGOs and employment agencies
Metropolitan Bangkok	In-depth interviews: 1 male Burmese delivery worker	Key informant interviews: Office of Foreign Workers Administration, Department of Employment, Inspection and Job-Seekers Protection Division, Department of Labour Protection and Welfare, Thailand Overseas Employment Administration	Key informant interviews: labour law attorney
Petchabun	In-depth interviews: 5 returned Thai berry pickers	Key informant interviews: Department of Employment	(no interviews)
Rayong	Focus groups: 5 female Cambodian factory workers, 11 male Cambodian factory workers, 7 male Cambodian fishermen, 5 male Cambodian rubber farmers In-depth interviews: 1 male Cambodian factory worker, 1 female Burmese factory worker	Key informant interviews: Department of Employment, Office of Labour Protection and Welfare	Key informant interviews: Foundation for AIDS Rights, private employment agencies
Samut Sakhon	Focus groups: 11 Burmese males, 6 Burmese females working in factories and in seafood processing plants	Key informant interviews: Department of Employment	Key informant interviews: Labour Rights Promotion Network

1.5 Research questions

1. What is the legal basis of the current complaint mechanisms for migrant worker recruitment and how do they function in practice?
2. How are the complaint mechanisms being used by migrant workers and what are the obstacles or constraints they encounter when availing themselves of the mechanisms? What are the differences in use between women and men, nationalities, work sectors, legal statuses, etc.?
3. What impacts have the current complaint mechanisms had on the resolution of disputes, the compensation for abuses, the access to justice, the protection of workers and the disciplining of recruitment agencies?

4. How do the complaint mechanisms operate and what are the constraints faced by the enforcing agencies?
5. What are the relevant international standards and good practices for complaint mechanisms for migrant worker recruitment recognized by the ILO and other authorities on international law?
6. How can the legal framework, operations and enforcement of the complaint mechanisms for migrant worker recruitment be improved so that they are more aligned with international labour standards and good practices?

1.6 Research terms and concepts

The principal concepts and terminology referred to within this report are based upon the ILO and United Nations General Assembly accepted definitions, as follows:

Migrant worker

“A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990)

Migrant recruitment

“The engagement of a person in one territory on behalf of an employer in another territory or the giving of an undertaking to a person in one territory to provide him [or her] with employment in another territory, together with the making of any arrangements in connection with the operations mentioned above, including the seeking for and selection of emigrants and the preparation for departure of the emigrants.” (Migration for Employment Convention, 1949 (No. 97))

Illegal recruitment of migrant workers

“Any form of canvassing, procuring, promising, contracting or transporting of workers for employment abroad by an agency/agent or directly by an employer that is not in conformity with national laws and regulations. This may include overcharging of fees; debt bondage; falsification or seizure of documents; deception with regard to the nature and conditions of employment, including contract substitution; exploitation and abuse while waiting for the job to materialize or to be sent abroad; lack of preparation for employment abroad, including lack of pre-departure training; forced/coerced recruitment, including being kidnapped or sold to illegal recruiters or traffickers; and hazardous journey to the country of destination.” (ILO, 2003, pp. 17–18)

Employment

“The employed population is made up of persons above a specified age who furnish the supply of labour for the production of goods and services. When measured for a short reference period (of one week or one day), it refers to all persons who worked for pay, profit or family gain during that period.” (ILO Resolution concerning statistics of the economically active population, employment, unemployment and underemployment, 1982)

Private employment agency

“Any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships [that] may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to ... as a ‘user enterprise’), which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.” (Private Employment Agencies Convention, 1997 (No. 181))

Labour broker

Although there is no official definition of the term “labour broker” within any instrument of the ILO or the United Nations General Assembly, the term is used in this report to refer to any natural or legal person not licensed by the State to provide one or more of the previously mentioned labour market services. This includes both individual brokers and social networks that provide services with or without remuneration.

Recruitment complaint mechanism

“...machinery and procedures, involving as appropriate the most representative employers’ and workers’ organizations, for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies.” (Private Employment Agencies Convention, 1997 (No. 181))

1.7 Limitations of the research

The most significant limitation for the analysis was the small scale of the field research. Estimates indicate that more than 3 million foreign workers are employed in Thailand and between 450,000 and 600,000 Thai workers deployed overseas, many of whom were recruited through insufficiently regulated private employment agencies and brokers. As a result of the financial and time constraints of the project, the study did not attempt to obtain a quantitatively representative sample of workers’ experiences in accessing recruitment complaint mechanisms. To mitigate this limitation, the researchers focused primarily upon making a qualitative assessment of the existing complaint mechanisms, based upon data provided by a knowledgeable and carefully selected sample of interviewees and focus group participants as well as an extensive review of secondary sources of information.

Chapter 2

International standards and good practices for recruitment complaint mechanisms and related policy measures

Increasing globalization and international trade as well as advances in information and communication technologies have dramatically changed many national labour markets. Among the impacts have been rises in part-time and temporary work as well as unemployment. These labour market conditions have led to growth in the prevalence and importance of private employment agencies in many countries (Hansen, 2006). According to the International Confederation of Private Employment Agencies, there were 128,000 such agencies operating globally in 2010, placing 10.4 million workers (CIETT, 2012, p. 8).

Although private employment agencies were generally looked upon unfavourably and banned in many countries during much of the twentieth century because of their potential for abuse and exploitation of workers, the changes in labour markets over the past several decades triggered a reassessment of their potential to make a positive contribution (Hansen, 2006). They are now considered by many in the international community to be catalysts for new forms of human resource management as well as prospective contributors to better working conditions for employees (ILO, 2007). This new perspective on the function of private employment agencies was established in international law under the Private Employment Agencies Convention, 1997 (No. 181). The instrument replaced the Fee-Charging Employment Agencies Convention, 1949 (No. 96), which is still in force in a few member States (Baruah and Cholewinski, 2006).

Convention No. 181 was developed to improve the efficiency of labour markets by allowing for private organizations to contribute towards greater matching of the supply and demand of labour and establishing programmes for partnership of private and public organizations to assist unemployed workers to re-enter the labour market. The Convention also provided for the regulation of private employment agencies to ensure fair practices and help prevent human trafficking and other forms of exploitation. However, ratification of the Convention has so far been limited to 27 countries (ILO, 2011a).

The slow pace of the Convention's ratification may be partly reflective of the significant differences between ILO member States in their approaches to regulating recruitment agencies. Historically, governments have used three main categories of policy strategies to regulate such agencies: strict prohibition, strict regulation or minimal/laissez-faire regulation. Although most member States no longer entirely prohibit the operation of private employment agencies within their territory, there remains broad variation in the scope and type of regulation applied (ILO, 2007).

In recognition of the particularly adverse effects of the recent global economic crisis on temporary workers, the ILO organized a workshop in 2009 to promote greater international support for Convention No. 181 (ILO, 2009). The results have been disappointing thus far with Japan the only ILO member State in Asia to ratify the Convention as of 2011 (ILO, 2011a).

Thailand has yet to indicate any plans to accede to the Convention. A government representative stated in a report to the Human Rights Council for the Universal Periodic Review (October 2011), "The country has ratified 14 Conventions of the International Labour Organization, namely Conventions Nos 80, 116, 104, 105, 127, 14, 19, 29, 88, 122, 100, 182, 138 and 159, and intends to ratify Conventions Nos 87 and 98" (Thailand Universal Periodic Review National Committee, 2011, p. 4).

The report makes no mention of any preparations for the ratification of Convention No. 181. Moreover, even for the ILO Conventions that Thailand has become a party to that are relevant to protection of the rights of migrant workers, there remain significant discrepancies between the principles of the Conventions and how they are observed and enforced in practice. As former United Nations Special Rapporteur Vitit Muntarbhorn wrote in 2005, "There is a key

challenge in advocating that these rights are not only the rights of Thai nationals but also the rights of all persons, including migrant workers, irrespective of race, religion, gender, nationality and social origin. The tendency of some less liberal quarters is to construe these rights as pertaining to only Thai nationals rather than all persons in Thai territory" (2005, p. 22).

To provide an understanding of their congruence with international law as well as to gather examples of good practices for use in amending Thailand's Recruitment and Job-Seekers Protection Act so that it is more inclusive and effective, this section provides a review of the recruitment complaint mechanisms and other closely associated policy measures for regulating migrant worker recruitment by private employment agencies. The framework of international labour law used for the review derives from Convention No. 181 and its supporting provisions in Recommendation No. 188. The review also covers supplemental literature related to this legal framework, including the ILO Multilateral Framework on Labour Migration, *the Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement*, *the Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*, *Labour Migration in Asia* and other relevant documents.

2.1 Definition of private employment agency

Convention No. 181 applies a broadly defined concept of private employment agencies. The experience of ratifying States has revealed the importance of clearly defining the types of agencies that the law will apply to because of the multiple ways in which the term can be understood. In some cases, only certain types of private employment agencies are targeted for regulation by governments, while in others there may be different laws that apply to each segment of the private employment agency industry (Hansen, 2006). Under Japanese law, for example, private employment agencies are categorized as providing job matching, temporary work or vacancy advertisement services, with specific licensing provisions for each (Government of Japan, 1985).

2.2 Institutional framework

To regulate the operations of private employment agencies, governments must designate an institution responsible for administering the enforcement of the legislation. In the majority of countries with such legislation, this authority is assigned to a designated department under the labour ministry (or its equivalent). Other nations have established separate institutional arrangements with this authority. Creating such an institution has the potential advantage of greater stakeholder involvement, both within and outside the government, and thus the prospect of increased legitimacy and effectiveness of the regulation process (ILO, 2007).

The institution given responsibility for regulating private employment agencies should be clearly designated and given a well-defined mandate so as to avoid overlapping responsibilities. If more than a single ministry or department is involved in the regulatory process, mechanisms and procedures for cooperation should be established. Because international labour migration is a complex and multisector concern, it is especially important to develop inter-departmental and/or inter-ministerial coordination procedures. This can facilitate not only a more coherent application of the government's overall labour market policies but also better implementation of bilateral agreements and other measures through coordination of differing departmental and ministerial needs or demands (ILO, 2007).

2.3 Registration and licensing of private employment agencies

One critically important way in which Convention No. 181 provides protection for workers is through obligating governments to establish a minimum set of requirements under which private employment agencies are allowed to operate. Under the terms of Article 3 of the Convention, member States are compelled to "determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice" (ILO, 1997a).

Although the specific requirements for registration and licensing enacted vary from country to country, they generally include the following basic conditions:

- registration as a business;
- registration with government tax and regulatory authorities;
- agreement to comply with applicable labour and equal opportunity laws;
- periodic reporting to government authorities on agency activities;
- agreement not to collect fees from jobseekers (unless under a specific exemption under the law); and
- agreement to maintain the confidentiality of jobseekers' and clients' personal information (Hansen, 2006).

In adherence with Article 3 of the Convention, as well as the guidelines provided by the International Labour Office in its *Guide to Private Employment Agencies*, ratifying states should conduct consultations with representatives of employers' and workers' organizations before adopting any licensing regulations or provisions. This provides not only information about labour market needs for the operation of private employment agencies but can also reveal additional protection concerns for groups of workers who are particularly vulnerable to exploitation. The licensing system that is established should attempt to avoid unnecessary complexity or create an undue burden upon business owners and should be appropriate for the developmental context of the country (ILO, 2007).

The benefits of establishing a compulsory licensing system are that it screens owners of private employment agencies for their competence and professional experience in job placement activities prior to commencing operations. Additionally, licensing helps to create a transparent market for private employment agencies to function in which the participating companies and their activities are openly disclosed. For example, both the Philippines and Singapore have created public registries of licensed private employment agencies that are available on the Internet and through brochures. This practice allows jobseekers to confirm whether a private employment agency is licensed or not and, in the case of the Philippines, even provides full information about those agencies that have been suspended or who have had their licenses revoked for regulatory violations (ILO, 2007).

Member States should regard the requirements previously described as the base standards for the registration and licensing of private employment agencies. Many governments have enacted supplemental regulatory principles under their own national laws. These can be generalized as falling into four categories of required qualifications: i) demonstration of lawful behaviour and practices; ii) sound business management capabilities; iii) sufficient financial resources; and iv) professional competence (Hansen, 2006).

In Germany, for instance, policy-makers working with the Ministry of Labour and Social Affairs and private employment agency associations organized consultations on quality standards for the industry that led to the adoption of the following minimum standards (ILO, 2007):

1. Personal qualifications (including lack of criminal records for staff, financial capability and a registration certificate).
2. Professional qualifications of staff (including evidence of professional experience, knowledge of legal regulations and knowledge of the labour market).
3. Institutional framework (including transparent business operations, adequate business site and protection of data).

Although these standards are voluntary in nature, private employment agency associations have accepted responsibility for ensuring adherence; and there is ongoing dialogue between Germany's Ministry of Labour and its private employment agencies associations to improve the standards and their application (ILO, 2007).

Other governments have enacted similar pieces of legislation that address many of the same principles. Singapore's regulatory procedures, for example, include five criteria for granting an operating license to private employment agencies (Ministry of Manpower, 2012):

1. Must be a Singapore citizen or permanent resident.
2. Must be registered with the Accounting and Corporate Regulatory Authority as owner/director/manager of the company, with one of the following registered as a principal activity: maid agency, employment agency, executive search agency.
3. Cannot have an undischarged bankruptcy.
4. Cannot have any previous record of court convictions (particularly under the Women's Charter, Children and Young Persons Act, Penal Code, Immigration Act, Employment Agencies Act and Employment of Foreign Manpower Act) in Singapore or elsewhere for an offence involving dishonesty or human trafficking.
5. Cannot have been a director or involved in the management of an employment agency whose license was revoked.

If the employment agency is to handle the overseas employment of workers, additional requirements for licensing are recommended to prevent some common forms of abuse. These extra conditions include reviewing and authenticating the credentials of non-nationals applying and requiring documentation of financial ability to support international operations and to pay for compensation claims by national workers, foreign employers or other business partners, if necessary (Hansen, 2006).

A guarantee deposit is a commonly used and effective requirement for the licensing of private employment agencies but there is currently no consensus as to the optimal size for striking the right balance between efficiency and protection. High amounts may prevent more unstable agencies from being licensed but can also drive them to operate clandestinely or stifle fair competition and lead to the formation of cartels. But the guarantee amount should at least be large enough to provide reimbursement or compensation to migrants for damages resulting from contract and rights violations (ILO, 2011b).

Based upon their study of the regulatory frameworks for migrant worker recruitment in Asia, Mughal and Padilla compared the licensing requirements in Pakistan (less strict) and Philippines (more strict), two countries with active private employment agencies industries, as shown in table 2.1.

Table 2.1. Licensing requirements in Pakistan and Philippines

Requirements	Pakistan	Philippines
National	Yes	Yes
Application fee	US\$16	US\$200
Registration	Company	Company (with capital of US\$40 000)
Character certificate	Good conduct certificate	No criminal record
Refundable deposit	US\$5 000	US\$20 000
Other	License fee – US\$500	Surety bond – US\$2 000
Validity of license	3 years	4 years

Source: Mughal and Padilla, 2005.

Despite the requirements, Mughal and Padilla found that the trend in the incidence of recruitment violations showed a consistent increase in the Philippines, both in real terms as well as in the proportion to the quantity of workers employed overseas. This led them to conclude that rigid and overly strict licensing regulations for private employment agencies can be counterproductive to the protection of migrant workers:

“Government regulations should take into account the realities of overseas employment dynamics. If regulations and procedures intended to protect workers are too cumbersome, they provide incentives for irregular migration. There are persistent complaints from private recruitment agencies that some of the rules on licensing and on the operations of agencies are unrealistic in the global employment market. Rules and procedures should be simplified and, where possible, should recognize realities at home and in foreign countries in order to make compliance easier. Rules [that] are unreasonably rigid can breed corruption and abuse.” (Mughal and Padilla, 2005, p. 64)

Practical guidelines on the licensing and supervision of private employment agencies, with reference to the principles of Convention No. 181, are contained within the text of the ILO Multilateral Framework on Labour Migration. While non-binding in nature, the Framework is a comprehensive collection of principles, guidelines and good practices on labour migration that were brought together from relevant international instruments and a review of labour migration policies and practices by ILO member States (ILO, 2006). Principle 13 of the Framework specifically refers to the licensing of private employment agencies:

“Governments in both origin and destination countries should give due consideration to licensing and supervising recruitment and placement services for migrant workers in accordance with the Private Employment Agencies Convention, 1997 (No. 181) and its Recommendation (No. 188).” (ILO, 2006, p. 24)

This principle is supported within the Framework by guidelines 13.1–13.8, which provide recommendations for legislation on the licensing and supervision of private employment agencies:

“13.1. providing that recruitment and placement services operate in accordance with a standardized system of licensing or certification established in consultation with employers’ and workers’ organizations;

13.2. providing that recruitment and placement services respect migrant workers’ fundamental principles and rights;

13.3. ensuring that migrant workers receive understandable and enforceable employment contracts;

13.4. providing arrangements to ensure that recruitment and placement services do not recruit, place or employ workers in jobs which involve unacceptable hazards or risks or abusive or discriminatory treatment of any kind and informing migrant workers in a language they understand of the nature of the position offered and the terms and conditions of employment;

13.5. working to implement legislation and policies containing effective enforcement mechanisms and sanctions to deter unethical practices, including provisions for the prohibition of private employment agencies engaging in unethical practices and the suspension or withdrawal of their licences in case of violation;

13.6. consider establishing a system of protection, such as insurance or bond, to be paid by the recruitment agencies, to compensate migrant workers for any monetary losses resulting from the failure of a recruitment or contracting agency to meet its obligations to them;

13.7. providing that fees or other charges for recruitment and placement are not borne directly or indirectly by migrant workers;

13.8. providing incentives for recruitment and placement services that meet recognized criteria for good performance.” (ILO, 2006, pp. 24–25)

Although these guidelines provide recommendations that go well beyond simply licensing and registering private employment agencies, they also demonstrate that mandatory registration and licensing “is the basic means for implementing the principles of Convention No. 181” (ILO, 2007, p. 13). According to the *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*, registration and licensing remain the most commonly used approaches for regulating the operations and activities of private employment agencies (Baruah and Cholewinski, 2006).

Guideline 13.7 also raises the contentious issue of charging fees for migrant worker recruitment. Article 7 of Convention No. 181 states that:

“Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.” (ILO, 1997a)

This remains a major obstacle to the signing of the Convention for many of the countries in Asia because they currently rely on private employment agencies to facilitate recruitment for their temporary labour migration schemes. Some governments have opted to establish ceilings for the amount that recruitment agencies can collect in service fees, with the rates usually calculated as a proportion of a worker’s monthly wages rather than a fixed figure. Nevertheless, the costs involved can still be extremely high for workers due to excessive fees that the agencies charge, costly bureaucratic procedures and/or corrupt government officials. To cover all of the associated expenses, many migrants resort to selling their assets, taking out high-interest loans or having payments automatically deducted from their wages. The debt that they incur during recruitment can lead migrants to remain in jobs even when they experience exploitive working conditions (ILO, 2011b).

2.4 Monitoring private employment agency operations and activities

After private employment agencies have been licensed to operate by the appropriate labour authorities, the ILO advises that their recruitment activities be monitored to ensure compliance with regulations. The two main approaches used for the monitoring of private employment agencies are desk and field audits:

1. Desk audits are the most common form of monitoring used to evaluate compliance with licensing conditions. They are often carried out during the initial application procedure for licensing, with the applicant required to appear in person. This allows the labour authorities to examine the applicant’s qualifications and business plan for operating the agency in advance of opening for business. In many countries, private employment agencies must also provide authorities with additional validating documentation upon request, particularly if the responsible authority suspects the agency of involvement in fraudulent recruitment practices.
2. Field audits to inspect the business site may also be conducted, both during the license application procedure as well as during regular or unannounced monitoring checks. These types of onsite inspections are often used to conduct follow-up investigations of complaints or other reports of regulatory violations. Even if financial and human resource restrictions prevent regular onsite inspections, responsible authorities should at least establish procedures for field inspections as part of the investigation of reported agency misconduct (ILO, 2007).

Another method for monitoring private employment agencies is to establish a system of registration numbers that are used in association with all agency activities. For example, when a private employment agency advertises its services through any type of media outlet, it is required to display its registration number within the advertisement. This provides jobseekers with the opportunity to research the agency through public registries to confirm that it is a legitimate and licensed enterprise (ILO, 2007).

An additional approach for monitoring the recruitment and placement activities of agencies is to require employment contracts to be approved by the labour authorities, based upon a set of minimum standards, prior to commencement of work. Because of the difficulties in monitoring workers while abroad, it is particularly important to establish in writing as many of the details of the terms of employment as possible before departure. The ILO Private Employment Agencies Recommendation states:

“Workers employed by private employment agencies as defined in Article 1.1(b) of the Convention should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.” (ILO, 1997b)

This is helpful in avoiding placement of migrant workers in abusive conditions, for making clear the rights and obligations of workers and in improving access to redress in case of violations (ILO, 2007).

2.5 Penalties for non-compliance by private employment agencies

To establish sanctions against private employment agencies that fail to abide by the laws and regulations that govern their recruitment operations and activities, Convention No. 181 directs States to enact legislation that provides appropriate penalties for violations as a deterrent against abuses during the recruitment process as well as remedy for victims. Article 8 states that a legal framework must be established that allows for punitive actions:

“A Member shall, after consulting the most representative organizations of employers and workers, adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.” (ILO, 1997a)

Without the establishment and enforcement of an apportioned system of penalties for private employment agencies that violate the laws that govern their operations, legislation enacted to regulate worker recruitment is largely ineffective at deterring misconduct and abuse (ILO, 2007).

Such sanctions against private employment agencies can be imposed through varying institutional arrangements, including the labour authority itself via administrative tribunals or by a court of law. Whichever mechanism is used, the type of sanctions applied should be based upon the form of the infraction as well as whether it is a first or repeat offence. The penalties should appropriately reflect these considerations and may range anywhere from a minor administrative reprimand to a prison sentence. If the infraction is of a minor nature, corrective advice on how to improve business practices, offered in a cooperative manner, may be the most effective approach. For more serious offences, sanctions should include the possibility of suspending or permanently cancelling a license to operate, particularly if the agency has repeatedly violated the law (ILO, 2007).

Depending on the severity of the consequences for jobseekers as a result of recruitment malpractice, penal sanctions in the form of jail time or fines may also be appropriate in some cases. Again, it is important that the form and severity of the penalties applied reflect the nature of the offence committed. If a private employment agency would have received large financial benefits from the recruitment infraction had it gone unchallenged, then the resulting fine should reflect the scale of the malfeasance. Penal sanctions should also include mechanisms for the pecuniary compensation of victims of recruitment malpractice if they were financially exploited during the recruitment or placement process (ILO, 2007).

2.6 Complaint mechanisms

In addition to the licensing and monitoring of private employment agencies, it is critical that governments establish and administer viable complaints mechanisms for workers in the event that they are mistreated or deceived during the recruitment process. According to Article 10 of Convention No. 181:

“The competent authority shall ensure that adequate machinery and procedures, involving as appropriate the most representative employers and workers organizations, exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies.” (ILO, 1997a)

Article 10 establishes the basis in international law for enacting recruitment complaint mechanisms. Further supplementing the tenets for such mechanisms established within Convention No. 181 are the non-binding principles and guidelines provided within the ILO Multilateral Framework on Labour Migration. Principle 10 of the Framework states that:

“The rights of all migrant workers which are referred to in principles 8 and 9 of this Framework should be protected by the effective application and enforcement of national laws and regulations in accordance with international labour standards and applicable regional instruments.” (ILO, 2006, p. 19)

Principle 10 further specifies in guidelines 10.5–10.11 that national laws and regulations should include the following provisions for protecting migrant worker rights:

“10.5. providing for effective remedies to all migrant workers for violation of their rights, and creating effective and accessible channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation;

10.6. providing for remedies from any or all persons and entities involved in the recruitment and employment of migrant workers for violation of their rights;

10.7. providing effective sanctions and penalties for all those responsible for violating migrant workers’ rights;

10.8. providing information to migrant workers on their rights and assisting them with defending their rights;

10.9. providing information to employers’ and workers’ organizations concerning the rights of migrant workers;

10.10. providing interpretation and translation services for migrant workers during administrative and legal proceedings, if necessary;

10.11. offering legal services, in accordance with national law and practice, to migrant workers involved in legal proceedings related to employment and migration.” (ILO, 2006, p. 20)

Fleshing out the framework of these principles, the ILO *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* points out that private employment agencies should be obliged to provide information to jobseekers on the procedures for filing complaints in the pre-departure phase of their recruitment. Jobseekers should be made aware of the terms and conditions of employment they’ve entered into as well as the mechanisms for redress in case of deceptive or unlawful recruitment practices (Abella, 1997).

Principle 11 of the Multilateral Framework addresses prevention of abusive practices towards migrant workers. Its guidelines provide further definition of the standards for complaint mechanisms:

“11.3. implementing effective and accessible remedies for workers whose rights have been violated, regardless of their migration status, including remedies for breach of employment contracts, such as financial compensation;

11.4. imposing sanctions and penalties against individuals and entities responsible for abusive practices against migrant workers;

11.5. adopting measures to encourage migrant workers and trafficking victims to denounce abuse, exploitation and violation of their rights, taking account of the special circumstances of women and children, and to this effect establishing mechanisms for migrant workers to lodge complaints and seek remedies without intimidation or retaliation.” (ILO, 2006, pp. 21–22)

Reflecting many of these same principles, the Association of Southeast Asian Nations (ASEAN) adopted the Declaration on the Protection and Promotion of the Rights of Migrant Workers during the twelfth ASEAN Summit in January 2007. While not specifically requiring the establishment of complaint mechanisms for recruitment-related abuses, two of the obligations for receiving countries within the Declaration do call for facilitating access to justice and legal remedies for migrant workers:

“7. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfil the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties”

9. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states.” (ASEAN, 2007)

These principles could be interpreted as applying to exploitation and abuse during the recruitment process. Additionally, the Declaration’s obligations for sending countries are even more explicit in promoting policies to regulate migrant worker recruitment by private employment agencies. Although, Obligation 14 of the Declaration does not directly state that worker complaint mechanisms must be established for this purpose, it does recall the tenets of Article 8 of Convention No. 181 in its commitment to regulation of private employment agencies and the abolition of unlawful recruitment practices:

“14. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.” (ASEAN, 2007)

Through complaint mechanisms, jobseekers who have been exploited during the recruitment process have the opportunity to access justice and seek remedy. However, the ILO stresses that “complaint mechanisms should be based on a differentiated approach, allowing for settlement among the different parties before choosing adjudication” (ILO, 2007, p. 48). This allows for alternative channels for the resolution of complaints rather than immediately proceeding to formal adjudication in court. The Handbook on Establishing Effective Labour Migration Policies provides a model of a three-tiered system for the handling of complaints, as displayed in table 2.2.

Table 2.2. Organization for Security and Co-operation in Europe–International Organization for Migration–ILO recommendation for a three-tiered complaint mechanism

<p>Tier 1: Private employment agencies</p> <p>In the event of abusive employment conditions abroad, the migrant should first contact the employment agency that hired him or her. The employment agency should then attempt to settle the dispute between employee and employer amicably and by voluntary agreement.</p>
<p>Tier 2: Responsible state authority</p> <p>If Tier 1 fails, then the appropriate institutions should provide impartial and effective third-party assistance through conciliation, arbitration, and mediation. Institutions should get in touch with their counterparts in the country of employment. Should the complaint be proven, the responsible authority should revoke or suspend the licenses or satisfy claims for refunding.</p>
<p>Tier 3: Adjudication</p> <p>Though prolonged and costly, this is the best way to deal with serious abuses of human rights in the recruitment process, including human trafficking. Complaints involving acts that are criminal in nature and require the imposition of penalties such as fines and imprisonment come within the jurisdiction of the courts.</p>

Source: Baruah and Cholewinski, 2006.

Although some countries require jobseekers to file complaints in the labour court, this has in many cases led to an overly expensive, prolonged and excessively legalistic adjudication process. Proper determination of the jurisdiction of labour courts in countries of employment over recruitment complaints lodged by migrant workers is often neglected and thus the cases eventually end up back in court in the country in which the worker was recruited. Unfortunately, after being passed back to the jurisdiction of the court in the country of origin, the complaints are often further mishandled, leaving the worker’s grievances unaddressed and increasing the level of impunity for private employment agencies that operate in an unlawful manner. Several governments have found that setting up an administrative grievance procedure to supplement adjudication in the labour court is a better system for handling recruitment complaints. This can allow for greater accessibility to justice for workers wanting to file a complaint against a private employment agency as well as more timely adjudication of cases (ILO, 2007).

In addition to considerations about the effective structuring of complaint mechanisms, it is important that the mechanisms are within the capacity of governments to implement thoroughly and systematically. A case in point

is that of the United Kingdom, which has more than 8,200 registered private employment agencies. In 1998, 10,000 recruitment complaints were received through the Government's telephone hotline, requiring the initiation of 1,300 formal investigations (Hansen, 2006, p. 174). In developing countries, resource and capacity constraints can make such mechanisms challenging to implement comprehensively, and thus the appropriateness of the model developed should be included as a consideration during policy formulation.

2.7 Self-regulation initiatives

Private employment agency associations in several countries have developed a code of conduct as a tool for self-regulation of recruitment practices. These types of standards and mechanisms are promoted by ILO Recommendation No. 188:

"Where appropriate, national laws and regulations applicable to private employment agencies should be supplemented by technical standards, guidelines, codes of ethics, self-regulatory mechanisms or other means consistent with national practice." (ILO, 1997b)

Based on past experiences, it has been found that codes of conduct can be made more influential by including the following good practices:

- Although the standards developed are to become internal policies for companies or associations, they should still be discussed and deliberated upon with representatives of trade unions, governments and civil society organizations.
- The codes should include mechanisms for independent monitoring that clearly defines non-compliance and the type and severity of sanctions to be enforced.
- Both the standards described in the code of conduct and reports about organizations that violate the code should be disseminated publicly.
- The code developed should be kept distinct from the internal by-laws of the federation or business association.

In some countries, government authorities have established positive incentives for good-performing agencies. The types of rewards offered include license extensions, the waiving of certain requirements, tax incentives, expedited processing of employment contracts, public listing as a recommended agency, reduced monitoring supervision, offers to fill the quotas for bilateral agreements and others. Another approach to self-regulation is through market-based competitive systems, such as a rating or labelling (ISO 9000), which certifies that agencies meet standards related to quality business management (ILO, 2011b).

2.8 Examples of good practices in regulating private employment agencies

The ILO Multilateral Framework on Labour Migration, the International Organization for Migration's (IOM) report *Labour Migration in Asia* and other documents from specialized organizations reviewed for this analysis provide useful examples of good practices. Many of the examples are drawn from countries that experience similar problems and constraints as Thailand, with high levels of exploitation and abuse of workers during recruitment as well as comparable stages of capacity development for the formation and implementation of policy. These cases provide examples of policies and practices that have proven effective for protecting migrant workers during the recruitment and job placement process:

2.8.1 Philippines

The Philippine Government's development of policies to better manage the recruitment of migrant workers was based on lessons learned from the country's extensive migration management experience. Government estimates place the total number of Filipinos working overseas at approximately 9.45 million people (POEA, 2009). According

to the World Bank (2011), those workers now remit approximately US\$21.3 billion annually, making the Philippines the fourth-highest receiving country for remittances in the world and constituting 12 per cent of the country's annual GDP.

The Philippines' employment-driven emigration policies facilitate the temporary labour migration of nationals while providing strong mechanisms for worker protection – with the goal of harnessing the impact of remittances for national development. The Government scouts sectors in labour markets abroad that can be filled by migrant workers and encourages a managed supply of labour through supervised recruitment of its nationals by foreign employers, private employment agencies and foreign governments (ILO, 2006).

The Philippines Overseas Employment Administration (POEA) has oversight of the labour emigration process and issues licenses to qualifying Philippines-based private employment agencies. The broad orientation of the POEA licensing policy is characterized as difficult to enter, easy to remove.

Licensed private employment agencies are required to enter into legally enforceable work contracts with workers seeking employment abroad. The POEA regulates these agreements by requiring an initial approval, monitoring for malpractice and prosecuting violators (ILO, 2006). To prevent corruption in the regulation of migrant worker recruitment, all government employees who work on migration-related issues are prohibited from personal involvement with private employment agencies.

To encourage compliance with its policies, migrant workers who depart from the country without POEA-approved contracts are charged a tax at the airport. In addition, private employment agencies are required to post a bond to provide compensation to workers in case their rights are violated; they also must sign a power of attorney agreement, which holds them liable for contract violations by overseas employers. Positive incentives are provided through a reward system for recruiters who maintain a clean record on recruitment improprieties (ILO, 2006).

The responsibility for adjudicating compensation claims cases was transferred to the National Labor Relations Commission (NLRC) to expedite the process and to allow the POEA to focus on its core mandate of promoting employment, regulating employment agencies and protecting the welfare of overseas workers. The NLRC is a quasi-judicial body connected institutionally to the Department of Labor and Employment. The Commission has been given the authority to hear and resolve disputes involving employer–employee relations (including claims against private employment agencies) and to determine compensation in cases of breach of contract. The NLRC is tasked with providing an accessible and impartial medium for resolving worker grievances that avoids the cost, duration and formality of adjudication in a court. Labour arbiters are stationed throughout the country to hear claims and determine their validity (Mughal and Padilla, 2005).

The regulation of recruitment for Filipino migrant workers while abroad is administered by the Philippines Overseas Labor Offices (POLOs), which are a part of the Department of Labor and Employment and are located in destination country embassies. The POLOs are staffed with labour attachés and welfare officers who assist workers with filing complaints while at an overseas worksite. They are also entitled to file a complaint with the NLRC to seek redress upon returning to the Philippines. The complaints are issued against both the employer and the private employment agency; the agency can be held solely responsible for the violation of employment contracts by foreign employers under the joint and solidary liability principle (Mughal and Padilla, 2005).

The governance structure of the POEA is also in line with ILO recommendations on regulating private employment agencies. The tripartite governing board of the POEA consists of six members (government, employer and worker representatives: the Secretary of Labor and Employment heads the Governing Board, the POEA Administrator serves as vice-chair and representatives from the private, women's, sea-based and land-based sectors are members (POEA, 2010).

The innovative model of regulation of private employment agencies developed by the Philippine Government provides many lessons for developing countries wanting to establish rights-based approaches for migrant worker recruitment that are generally in accordance with international labour laws and standards.

2.8.2 Sri Lanka

In Sri Lanka, the Bureau of Foreign Employment (BOFE) regulates recruitment agencies. The Act No. 21, passed in 1985, requires private employment agencies to obtain a license for operation. Additionally, recruiters are required to deposit a cash bond with the BOFE and provide a bank guarantee. The bond can be withdrawn by the BOFE if an agency is found to be in breach of contract with recruited workers. The BOFE may also cancel or suspend the recruiting license if an agency violates the law or its associated regulations. A special division within the BOFE makes regular monitoring visits to private employment agencies to ensure that they are operating in accordance with the national legislation (ILO, 2006).

Within destination countries, private employment agencies and employers are required to register with the consulate if they want to recruit Sri Lankan workers. To support cooperation on the protection of workers abroad, the Government signed memoranda of understanding (MOUs) with private employment agencies in the Gulf States, Hong Kong (China) and Singapore that require that the Sri Lankan Government approve all employment contracts for domestic workers and provides a mechanism for investigating violations by employers (ILO, 2006).

To control the fees and expenses charged to migrant workers for recruitment, the Government requires private employment agencies to declare how much they intend to collect from the migrant worker for each job opening. The Sri Lanka Bureau of Foreign Employment then checks the description of the position and determines an approved rate that can be charged to migrant workers. The Bureau's calculation takes into account the salary offered as well as the costs of travel, medical exams and administrative procedures. The approved rate must then be published as part of the vacancy advertisement, allowing migrant workers to make an informed decision regarding the expenses involved before applying. This process has reportedly led to a dramatic reduction in the costs for recruitment charged to workers (ILO, 2011b).

In Asia, the large number of women who are willing to migrate internationally for domestic work as well as the massive demand from more developed economies has led to a huge and profitable market for private employment agencies specializing in domestic worker recruitment and placement. Inadequate regulation and oversight by governments in many countries has meant that domestic workers are often largely dependent upon those agencies for establishing fair working conditions and resolution of disputes. As a result, domestic workers are frequently subjected to deceptive and fraudulent recruitment practices, debt bondage and abuse by agencies in both sending and receiving countries (Human Rights Watch, 2006).

Within the region, the Philippines and Sri Lanka have so far been the most successful labour-sending countries at developing regulatory frameworks for monitoring migrant domestic workers abroad. According to a Human Rights Watch report (2006), migrant domestic workers from these two countries have tended to encounter far less abuse and exploitation by using private employment agencies that are licensed and supervised by their respective labour authorities when compared to those who migrated through unregulated channels. Some of the good practices adopted by Sri Lanka (ILO, 2011b):

- Domestic workers must be at least 21 years old.
- Contracts must originate in receiving countries and should be confirmed by the Labour Attaché at a Sri Lankan diplomatic mission.
- Minimum wage standards must be respected.
- Domestic workers must participate in a compulsory training session before departure.
- No fees should be collected from domestic workers.

2.8.3 Egypt

Egypt's Labour Code, enacted in 2003, provides an additional example from the developing world for managing the recruitment of workers for overseas employment. Through the Ministry of Manpower and Immigration, as well as through private employment agencies, workers wanting to obtain overseas employment are matched with foreign companies seeking migrant workers. The Labour Code provides a regulatory framework for private employment agencies, which is enforced by the Department of Labour Migration. The Department is responsible for reviewing all offers of employment and certifying them for compliance with the regulations of the Labour Code. In cases in which an agency violates the Labour Code, the Ministry of Manpower and Immigration can suspend or discontinue their operations (ILO, 2006).

2.8.4 Ethiopia

Ethiopia enacted the Private Employment Agency Proclamation in 1998, with the policy objective of protecting Ethiopian migrant workers from abuses through the licensing of agencies. The Proclamation establishes minimum legal requirements that must be met by private employment agencies before recruitment activities take place. It also establishes legal standards for employment contracts, which must be submitted to the government authorities for their review of compliance. Additionally, private employment agencies must post a bond for recruited workers who are sent abroad and are required to accept legal responsibility for any violations of employment contracts by their employers or other third parties. Finally, the Proclamation also establishes penalties for recruitment violations, including suspension or cancellation of the private employment agency's recruiting license (ILO, 2006).

2.9 Conclusions on international standards and good practices for recruitment complaint mechanisms and related policy measures

Problems with malpractice and the exploitation of migrant workers by private employment agencies persist and have even increased in magnitude in many countries in spite of national legal frameworks and regulations. These events have helped to create recognition that problems with abuse and exploitation in recruitment are fundamentally more complex than simply legal loopholes or gaps in implementation efforts. As Mughal and Padilla conclude in their study of regulatory frameworks for the recruitment of migrant workers, "Poverty, dire lack of viable choices in the home country and the need to escape from their harsh effects push migrant workers to take even the most unjust terms of recruitment and dangerous conditions of employment in exchange for a slim chance of a better future for themselves and their families" (2005, pp. 65–66).

Although the long-term solutions for addressing increased vulnerability to recruitment abuses should include initiatives on poverty reduction and improving livelihood options domestically, there are legislative and administrative measures that have proven beneficial in reducing recruitment malpractice through enhanced monitoring and regulation of private employment agencies. Establishing complaint mechanisms under a legal framework that is based upon international labour standards is a step that can be taken in the short to medium term to help ensure greater protection for jobseekers. These mechanisms not only support the rights of workers who have been deceived or abused during the recruitment process to access justice through the filing of complaints but they also act as a valuable deterrent against unlawful practices by private employment agencies.

The enactment of a specific model for complaint mechanisms in Thailand needs to be based upon a thorough analysis of the scale, activities and problems of the recruitment industry as well as the capabilities of the Government to implement the policy effectively and systematically. The principles contained within Convention No. 181 and its companion Recommendation No. 188 as well as the practical guidelines for establishing complaint mechanisms contained within the *Guide to Private Employment Agencies, the Handbook on Establishing Effective Labour Migration Policies* and the Multilateral Framework on Labour Migration, provide essential knowledge and insights that can be used to strengthen Thailand's regulation of private employment agencies.

Chapter 3

Protection policies, practices and complaint mechanisms

3.1 Outbound migrant workers

As a result of the increased number of Thai workers migrating for work abroad during the 1960s, the Government became aware of the need to establish policies to protect its nationals from exploitation and abuse during the recruiting process. The Recruitment and Job-Seekers Protection Act was passed in 1968 to provide the legal framework for regulation of the recruitment process. The law stipulates that private employment agencies must be licensed by the Department of Employment. The number of licensed recruitment agencies increased from just a handful to approximately 220 by the end of 2010 (Chantavanich et al., 2010, p. 8). However, the rapid growth in the number of agencies was followed by a correlated increase in the number of complaints from jobseekers of agency malpractice. To keep pace with both the growth in the industry and the increasingly complex forms of abuse against migrant workers, the Recruitment and Job-Seekers Protection Act was amended in 1985, 1994 and 2001.

This section examines Thailand's protection policies and practices for the regulation of recognized recruitment channels and the process and obstacles or constraints for filing grievances and the use of such mechanisms.

3.1.1 Protection policies and practices for the regulation of the recruitment channels

To fulfil its mandate to enforce the law to protect jobseekers and regulate the activities of private employment agencies, the Department of Employment monitors the five officially recognized channels available to Thais seeking work abroad:

1. Recruitment through the Department of Employment.
2. Direct recruitment.
3. Recruitment through private employment agency.
4. Being sent to work abroad by an employer.
5. Being sent to work abroad as an intern or trainee by an employer.

Table 3.1. Number of Thais working overseas, by recruitment channel, 2006–11

	Direct	Re-entry	DOE	Employer		Agency	Total
				Working	Training		
2006	14 236	57 281	8 013	6 634	6 505	68 177	160 846
2007	15 784	61 931	8 290	7 613	6 158	62 141	161 917
2008	13 355	68 252	5 553	11 539	5 304	57 851	161 852
2009	10 482	68 953	3 048	12 566	3 942	48 720	147 711
2010	10 343	63 542	3 452	9 215	4 272	52 971	143 795
2011	11 612	57 380	4 987	12 720	3 826	57 092	147 623

Source: DOE, 2012.

Although not included within the five recognized categories of recruitment channels for outbound migrant workers, another formally sanctioned channel is available for those seeking work abroad as berry pickers in Sweden and Finland. As an exception to the Recruitment and Job-Seekers Protection Act, the Department of Employment gives special permission to agencies not officially licensed to recruit Thai workers only for berry picking in Sweden and Finland.

The policies and procedures for each of the five channels are as follows:

1. Recruitment through the Department of Employment

By choosing to go work abroad through the state recruitment channel, Thai workers bypass the need to use private employment agencies. The three main destination countries where workers are recruited through this channel are the Republic of Korea via the Employment Permit System, Japan via the Technical Intern Training Program and Israel through the IOM supervised job placement scheme.

Through this channel, the Department of Employment acts as the representative agent of an employer abroad, first screening and then sending the workers. As a result of the direct involvement of the authorities in the recruitment process, this method is considered to be the safest way to find employment overseas and requires the smallest expenditure for jobseekers on recruitment fees. Workers are only required to pay the cost of practical necessities, such as airfare, passport fees and similar basic expenses. However, it remains an underutilized channel because of competition from other forms of recruitment.

2. Direct recruitment

It is possible for workers to contact employers directly and find employment without any assistance from a broker or recruitment agent. Seeking overseas employment through this channel does often save workers the expense of paying a recruitment fee. It is a common method used by workers who have previous overseas experience and who are familiar enough with their prospective employer to establish direct contact to arrange an employment contract and other necessary documentation.

Generally speaking, this type of recruitment is more suitable for workers with some technical or vocational skills, such as welders or carpenters, rather than unskilled workers. Because workers with these skills are in greater demand in many countries, they have greater bargaining power when negotiating the terms of their employment and are therefore less vulnerable to exploitation and abuse.

Private employment agencies frequently attempt to use this method of recruitment to avoid taking responsibility for the welfare of the workers they recruit once they are overseas. By assisting workers to apply for employment through their agency but persuading them to report to the Department of Employment that they were directly recruited for work abroad, private employment agencies circumvent the regulations governing their activities. As a consequence, if workers encounter difficulties while employed overseas, such as deception related to the structure or amount of payment for their work, they may find themselves unable to file a complaint against the private employment agency involved.

3. Recruitment through private employment agency

To legally seek work abroad through this channel, workers must secure employment through a licensed employment agency that is registered with the central registrar's office (Director General of the Department of Employment). Workers pursuing employment through a private agency are generally required to pay a fee for the services and are also responsible for the ancillary costs of their recruitment, such as airfare and other expenses.

The Department of Employment disseminates an updated list of licensed private employment agencies through bulletins and its website for jobseekers to access. However, even licensed private employment agencies at times employ practices that clearly violate the Recruitment and Job-Seekers Protection Act, such as recruiting workers for positions in advance of their actual availability.

4. Being sent to work abroad by an employer

In cases in which a Thai company has offices located in another country or has successfully bid for an overseas project, employers are permitted to send their workers abroad. These workers are considered as employees of the Thai company and thus the employment contract needs to be arranged in Thailand and falls under the jurisdiction of Thai laws. The Thai employer must pay for the expenses associated with the relocation of the worker and submit the documents requesting permission from the Department of Employment for the worker to go abroad.

5. Being sent to work abroad as an intern or trainee by an employer

Thai employers can request permission for employees to travel abroad for an internship or trainee programme. However, the law limits the length of such assignments to 45 days. In such cases, the Thai employer must pay for the relocation expenses of the worker and submit the necessary documents requesting Department of Employment permission.

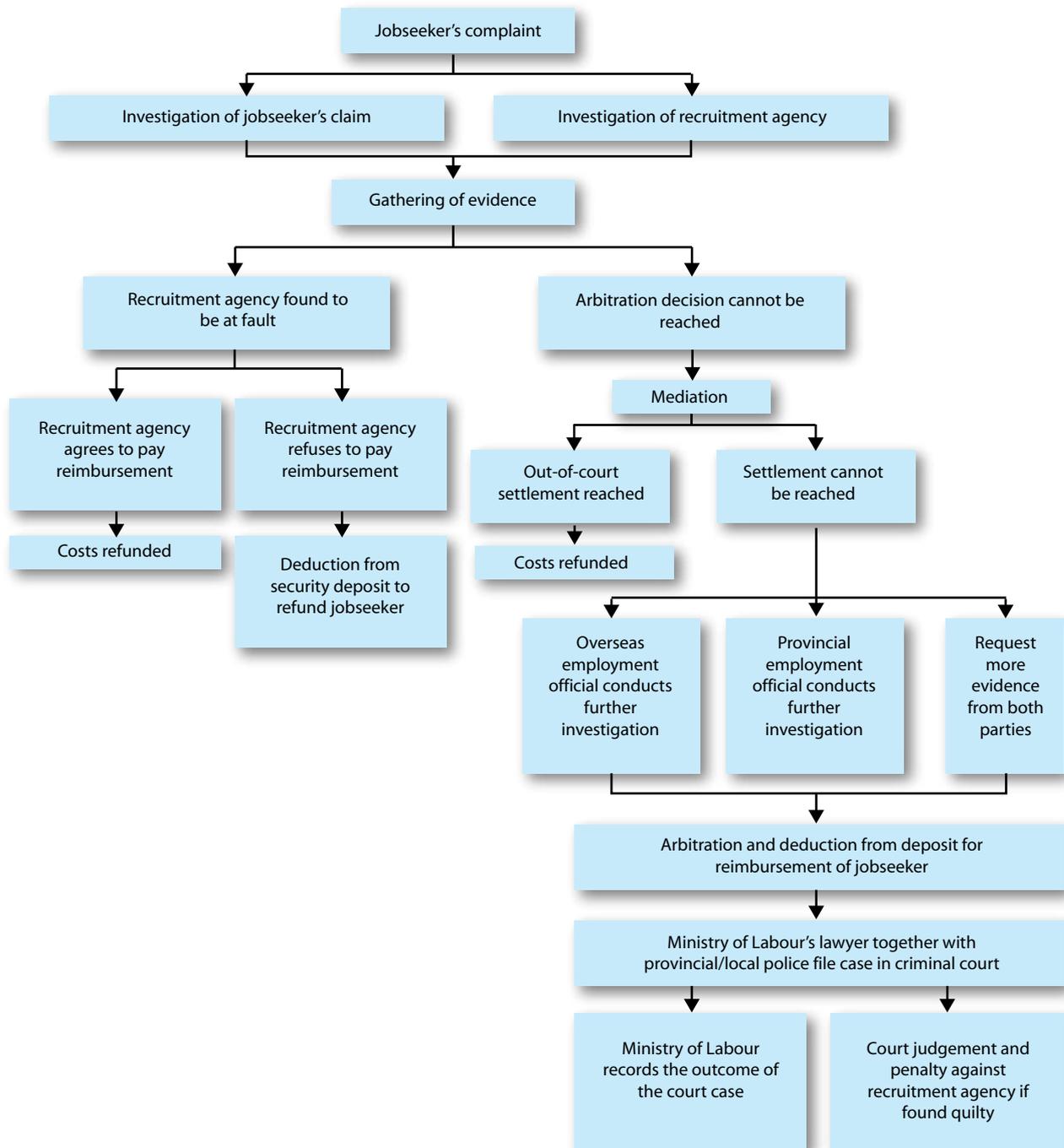
3.1.2 Filing complaints: Process, utilization, obstacles and constraints

During the recruitment process for an overseas job, any complaints with private employment agencies or other involved parties can be reported to the Department of Employment's Inspection and Job-Seekers Protection Division, which receives and investigates such grievances. However, because there are many channels for workers pursuing employment abroad, including the recognized legal channels as well as illegal recruitment through unlicensed agencies or brokers, the complaint mechanisms and procedures differ in relation to the legal status of the recruitment party involved. The following section describes the official procedures for filing and resolving complaints by the two categories: cases against licensed agencies and cases against unlicensed agencies.

Complaints process for licensed private employment agencies

Figure 3.1 outlines the Department of Employment's process for handling complaints against licensed private employment agencies. Outbound migrant workers with a complaint must report their grievance to the Inspection and Job-Seekers Protection Division or a local Provincial Employment Office (PEO). After a complaint has been received and it has been determined that the case falls under the jurisdiction of the Division or PEO, an officer is assigned to investigate, including collecting physical evidence and testimony from witnesses. The primary source of evidence for the complaints is generally from the jobseeker and any witnesses he or she provides. The evidence collection process must be conducted in accordance with the regulations set forth in the Administrative Procedure Act.

Figure 3.1. Process for outbound workers to resolve complaints against licensed recruitment agencies



Source: Inspection and Job-Seekers Protection Division, Department of Employment.

NOTE: The diagram of the official process for the handling of complaints was supplied by the Department of Employment and has not been altered. There are some unusual legal mechanisms within its structure, such as a formal arbitration hearing taking place before an attempt at mediation and then returning to formal arbitration again, which seem to demonstrate a lack of formalization and do not correspond with the findings of the field research conducted during this study.

In practice, informal out-of-court settlements remain at the core of resolving many recruitment-related complaints. After the government officer has collected evidence and testimony from the complainant, the accused agent and any other parties involved are given an opportunity to defend themselves against the allegation. The parties will first meet to try to reconcile their differences through mediation. Frequently, the procedure for resolving complaints made by a worker ends during this stage as the accused agent will offer a monetary settlement as compensation. If the worker is satisfied with the offer, then the case is settled.

Regulating recruitment of migrant workers:

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These settlements sometimes result in a blurring of the lines between compoundable and non-compoundable offences, allowing private employment agencies to avoid punishment for violations by settling cases with complainants before they end up in a trial.

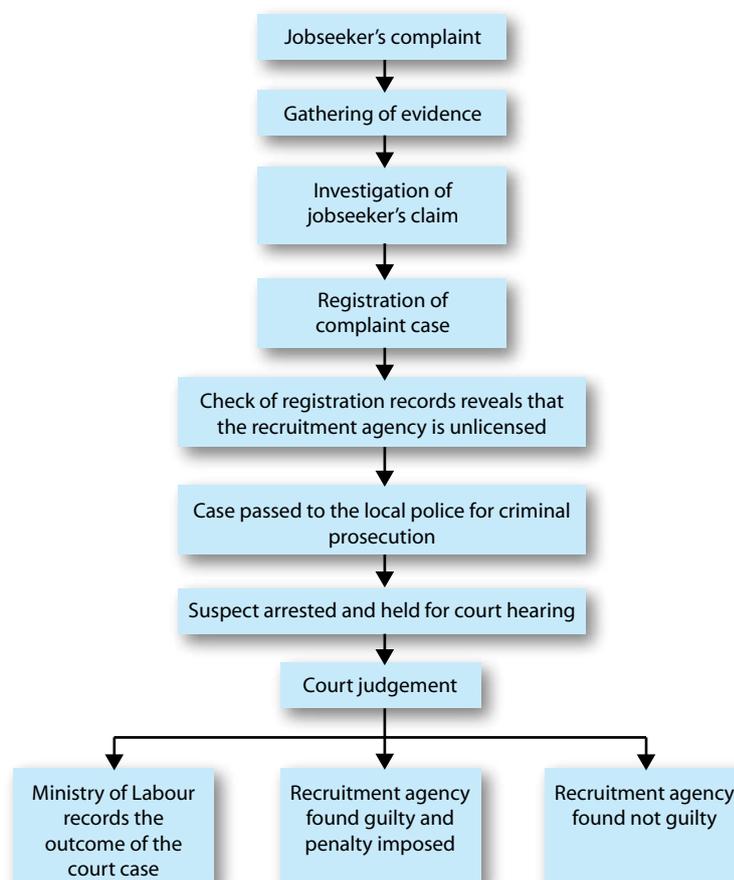
If the case does go to court and it is determined that the private employment agency is culpable of an offence, a sanction is imposed on the agency in accordance with the penal code contained within the Recruitment and Job-Seekers Protection Act or other relevant legislation. The sanction may be a warning, confiscation of the agency's security deposit, suspension of the license, revocation of the license or a criminal penalty.

Complaint process for unlicensed private employment agencies and brokers

As with the previously described process, workers who want to file a complaint against an unlicensed private employment agency or broker must register their grievance with the Inspection and Job-Seekers Protection Division or PEO (Figure 3.2). A Division or PEO officer then investigates the complaint and gathers evidence, such as money transfer receipts, employment contracts and other pertinent documentation. If the accused party is found to be operating without a valid license, the case is referred to the local police for further investigation. If the local police find that the case has merit, an arrest warrant is issued for the owner of the agency or the broker. The suspect is then arrested and held for a court hearing. Most commonly, this would be for the offence of cheating or fraud under the Criminal Code (No.21).

Additionally, complainants can file a lawsuit under the Civil Code against an unlicensed private employment agency for compensation. If the accused is found guilty of the alleged offence, then a determination of the amount of compensation and other penalties are made. If the charges are found to be groundless, the case is closed.

Figure 3.2. Process for outbound workers to resolve complaints against unlicensed recruitment agencies



Source: Inspection and Job-Seekers Protection Division, Department of Employment.

NOTE: The diagram of the official process for handling complaints against unlicensed private employment agencies was also supplied directly by the Department of Employment and has not been altered. As with the procedure for complaints against licensed private employment agencies, there were discrepancies found with how this process is conducted in practice. This includes cases in which an informal settlement is reached between the two parties, which can preclude the enforcement of criminal penalties against unlicensed private employment agencies or brokers. In addition, when charges are filed against an unlicensed agent, the time required for investigation and adjudication of their case is generally lengthy, which can allow the accused sufficient time to flee and escape punishment. This lack of penalty for malfeasance further encourages a culture of impunity within segments of the Thai recruitment industry.

Utilization of the complaint mechanism for outbound migrant workers

According to Department of Employment records, an average of 2,593 complaints per year was filed against recruitment agencies between 2006 and 2011, the majority of them involving unlicensed agencies or brokers.

Government-provided statistics for 2011 show that of 147,623 outbound Thai migrant workers, 1,781 workers filed a complaint related to recruitment abuse. In terms of hotspots, Bangkok was the province with the largest number of complaints from workers, followed by the north-eastern region. These two regions perennially top the list for number of grievances filed for recruitment-related abuses primarily because they have the largest concentrations of private employment agencies, and workers are required to file complaints in the province in which they were recruited.

The statistics highlighted in Table 3.2 reveal a steady decline not only in the total amount of compensation paid by recruitment agencies but also in the proportion of the amount requested that workers actually receive. Although a reduction in the amount of compensation paid could be posited as the result of successful law enforcement, coupled with the decline in the percentage of the requested amount that is in fact received, the evidence suggests an increasingly ineffective complaint mechanism. When also considering the small number of punitive actions taken against recruiters in recent years, the picture presented appears to be one of an increasingly dysfunctional regulatory system that is considerably biased against workers and jobseekers.

Table 3.2. Grievances filed and compensation paid to overseas jobseekers under the Recruitment and Job-Seekers Protection Act between 2006 and 2011 (THB)

	Grievances			Compensation			
	Persons	Money requested in compensation	Average amount requested per person	Persons	Money received in compensation	Average amount received per person	Percentage Requested actually received
2006	3 139	203 578 847	64 854	3 148	81 782 099	25 979	40%
2007	2 561	147 566 446	57 620	2 556	61 035 218	23 879	41%
2008	2 710	169 115 771	62 404	2 869	58 257 023	20 305	34%
2009	3 220	192 180 877	59 683	3 148	55 430 808	17 608	29%
2010	2 145	120 763 548	56 300	2 192	32 399 001	14 780	27%
2011	1 781	120 016 470	67 387	1 792	23 200 380	12 947	19%

Source: DOE, 2012.

The primary reason behind the decline seems to be the increased frequency of out-of-court settlements for resolving complaints against both licensed and unlicensed recruitment agencies. As a result of the expense, duration and complexity of a court hearing, many workers and recruitment agencies prefer to use this method. However, as a consequence, workers often end up receiving a far smaller amount of compensation than requested, and it is rare that further sanctions are imposed against the recruiters.

For certain complaint cases in which there is insufficient material evidence to support a worker's claim, a more informal mediation process may be an appropriate option for resolving the dispute. Unfortunately, it appears that the impartiality of such mediations is sometimes questionable under the current mechanisms.

An alternative explanation for the small amount of compensation paid was provided by a Department of Employment staff member who suggested that the sums requested are often "inflated" because of an emotional reaction by workers to the abuses suffered; thus, what they actually receive should be less. No evidence to either confirm or deny the validity of this justification was found during the field research. Regardless, it does not offer an explanation of why there has been a declining trend in the proportion of compensation paid.

As shown in Table 3.3, the existing complaint mechanism was unable to handle the quantity of grievances filed in 2010–11. Of the 1,649 complaints received during that period, 1,080 cases are still outstanding, or 65 per cent of the total. A similar backlog was found for cases against unlicensed recruiters, with 802 of the 1,268 complaints, or 63 per cent, still unresolved. Staffing shortages for the investigation of claims and the long duration of the process to have claims adjudicated in court were cited during the research as the primary factors contributing to this build-up of unresolved cases.

Table 3.3. Grievances filed and compensation paid to overseas jobseekers under the Recruitment and Job-Seekers Protection Act between October 2010 and August 2011, by region (THB)

	Grievances		Compensation		Pending cases
	#	Money requested	#	Money received	#
Bangkok	580	39 857 598	626	16 442 030	948
Metropolitan Bangkok	140	4 845 020	65	519 000	51
Central region	63	2 972 000	63	-	-
Northern region	217	10 505 879	207	20 000	71
North-eastern region	685	47 021 413	686	432 250	10
Southern region	-	-	-	-	-
Total	1 649	105 201 910	1 647	17 413 280	1 080

Source: DOE, 2011.

The amounts paid in compensation for claims in areas outside of Bangkok were considerably smaller in relation to what was requested. In Bangkok and Metropolitan Bangkok, almost 37 per cent of the total claimed amount, or nearly THB17 million, was paid to complainants. In the rest of Thailand, less than 1 per cent, or THB452,250, was paid out. Although it is possible that there were reporting errors during the period that have exaggerated the disparity, the data obtained suggests that stronger follow-up action in response to complaints against private employment agencies is a particularly acute need in the provinces.

Although the statistical data in Table 3.4 suggests that a relatively small percentage of workers files a complaint against a recruiter, the qualitative data that emerged in the research for this analysis indicates that workers are often dissuaded from following through with their complaint by the recruiter, employer or other persons during the process of reporting them to authorities. As a result, the quantitative data on recruitment complaints collected by the Department of Employment is not an accurate representation of the scale of recruitment problems that Thai migrant workers experience.

The results from the in-depth field study reveal that there are several important factors that lead to obstacles and constraints on the ability of jobseekers to successfully file complaints against recruitment agencies, as the following section explains.

Table 3.4 Grievances filed and compensation paid to overseas jobseekers under the Recruitment and Job-Seekers Protection Act between October 2010 and August 2011, by region and legal status of recruitment agency (THB)

	Licensed recruitment agencies								Unlicensed recruitment agencies			
	Filed complaint pre-departure				Filed complaint after return				Grievances	Comp	Cases closed	
	Grievances		Compensation		Grievances		Compensation					
	#	Money requested	#	Money received	#	Money requested	#	Money received	#	Money requested	#	#
Bangkok	190	8 084 800	207	7 948 400	111	12 475 252	140	8 493 630	279	19 297 546	279	92
Met Bangkok	2	30 000	2	25 000	59	1 656 520	21	494 000	43	3 158 500	42	12
Central	0	0	0	0	0	0	0	0	63	2 972 000	63	19
North	1	56 400	1	20 000	0	0	0	0	216	10 449 479	206	72
North-east	7	190 500	7	176 000	11	646 750	11	256 250	667	46 184 163	668	271
South	0	0	0	0	0	0	0	0	0	0	0	0
Total	200	8 361 700	217	8 169 400	181	14 778 522	172	9 243 880	1 268	82 061 688	1 258	466

Source: DOE, 2011.

Obstacles and constraints to a fair hearing and resolution of recruitment complaints for outbound migrant workers

Despite the attempts of authorities to develop a systematic procedure for addressing recruitment complaints, in practice there are still problems with how the process functions. These are the result of how the workers use the mechanism, how the responsible authorities administrate it and how recruitment agencies and brokers attempt to interfere with it. The problems can be categorized into three causal types:

1. Problems and obstacles caused by workers.
2. Problems and obstacles caused by recruitment agencies and brokers.
3. Problems and obstacles caused by government agencies or officers.

1. Problems and obstacles caused by workers

- **Workers cooperating with recruitment agencies in providing false information to authorities**

This type of problem occurs prior to departure when workers, on the advice of the recruitment agent, conceal the truth or provide false information to officers with the Thailand Overseas Employment Administration (TOEA) regarding the agency's involvement in their recruitment or the amount of payment made during the process. In interviews with officers handling the overseas employment recruitment process and officers handling workers' complaints, there was agreement that the ineffectiveness of the complaint mechanisms is largely due to workers putting too much trust in their recruitment agent or broker. In some cases, workers are willing to trust the recruiter even more than the government authorities, even if they are operating without a recruitment license, because they typically come from the same local area and share a close cultural affinity.

Workers tend to view their cooperation with private employment agencies or brokers as a means to accelerate the recruitment process so that they can leave for work overseas more quickly. By reporting to the TOEA that they have been recruited directly by their employer, even though they did in fact find the job via a recruitment agency, they are circumventing the regulatory safeguards that have been put in place to protect them. Such cases of providing false information have been particularly prevalent among workers who were recruited to pick berries in Sweden. Through this deception, recruitment agencies can avoid being held responsible if complaints are made afterwards.

"Workers tend to believe the recruitment agency or broker more than the officer. The officer is asking workers who come to register or come for the training to provide them with information to protect them from deception. However, they don't believe us. Oftentimes, a rehearsed speech is prepared between the workers

and the recruitment agency. However, when we ask them questions regarding the expenses and the service fees collected by the recruitment agency, the worker will reply that the amount does exceed the rate set by the law. In fact, they have often already paid a large amount to the agency. We would then find out that the worker has been deceived and all of the truthful information starts to pour out of their mouth.” (TOEA officer, December 2011)

- **Workers afraid or unaware of how to make a complaint**

A lack of knowledge and understanding about their rights and the procedure for filing a complaint often prevents workers from approaching the proper authorities. These are reinforced by concerns about retaliation from recruitment agencies, fears about the inadequacy of the evidence they possess to reinforce their claims and an attitude of fatalism resulting from cultural beliefs.

The field research in Petchabun Province revealed that a sizeable proportion of the workers who had been deceived by recruitment agencies promising berry picking work in Sweden did not file complaints. The statistical data on the number of complaints actually registered in the province with the Department of Employment showed only 30 cases in 2008, six cases in 2009 and two cases in 2010 (DOE, 2011).

In a focus group discussion, workers who were deceived by recruitment agencies cited several obstacles that deterred them from reporting complaints to the authorities. These included the previously stated reasons as well as the hefty amounts already paid for expenses and services fees – which make them want to continue working even though the job does not match what was stated in the employment contract. Many workers downplayed the significance of the unscrupulous practices of the private employment agency or broker and instead attributed their problems to their own karma for not being more cautious.

“When I went to apply for a job and sign the contract, I didn’t read or ask for a copy of the document because there were hundreds that were there to apply for a job as well. When they asked us to line up and sign the contract, we didn’t know what was written in it; we just quickly signed because we were afraid that we might not get to go for work.” (Worker from Petchabun Province, October 2011)

- **Workers disband after filing group complaints against recruitment agencies**

Another major obstacle for filing complaints is that after a group of migrant workers is deceived or taken advantage of by a private employment agency or broker and files a complaint together, they often go back to their home region. This creates discontinuity in the complaint process in terms of gathering evidence and following up with plaintiffs. It is often the case with group complaints that the workers who filed the complaint disappear or cannot be located to complete the process. In addition, the separation of the group sometimes allows for private employment agents to take advantage of individual workers.

“A common problem that can be found is that the workers lose their bargaining power with the recruitment agency because they do not come together after issuing the complaint. In the beginning when the problem occurred, they would gather together to register their grievance; but as time passed, they went their separate ways for work. This provided the company with the opportunity to negotiate with the workers individually. The workers then ended up being paid only a portion of the compensation they requested, usually less than what the workers paid in the first place.” (DOE officer in Petchabun Province, October 2011)

Other problems in handling group complaints are created by jurisdictional obstacles for authorities.

“In our province, the group members filing a complaint are often found to have been deceived in different areas.... This makes it difficult for us to find evidence and witnesses. All we can do is make a record of those who came to make the report and then pass it on to the local authorities for the next step in the procedure.... The workers then need to follow up with the locality where the incident first occurred. However, if the office site of the recruitment agency is located in our province, then we can provide assistance to all of the workers.” (DOE officer in Rayong Province, December 2011)

2. Problems and obstacles caused by recruitment agencies and brokers

- **Interference by recruitment agencies during investigation of complaints**

A frequent problem that occurs during the investigation stage of the complaint process is unlawful interference by representatives of a private employment agency. When a licensed operator learns that a complaint of malpractice has been lodged against the agency, he or she will send an agent to intervene in the process by contacting the workers directly. For example, agency staff may be sent to informally settle the claim by making an offer of compensation to the worker, usually for less than the amount they are entitled to.

Another common example of this type of interference occurs after the complaint process has reached the stage of determining sanctions against an agency found guilty of misconduct in the form of a licensing penalty. In many cases, the operator will send an important or influential figure to negotiate a reduction in the severity of the penalty imposed. This may take the form of a request for the period of the suspension to be reduced or for a license suspension instead of a license revocation. This type of interference often occurs as part of an operator's patronage relationship with a high-ranking official or politician, which often exists in the form of hiring them as a "consultant." An ARCM study found that approximately two-thirds of recruitment agencies in Thailand had these types of relationships with influential persons (Chantavanich et al., 2010).

"In terms of influential people intervening in the process, either in the person of a politician or high-ranking official, it is almost certain that there will be some form of interference that will try to deter the authorities from justly imposing a penalty. This shows the difficulties that we face in trying to fairly adjudicate cases." (TOEA officer, 2009, in a research project conducted by the Asian Research Center for Migration)

- **Using financial management techniques and employment contracts to conceal fraud**

Recruitment agencies often issue fraudulent receipts to hide from authorities that they overcharge jobseekers for service fees. This frequently includes issuing receipts with an amount that is allowed under the law and concealing the real amount actually charged by issuing a receipt for the remainder of the service fee as another expense or by collecting the service fee in a series of smaller payments for other expenses and issuing individual receipts for each (which are often not saved by workers).

"In terms of collecting money from workers, the agencies often use a technique to deceive them by not collecting the full amount of their service fee in one round. They will collect it bit by bit by adding on to other expenses. When it comes to small amounts of money, the workers often do not pay much attention to requesting or keeping the receipt." (DOE officer in Rayong Province, December 2011)

It is true that fees are the core issue in most recruitment irregularities, both in Thailand and internationally, with recruiters charging excessive rates, collecting fees too early in the process or failing to issue the appropriate receipts. The Department of Employment, however, has limited jurisdiction in regulating some of the fees that are charged during the recruitment of migrants workers by other parties. These include charges incurred for such services as medical examinations, skills and language training and loans. The fees may be legal under Thai laws but nonetheless add up to unexpectedly large amounts for workers.

Another common form of fraudulent practice by agencies and employers is contract substitution. A first contract is drafted and signed for submission to the Department of Employment, while a second contract contains the actual employment terms for the worker. The second contract will frequently alter the conditions (less favourable) related to the salary, job duties and welfare of the worker that are described in the first contract. The private employment agency and the employer have already agreed to the different terms and wilfully deceive both the Department of Employment officer and the jobseeker. The jobseeker likely will not learn of the deception until he/she arrives abroad and is asked to sign the second contract, after having spent a large amount of time and money to secure the employment.

“Thai employers often write up an employment contract that abides by the regulations set out by the Department of Employment. But when the workers have travelled to the destination country, the employer will make up a new employment contract that is different from the one that the Department of Employment granted permission for. This has become quite a big problem because instead of returning home and making a complaint after finding out that the employer had broken the original contract, the workers often choose to sign a new contract. In fact, the initial contract should be considered as the legally binding document because it is the contract that was initially signed by the worker for overseas employment.” (Labour lawyer, December 2011)

3. Problems and obstacles caused by government agencies or officers

- **Officers biased against workers**

Although migrant workers’ eagerness to find overseas employment may lead them to overlook the details of the terms of employment or be overly trusting of the person recruiting them, it is also clear that some of the officers handling workers’ complaints have a rather one-sided view of the causal factors involved. A “blame the victim” approach among officers may lead to a biased response in investigating and resolving complaint cases.

“In the case of complaints against recruitment agencies, it is often found that the problem was not caused by a recruitment agency trying to break the law or obstacles created by state authorities to reporting it, but rather it is the fault of the workers themselves. I blame the workers for not knowing anything about an unlicensed recruitment agency but still going to apply for a job with them and giving them money... If they applied with licensed recruitment agencies, whether or not there is an actual job available, at least it is clear that they have a proper business office where they can go if they have any problems.

I don’t consider this a problem caused by a loophole in Thai laws but see it as a problem caused by the workers not knowing how to protect their rights... If you ask me why they were deceived by the broker, it’s because of their own greed and neediness... When they see that others who have gone to work abroad can buy more land, can buy a new house, can buy a new car, can buy their children a motorcycle to ride to school, then they start to compare. It’s really all about them wanting to have as much as others... When the jobseekers hear that they can earn THB30,000 per month in salary and THB40,000 including overtime, they start to calculate how much they would get paid in a year. When they do the math and calculate that they would get up to THB480,000 per year, the brokerage fee of THB200,000 doesn’t sound like so much. In their heads they start calculating the amount they can make for 24 months, 36 months, etc. In the end, they often decide to go because their greediness overwhelms their concern about the broker’s fees or actions.” (Inspection and Job-Seekers Protection Division officer, November 2009, in a research project conducted by the Asian Research Center for Migration)

- **Personnel shortages**

The Department of Employment staff handling workers’ complaints also are constrained by personnel shortages. One officer often has to handle multiple complaint cases at the same time, with each one requiring a considerable amount of time to investigate and resolve properly. Insufficient staffing often leads to delays and discontinuity in the handling of individual complaint cases and follow-up.

- **Outdated laws and enforcement efforts that have not kept pace with innovative practices by fraudulent recruitment agencies and brokers**

Both licensed and unlicensed private employment agencies and brokers continue to adapt their techniques for avoiding accountability in recruitment misconduct. For example, many licensed agencies now make use of unlicensed “subagents” or brokers who are not formally in their employ when recruiting in local villages. This allows a licensed agency to circumvent the regulations governing their operations by using the subagents as proxies. In so doing, they can distance themselves from legal responsibility for the illicit practices of such subagents. Another innovative

technique that has emerged is drawing up legal documents that conceal the true identity of the recruitment agency providing services; thus preventing workers from seeking redress for their actions.

“Nowadays, recruitment agencies have reached new levels of advancement in their deceptions. Back in 2009, there was still an employment contract made between the employer and the worker, so we could hold them responsible through court proceedings. Now however, in addition to the employment contracts, they also create other legal documents that they get workers to sign stating the amount that the agency is requesting for their service fees and limiting their future liability. The agencies are provided with exceptions from the Department of Employment to create these legal documents and thus gain approval for their actions. This shows that their techniques are evolving over time and that there is a need to investigate these practices and how to protect workers against them. The workers also need to protect themselves... Apart from this technique, the recruitment of workers is often conducted through unlicensed agents. These agents normally do not accept money transfers but only payment in cash... As a result, the workers will often not have any evidence to show that they have made their payment.” (Labour lawyer, December 2011)

- **Inadequate investigation and officers’ fears about being sued for false accusations**

Other important obstacles to the complaints process are deficiencies in follow-up investigations and the fears that officers have about being sued for making a false claim against someone. As the plaintiff workers often cannot provide clear-cut material evidence or witnesses to aid the investigation, the officers end up using the quick and easy way to resolve the case: arbitration. This bias towards settling cases out of court is also partly due to officers being afraid to be overly assertive in going ahead with a trial due to the potential legal repercussions against themselves.

“There was a case in which an officer from the Department was trying to help a worker who was deceived by pursuing a court hearing against the offending recruitment agency. However, in the end, the court handed down a not guilty verdict and the officer ended up being countersued under Article 157 of the law. This case has caused a great deal of concern for many officers and has affected the way they handle complaint cases.” (Department of Labour Protection and Welfare officer, December 2011)

Box 1

A Thai worker in Sweden’s berry picking industry

Somchai, a Thai national from Petchabun Province, decided to apply for a berry picking job in Sweden because he saw that his village neighbours earned much money from this type of work. He was recruited by a private employment agency registered with the Department of Employment for sending workers to Sweden in 2009 and signed a contract for two months and ten days in duration. To cover the travelling expenses for the trip, which totalled THB75,000, Somchai used the deed to his house as collateral with the agency. The contract stated that he had to pay back the principal of the loan plus 3 per cent per month in interest. This amount of money was to be deducted from his berry picking wages each month.

After working for 48 days, Somchai realized that working there would not provide any financial benefit. There were too many Thai pickers for the amount of berries available. As well, he found the cost of living in Sweden to be quite high; but he had not yet been paid and was living off money he had brought with him. With these considerations, he decided he would be better off quitting and returning to Thailand.

Upon his return though, he learned that he had accumulated a total debt obligation of around THB200,000 from expenses and the unpaid interest on the loan. He initially attempted to pay some of the money back every day but found the burden overwhelming. He did not want to lose his house, so he decided to sue the agency that had recruited him. After the case was adjudicated, the judge found in his favour, and the deed to his house was returned. However, he did not receive any compensation for the unpaid wages.

3.1.3 Conclusions on the complaint mechanism for outbound migrant workers

There is an established process for handling complaints of outbound Thai migrant workers. Under this mechanism, the responsible authorities have clearly delegated mandates and procedures for carrying out their regulatory duties in cases against both licensed and unlicensed private employment agencies and brokers. In this respect, Thailand does have most of the law enforcement structures in place for an effective system to respond to grievances filed by Thai migrant workers.

However, significant obstacles and constraints exist within the complaint process relating to how the actors involved mismanage, disregard or attempt to sabotage its procedures. These can be roughly categorized as impunity of offenders through patronage and corruption; circumvention of laws by private employment agencies and migrant workers; and bias, capacity and resource constraints among authorities enforcing the law. Structural problems, in the form of a lack of fair and impartial alternatives to hearings in criminal courts for the resolution of complaints are also a considerable constraint on access to justice for migrant workers.

These concerns, when taken as a whole, pose a major obstacle to the ability of outbound Thai migrant workers to receive a just and fair hearing of their grievances for abuses during the recruitment process. Thus, renewed efforts at refining the process and strengthening law enforcement are necessary to increase the effectiveness of the existing mechanism.

3.2 Inbound migrant workers

There are three processes for inbound migrant workers to work legally in Thailand: i) registration with the Department of Employment under occasionally offered short-term amnesties to attain a temporary work permit; ii) a nationality verification process for registered migrant workers to obtain a temporary passport and visa; and iii) enrolling in the "MOU importation process" through which migrants obtain a work permit, a temporary passport and a visa.

Regular migrant workers who have acquired a work permit should theoretically receive protection under Thai labour laws, including the Recruitment and Job-Seekers Protection Act. However, in many cases it is quite evident there is a difference between protection policies for foreign workers as they are written in national laws and international agreements and the way they are interpreted and applied in practice.

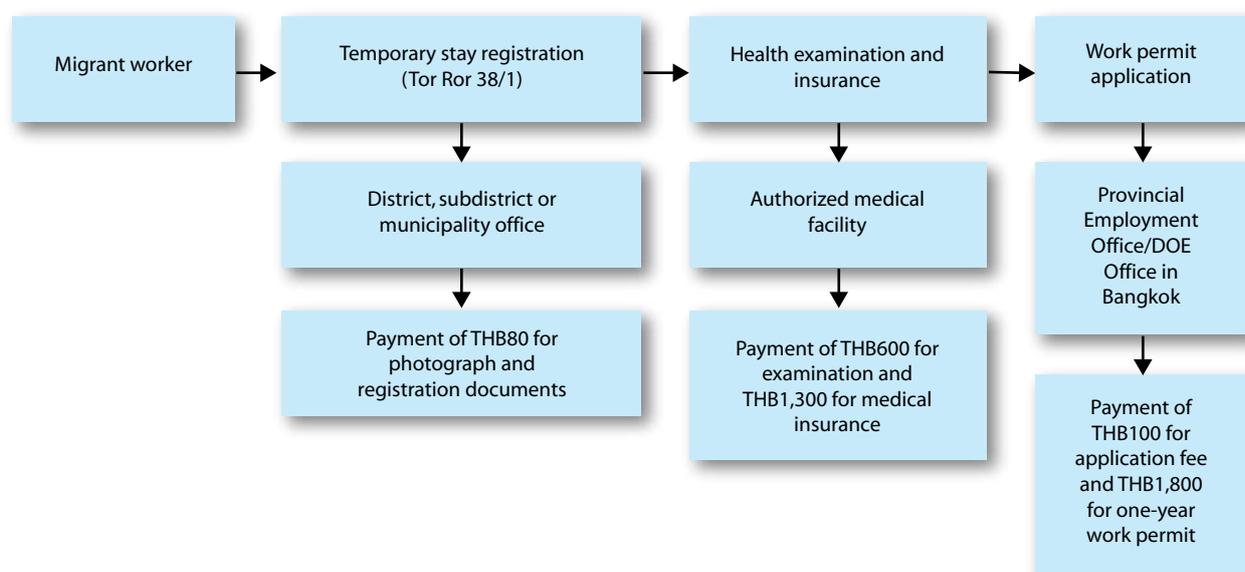
This section provides a practical analysis of the mechanisms available for inbound migrant workers to file recruitment-related complaints by examining the protection policies and practices for migrants to work legally in Thailand and the channels, obstacles and constraints for filing grievances.

3.2.1 Protection policy and practices for immigration and regularization

Thailand temporarily permits the nationals of Cambodia, Lao PDR and Myanmar to legally work in low-skilled employment within its borders via the following three processes.

1. Registration amnesties

On 26 April 2011, the Government announced the latest amnesty that allowed migrant workers who had entered the country illegally to register and thus obtain the right to live and work legally in Thailand. Migrant workers could complete a Temporary Stay Registration (Tor Ror 38/1) and then obtain a work permit through the following process:

Figure 3.3. Process to complete the temporary stay registration and obtain a work permit

The registration initiative for irregular migrant workers in Thailand is by no means a new phenomenon. Since 1996, the Government has declared amnesties to register migrant workers nearly on an annual basis, with mixed levels of worker participation and labour protection results. Although the registrations enable workers to legally work for a temporary period of one or two years and now provide medical insurance, a photo ID and a work permit, their tangible impact on protecting the rights of workers has been limited due to the inaccessibility of services and limited observance of workers' legal rights by local authorities. Moreover, a large proportion of migrant workers remain unable or unwilling to participate in the amnesty registrations: more than 60 per cent of irregular migrants from Cambodia, Lao PDR and Myanmar according to one Ministry of Labour estimate (Huguet et al., 2011, p. 9).

Table 3.5. Number of migrant workers registered between 15 June and 14 July 2011

	Employers	Total workers	Cambodia	Lao PDR	Myanmar
Bangkok	39 604	174 295	44 576	30 865	98 854
Rayong	4 322	37 050	27 307	2 762	6 981
Samut Sakhon	7 448	115 713	877	3 293	111 543
Thailand	165 980	996 278	242 429	104 928	648 921

Source: OFWA, 2011.

2. Nationality verification

The Government passed a Cabinet Resolution declaring that migrant workers who were already registered in Thailand through the amnesty policies were required to go through a nationality verification (NV) process to remain working legally. After several delays and extensions, a deadline was set for applications to the NV process of 28 February 2010, after which workers would be granted a two-year period to complete the process. If they had not completed the process by that date, they would be subject to deportation. The process for Cambodian and Lao nationals started in 2006, while for Myanmar nationals it only began as of 15 July 2009 due to limited cooperation from the Government of Myanmar.

The NV process requires registered migrants to provide identifying data to their government of origin so as to verify their nationality, after which they can obtain a temporary passport and a two-year Thai visa, which can be extended for an additional two years. Upon completion, migrant workers in theory can receive access to health care under the Social Security Scheme, worker's compensation insurance, the right to apply for a motorbike license and freedom of movement within Thailand for the time they are allowed to remain in the country working.

Regulating recruitment of migrant workers:

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However, the procedure that migrant workers and employers are required to follow to complete the NV process is quite complex. Figures 3.4 and 3.5 map out the bilateral process involved as well as the procedures for workers to obtain a visa and work permit (see Appendix I for a step-by-step guide describing all of the procedures involved).

The NV process proved especially challenging for migrant workers from Myanmar, who made up 82 per cent of all migrant workers with work permits for low-skilled employment in Thailand as of December 2009 (Huguet et al., 2011, p. 11). Unlike the other two governments, which set up a mechanism within Thailand to service their nationals, the authorities in Myanmar initially required that migrant workers return to their home country to obtain a temporary passport (with the exception of services offered at an NV processing centre in Ranong Province starting in July 2010). Many of the workers came from ethnic minority groups that had been engaged in decades of armed conflict with the military-controlled Government of Myanmar and were thus afraid to take part in the NV process. The process also entailed providing detailed biographical information to the Government of Myanmar, an obvious concern for migrant workers who had broken national laws to migrate to Thailand for work.

As a result, a grey market developed with brokers providing services to assist in navigating the 13-step process. Private agents offering assistance typically charged migrant workers between THB7,000 and THB14,000 to facilitate the process of verification. Thailand's Ministry of Labour attempted to regulate those businesses by granting permission to five agencies to carry out the services, with service fees not to exceed THB5,000 for each worker (IOM, 2011).

Figure 3.4. Process to complete the nationality verification for migrant workers from Myanmar (as of 2011)

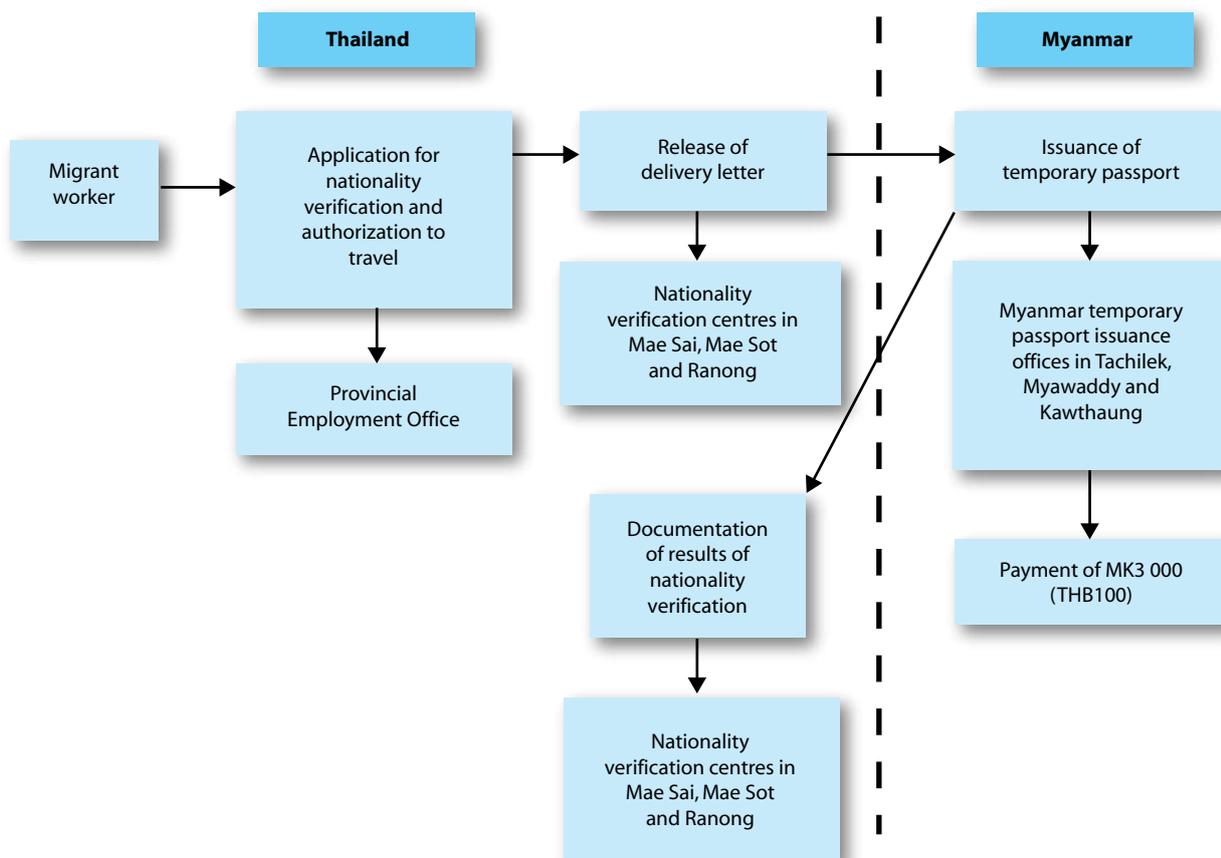
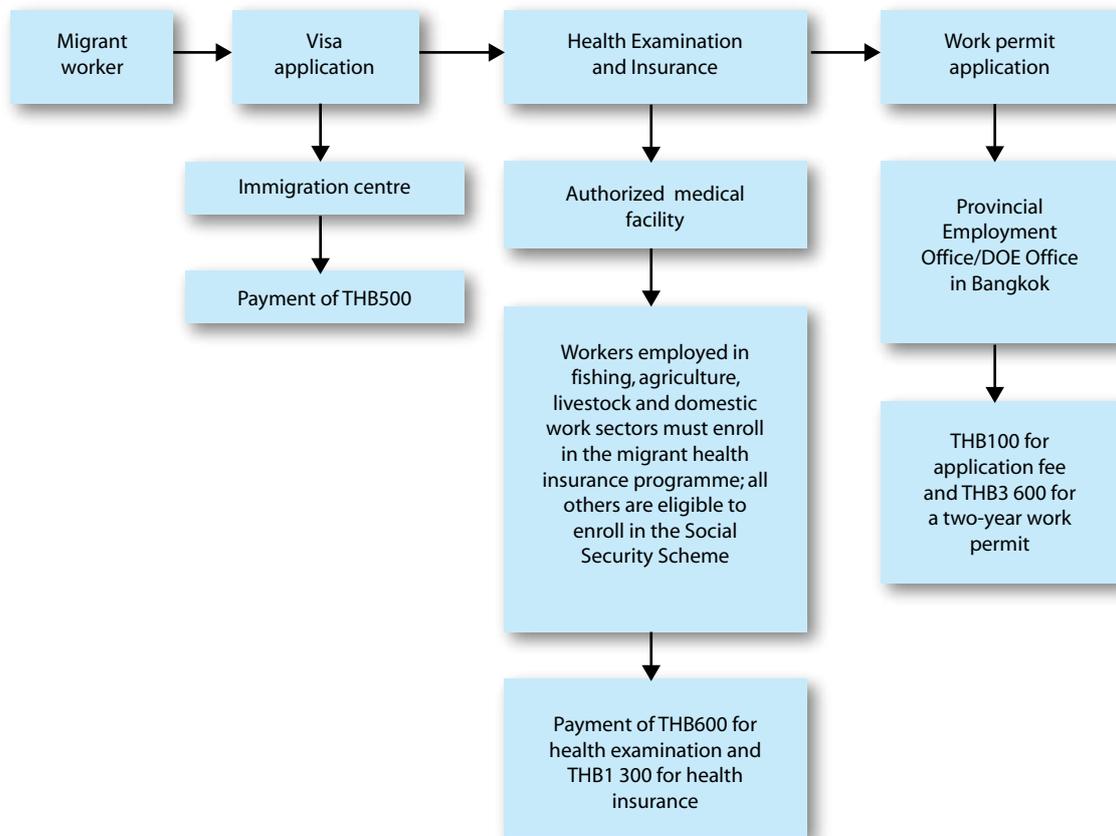


Figure 3.5. Procedures to obtain a visa and work permit after completing the nationality verification process (as of 2011)



There remain practical obstacles to migrant workers accessing the rights they were to be granted after completing the process. For example, many employers of migrant workers are unwilling to pay into the Social Security Scheme on their behalf and enforcement by authorities remains weak. Knowledge and understanding of the rights they are entitled to with the NV status they have acquired is often very limited among workers. Thus, a large part of the motivation to participate in the NV process remains the continuing threat of large-scale deportation of low-skilled foreign workers by the Government.

Table 3.6. Nationality verification processing status as of July 2011

Migrants eligible for NV as of Feb 2010				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	-	-	-	-
Samut Sakhon	-	-	-	-
Thailand	56 479	62 792	812 984	932 255
Migrants completed NV Mar 2010–July 2011				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	2 910	650	1 678	5 238
Samut Sakhon	-	-	7 787	7 787
Thailand	29 872	34 999	494 944	559 815
Migrants completed NV and received work permit Mar 2010–July 2011				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	3 903	670	2 645	7 218
Samut Sakhon	89	-	6 906	6 995
Thailand	28 424	30 997	319 006	378 427
Migrants not completing NV July 2011				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	884	-	139 210	140 094
Samut Sakhon	10 672	2 028	4 766	20 280
Thailand	26 607	27 793	318 040	372 440

Source: OFWA, 2011.

3. MOU recruitment

The Government signed memoranda of understanding (MOUs) to create legal channels for the recruitment of workers with Lao PDR in October 2002, Cambodia in May 2003 and Myanmar in June 2003. The agreements were developed at the request of the National Security Council of Thailand to avoid the ad hoc regularization policies in the form of the registration amnesties.

With recruitment undertaken via a formal intergovernmental process, the labour rights of migrants are to be fully protected under the jurisdiction of Thai labour laws. Workers recruited through this channel no longer should be subject to prosecution for illegal entry and are to receive a proper passport, visa and work permit. In addition, an employment contract specifying the terms and conditions of their jobs in Thailand is to be signed during recruitment within the countries of origin (see Appendix II for a step-by-step guide describing the procedures involved).

As of August 2011, more than eight years since the last of the agreements was signed, a total of only 38,994 workers had been recruited under the MOUs and were actually working in Thailand. This relatively small number is attributed to the high fees, complex procedures and long duration of the process involved. However, the number of people migrating through the MOU channels has begun to increase in recent years.

According to the field research, the number of foreign workers who had been recruited via the MOU process in Rayong Province totalled 7,218 workers, while in Samut Sakhon Province it numbered 1,777 workers. In both provinces, the workers had typically experienced a three-month recruitment process and had paid between THB18,000 and THB20,000 in service fees.

Table 3.7. Total number of migrants recruited under the MOU process as of August 2011

Migrants granted permission to work in Thailand				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	10 672	2 028	4 766	5 983
Samut Sakhon	2 398	676	-	3 074
Thailand	44 953	8 532	5 420	58 905
Migrants employed in Thailand and received work permit				
	Cambodia	Lao PDR	Myanmar	Total
Rayong	3 903	670	2 645	7 218
Samut Sakhon	1 356	421	-	1 777
Thailand	31 327	6 300	1 367	38 994

Source: OFWA, 2011.

More than 80 per cent of the workers recruited under the MOUs are Cambodian nationals, which reflects the comparative capacity of authorities and private employment agencies in the other countries as well as the willingness of migrants to use the licensed channels. A previous research study conducted by the Asian Research Center for Migration (ARCM) found three types of brokers and private employment agencies involved in the MOU recruitment procedure:

1. Individual brokers whose role includes working as employer representatives in the recruitment of workers in countries of origin.
2. Registered private employment agencies in Cambodia and Lao PDR that act as the representatives of Thai agencies.
3. Private employment agencies in Thailand that are often licensed agencies but operate only as “labour consulting companies” under the MOU process.

The primary role of a private employment agency in the countries of origin is to act as a representative on behalf of a Thailand-based agency. After the worker migrates to Thailand, the Thai agency often becomes the migrant worker’s employer in practical terms, generally contracting out their labour to a large factory. Due to the complexity involved, the Thai agency also assists with completing the MOU administrative process for obtaining a visa and work permit.

In terms of government oversight of the MOU process, the Office of Foreign Workers Administration of the Department of Employment regulates the recruitment of migrant workers, issues the work permits and coordinates with government agencies and embassies of the origin countries. At the local level, the Provincial Employment Offices approve the requests from companies to recruit workers under the quotas contained within the MOUs. However, a major policy gap exists in the MOUs on the regulation of the roles of Thai private employment agencies and their counterparts in countries of origin; even the term “recruitment agency” is avoided in the official parlance because they have no authorized role.

Although recruitment through the MOU process should mean that migrants are equally protected under Thai labour and recruitment laws and can enjoy the same legal benefits and protections as native Thai workers, this status has yet to be realized in practice. In principle, this should include equitable access to the official recruitment complaint mechanism provided under the Recruitment and Job-Seekers Protection Act. At local levels, however, many of the Provincial Employment Offices have not set up any process to receive complaints from foreign workers, and their officers do not believe that it would even fall under their mandate to do so.

Instead, migrant workers often approach the Thai recruitment agency involved with their recruitment when they want to make a complaint. Clearly, there are conflict-of-interest problems with this type of informal complaints mechanism, particularly given the level of debt that migrants often take on to go through the MOU process. Even

still, the obvious deficiencies notwithstanding, these informal mechanisms for handling grievances still provide relatively greater access to justice than that experienced by migrants using other migration channels, as discussed in the following section.

3.2.2 Filing recruitment-related complaints: Channels, obstacles and constraints

Official mechanisms for inbound migrant workers to file recruitment-related complaints remain quite limited because of the lack of explicit provisions for establishing such mechanisms within the Recruitment and Job-Seekers Protection Act. In the absence of an official mechanism, migrant workers have varying degrees of access to the following informal channels for addressing grievances:

1. Complaints via diplomatic channels

Lodging a complaint with their own country's diplomatic missions in Thailand is one means by which migrant workers can lodge grievances, either at their embassy in Bangkok or other consulates. Previous research conducted by ARCM demonstrated that this channel is primarily used by migrant workers recruited via the MOU process, although theoretically other regular migrant workers could also make use of it. Most often the complaints received relate to the activities of Thai private employment agencies in their role as "labour consulting company" under the MOU. These grievances are then referred to the Thai labour authorities, and even back to the Thai consulting companies in some cases, to seek informal resolution of the matter (Vungsiriphisal et al., 2010).

2. Complaints via Thai labour consulting agencies

As previously pointed out, migrant workers recruited through the MOU process typically lodge a complaint through their Thai labour consulting agency (the Thai private employment agency). This is the initial channel used for resolving their grievance because they believe the agency can negotiate directly with their employer. However, making a complaint through this channel would of course preclude the possibility of the grievance being related to the recruitment practices of the Thai consulting company itself and does not provide a genuinely neutral arbiter for resolving disputes.

3. Complaints via local NGOs

Filing complaints through local NGOs is a channel used mainly by registered migrant workers. Information about making a complaint in this way is often shared simply through word of mouth by fellow migrant workers. In many cases, local NGOs that have programming related to migrants have some experience in negotiating with employers or other parties to resolve conflicts. Employers in these circumstances often attempt to involve government authorities in the mediation process to formalize any resolution reached.

Obstacles and constraints to a fair hearing and resolution of recruitment-related complaints for inbound migrant workers

The obstacles and constraints to a fair hearing and resolution of the recruitment-related grievances of foreign migrant workers can be classified by the actors involved into the following typology:

1. Obstacles and constraints for migrant workers

The most commonly experienced obstacles and constraints for migrant workers wanting to lodge a recruitment-related complaint in Thailand are the language barrier, lack of familiarity with the complaint channels available and reticence to contact government authorities out of fear of retaliation from employers in the form of dismissal or even physical violence. As a result, according to staff in the Rayong Provincial Employment Office interviewed during the field research, foreign migrant workers do not even attempt to file a complaint with their office, leaving the staff largely unaware of the scope of exploitation and abuse that migrant workers experience. In fact, most of the grievances received were complaints from employers who were reporting the disappearance of a foreign migrant worker believed to have run away.

2. Obstacles and constraints for government authorities

The prime obstacle for local authorities is the lack of a clear mandate from the national level to handle migrant worker recruitment complaints, including the lack of dissemination of standard operating procedures for addressing such complaints. Although informants from the Ministry of Labour stated that they have a proactive policy towards protecting the rights of migrant workers, including establishing formal channels for handling recruitment-related complaints, the efforts were not evident during the field research. Despite high levels of migrant worker employment in the provinces, there was no evidence found of migrant workers ever having filed formal recruitment-related complaints with authorities.

Interviews with the staff of the Labour Rights Promotion Network in Samut Sakhon Province (a Thai NGO that provides assistance to foreign migrant workers) revealed that channels for migrant workers to file recruitment-related complaints are limited and that migrant workers are generally unaware of their existence. According to the informants interviewed, no attempts have been made in the provinces to educate workers about the channels available to them to pursue grievances in such cases, which disputes the notion that government officials have been active in establishing or promoting such mechanisms.

The research also indicated that even for migrant workers recruited formally under the MOU process, government mechanisms for resolving recruitment-related complaints are essentially non-existent.

3. Obstacles and constraints for Thai labour consulting agencies

The obstacles and constraints to the filing of recruitment-related complaints by migrant workers via their Thai labour consulting agency appear mostly in the conflict of interest that exists for the agencies as arbiter in such disputes. These are both directly financial in nature as well as temporal in that there is generally a significant delay involved in replacing migrant workers if the complaint cannot be resolved amicably.

“Our agency receives quotas from various factories seeking to hire migrant workers. After receiving those requirements, we contact employment agencies in both Cambodia and Myanmar; however, the majority of the migrant workers that we hire come from Cambodia. Half of the fee that we pay foreign employment agencies for recruitment is paid to them upon the entry of the worker into Thailand. The other half is paid after the worker begins employment. We demand a full refund of the fee from the Cambodian employment agency for any worker who deserts the workplace or resigns prior to the end of their agreed period of employment. How the employment agency in Cambodia deals with the errant worker is not known to us. ... As far as we can tell, the majority of those who decide to leave the job do return to their country. As for the salary paid by employers to their workers, we subtract our fees and expenses before paying the workers for their services.

(Thai labour consulting agency staff member, December 2011)

The ability of such labour consulting agencies to operate as an impartial mediator in disputes is thus very questionable. There are certainly elements of the standard definition of human trafficking involved in the practices of such agencies, including deception about salaries and fees, coercion through debt bondage and fear of physical abuse and exploitive labour practices.

With many migrant workers having taken on a debt of THB18,000–20,000 for the MOU process, they are likely stuck without recourse if the terms and conditions of employment are not as promised in the contract that was signed in the country of origin. The companies engaging in such activities remain an unregulated (but required) sector of employment services in Thailand and are thus officially referred to as “labour consulting agencies” rather than recruitment agencies. In practice they typically operate as both the recruiter and the de facto employer of migrant workers within Thailand, accepting the workers’ salaries from the employing company or principal and then passing on a portion of the amount received after deducting a myriad of expenses and fees. Such agencies attempting to play neutral arbiter for complaints by migrant workers are thus highly suspect.

“When I came to work at this factory, I was supposed to be paid THB244 per day for my labour, every two weeks. However, at each pay period, my wages are deducted THB800 for the recruitment service fee, THB10 per day for the Social Security Scheme, THB7 per day in taxes and THB100 per month to pay for the health check as well as additional fees for housing. I am left with only about THB2,000 per month in net pay, from which I am barely able to afford to buy adequate food. This taught me that coming in illegally is actually better compensated than entering through the MOU. Some of my friends have already fled these types of working conditions and found better work elsewhere [illegally].” (Cambodian worker recruited via MOU, December 2011)

Figure 3.6. Example of an Internet advertisement by a Thai labour consulting agency



Translation: 100 per cent legal migrant workers, one-year work permit under MOU, expenditure for one worker will be on average THB333 per month. Satisfaction guaranteed: If workers cannot work, run away or resign before the end of contract, we shall repay fees.

4. Obstacles and constraints for local NGOs

The most substantial constraint for local NGOs is that they lack any official mandate to intervene in disputes related to migrant worker recruitment. Although NGOs try to use their resources to provide assistance to migrant workers, they do not have any recognized authority when negotiating with employers or private employment agencies. They are thus relegated to the role of intermediary with employers, liaison with government authorities, information resource or interpreter. Additionally, the Burmese and Cambodian aid workers are often volunteers who are well intentioned but not necessarily aware of how to effectively intervene in such cases within Thailand.

3.2.3 Conclusions on the complaint mechanisms for inbound migrant workers

The field research for this study revealed that although regular inbound migrant workers are theoretically covered by the same protections as native workers under Thai labour laws, in practice there are no systematically available channels for them to file recruitment-related complaints with the Thai labour authorities. Formidable obstacles and constraints exist for migrant workers to even attempt to access such complaint mechanisms, including a general lack of awareness, language barriers and concerns about contacting government authorities out of fear of retaliation from employers and agents.

As a result, the primary complaint mechanism that exists for workers migrating under the MOU process is through the Thai “labour consulting agency” that recruited them. However, there are major obstacles to a fair hearing of grievances through this channel because such agencies have very clear conflicts of interest in such disputes and generally seek to resolve them as quickly and quietly as possible. The frequent involvement of such agencies in exploitive recruitment and labour practices also calls into serious question their ability to act as a fair arbiter in resolving migrant workers’ grievances.

For the remainder of the regular migrant workers who registered during the last registration window or who have completed the NV process, the only channels available for filing complaints are through a local NGO or the

diplomatic missions of their country of origin. There are also limitations to the effectiveness of those channels in that NGO staff members have no authority to conduct binding negotiations with private employment agencies or employers on these matters. As a consequence, they are generally consigned to providing basic assistance in the form of mediation, interpretation or information services for resolving disputes. Likewise, officers at the embassies and consulates of migrant workers' country of origin have little relevant authority over such conflicts and tend to refer cases to the Thai labour authorities and even directly to the private employment agency involved to resolve a complaint.

Overall, little substantive effort appears to have been made by government authorities to establish an institutional mandate, develop standard operating procedures or conduct awareness-raising activities to make the official complaint mechanism widely available to inbound migrant workers.

Box 2

A Cambodian in fisheries work in Rayong Province

Nine years ago, Momo, now 26, was recruited in his native Cambodia by a fellow Cambodian who convinced him to migrate to Thailand for work on a fishing boat. The broker told him that working in the fisheries sector would allow him to earn more money than he could in Cambodia, plus there would be free accommodation and food.

Momo is currently unregistered for work in Thailand but has a card with his employer's name on it, for which he pays THB300 each month. This card allows him to stay in the Rayong area only. It did not protect him from being arrested by the Royal Thai Navy while fishing in the Gulf of Thailand because he was unregistered and did not have a work permit.

Although he is aware that he could make a complaint with the Cambodian Embassy in Bangkok by phone for the misleading information that he was provided with during recruitment, he is very concerned that if the captain learned of a crew member making such a complaint to authorities he would try to shoot him.*

* Several recent studies and media stories support the legitimacy of the fear among migrant fisherman of being grievously injured or killed by their captain. A report by IOM, *Trafficking of Fisherman in Thailand*, noted that "Fishermen who do not perform according to the expectations of the boat captain may face severe beatings or other forms of physical maltreatment, denial of medical care and, in the worst cases, maiming or killing." This finding was also corroborated by an investigative report by BBC News entitled, "Burmese 'slavery' fishermen are trafficked and abused," which documented the story of a Burmese fisherman who saw three migrants murdered during only three months out at sea.

Chapter 4

Legal framework of recruitment complaint mechanisms

Thailand is both a labour-sending and receiving country; inbound migrant workers enter primarily from the neighbouring countries of Cambodia, Lao PDR, Myanmar and outbound Thai workers largely journey to Israel, Singapore, Taiwan and other higher-income countries. To further assess the recruitment-related complaint mechanisms available to those inbound and outbound migrant workers, this chapter examines the legislative framework and its implementation in Thailand in relationship to international labour standards. Through review and analysis of the formation and application of national, bilateral and regional policies for resolving workers' grievances in the recruitment process, the chapter highlights policy outcomes, challenges and areas for further development.

4.1 National legal framework for regulating migrant worker recruitment

In principle, both foreign inbound migrant workers and Thai outbound migrant workers are entitled to the same legal rights and protection under the Thai legal system. The most important of the relevant laws and regulations for governance of the migrant worker recruitment process are explained in the following sections.

4.1.1 Constitution of the Kingdom of Thailand

Section 4 of the country's Constitution, drafted in 2007, guarantees protection of the rights of all people in Thailand: "The human dignity, rights, liberty and equality of the people shall be protected." This section establishes a legal basis for a non-discriminatory application of human rights principles for all people within Thailand by state authorities. The Constitution thus can be interpreted as guaranteeing the right to impartial treatment and access to justice for migrant workers within Thailand, regardless of their nationality or legal status.

4.1.2 Recruitment and Job-Seekers Protection Act

The primary legislation for protecting migrant workers during the recruitment process is the Recruitment and Job-Seekers Protection Act (1985) and the attendant ministerial regulations of the Ministry of Labour. By regulating the involvement of private employment agencies in the recruitment of workers and providing legal protections to jobseekers, the law allows licensed agencies to offer employment services for outbound Thai migrant workers.

However, the law has become somewhat outdated for the effective regulation of private employment agencies. Limitations contained within the provisions of the Act and inadequate enforcement have allowed for frequent offences and infractions to take place. In the rare cases in which penalties against offenders have been enforced, the most commonly imposed sanction has been a temporary license suspension of 30–120 days, followed closely by a probationary period against the offender. Between 2004 and 2010, only six private employment agencies actually had their license permanently revoked for recruitment-related offences – despite evidence of widespread malpractice within the industry (Chantavanich et al., 2010, p. 103; DOE, 2011).

Another problem with the Act is that it was drafted with the intent of protecting outbound Thai migrant workers before large-scale in-migration had begun to take place. As a result, there are no specific provisions related to the protection of foreign jobseekers during recruitment. A corollary has been that no clear procedures or institutional frameworks have been developed to provide protection for inbound migrant worker recruitment. Thus, many labour authorities interpret the law as only applying to Thai workers. Likewise, the related ministerial regulations that were enacted do not contain any specific provisions related to the establishment of recruitment protections for inbound migrant workers.

4.1.3 Alien Employment Act

The more recent Alien Employment Act (2008) is one of the most important pieces of legislation concerning the regularization of migrant workers in Thailand, with Section 13 of the law establishing permission for the registering of migrant workers. However, the law was mainly enacted with the policy objective of regulating foreign migrant workers while in the country. Thus, it does not contain any provision that describes penalties for unscrupulous recruiters or employers. The intent of the Act is clearly more focused on the management of foreign workers than the businesses involved with their employment.

Despite the lack of provisions for disciplining exploitive recruiters or employers, the Alien Employment Act clearly stipulates specific penalties for migrant workers without work permits (Section 51), work permit holders who violate the conditions of their permits (Section 52) and work permit holders who fail to notify the Registrar in accordance with the law (Section 53). As a result of this orientation, its impact on labour protection for foreign migrant workers has been negligible.

4.1.4 Anti-Trafficking in Persons Act

The Anti-Trafficking in Persons Act (2008) is more relevant to providing criminal sanctions against those responsible for illicit recruitment practices against migrants – if they can be classified as human trafficking cases. These practices may qualify as the “act” element of human trafficking under Section 6 of the law if they used or threatened to use the “means” of force, abduction, fraud, deception, abuse of power or gave money or benefits to achieve the consent of a person having control over another person for the “purpose” of exploitation.

The law should apply equally to both outbound Thai migrant workers and inbound foreign migrant workers, providing a guarantee of fair access and treatment within the judicial system. However, the manner in which the law will be enforced remains in question because there have been few successful prosecutions of offenders to date and those prosecuted are not considered to be among the worst offenders by anti-trafficking organizations.

4.1.5 Criminal Code (No. 21): Cheating and fraud

Both Thai and foreign workers are permitted to file charges against recruiters who commit criminal offences covered under the provisions of the Criminal Code. Amended in 2008, the Criminal Code defines offences and corresponding penalties for violators, including offences related to the recruitment of workers. The offences of fraud and deception during recruitment are described under Sections 341, 342, 343 and 344 of the Code:

- **Offence of committing cheating or fraud, Section 341:** If someone deceives a worker during recruitment by providing false information or concealing of a fact that should have been revealed, it is described as committing the offence of cheating or fraud under the Code. This section sets the punishment for lawbreakers as imprisonment not exceeding three years, a fine not exceeding THB6,000 or both.
- **Actions of cheating or fraud, Section 342:** This section discusses actions of cheating or fraud by offenders during the recruitment process. These include falsely representing themselves or by taking advantage of the lack of knowledge of the deceived person.
- **Offence of providing false information to the public, Section 343:** If the offender under Section 341 provided false information to the public or concealed a fact that should have been revealed, they will be punished with five years of imprisonment, a fine not exceeding THB10,000 or both.
- **Offence of deceiving ten persons or more to work without pay or with pay less than agreed to, Section 344:** This section applies to brokers or recruitment agents who have cheated or deceived a group of workers. It sets punishment for brokers, agents, recruiting company owners or other offenders who deceive ten or more persons to perform work for themselves or for a third person with the intention of not paying wages or remuneration to such persons or with the intent to pay them lower wages or remuneration than those agreed upon.

Typically, for cases of illegal recruitment practices committed by private employment agencies or brokers, criminal charges would be filed under section 341 for committing the offence of cheating or fraud while compensation for such violations would fall under the provisions of the Civil and Commercial Code. The charge of cheating and fraud is generally considered a compoundable offence and can be dismissed if the parties involved reconcile their dispute.

Table 4.1. Criminal offences for recruitment malpractice

Criminal actions during the recruitment process	Charges under the law	Offenders	Plaintiffs	Trial location
Actions of cheating and fraud: Cheating, fraud, deception, providing false information, not revealing the truth, deceiving ten persons or more to work without pay or with pay less than the agreement.	Offence of cheating or fraud: Sections 341, 342, 343 and 344 of the Criminal Code (2008)	Anyone committing malpractice in recruitment, such as brokers, recruitment company agents or owners and employers	Victims, public prosecutors, Ministry of Labour	Criminal Court
Actions for purposes of exploitation: Procuring, buying, selling, bringing from or sending to, detaining or confining, harbouring or receiving any person. The action must be conducted by means of threat, use of force, abduction, fraud, deception, abuse of power or providing money or benefits to achieve the consent of a person having control over another person. The action must be committed for purposes of exploitation.	Offence of trafficking in persons: Section 6 of the Anti-Trafficking in Persons Act (2008)	Same as above, as well as any other parties involved in the act of trafficking in persons	Victims, public prosecutors, Ministry of Social Development and Human Security	Criminal Court

4.1.6 Civil and Commercial Code (Sections 420–424): Wrongful acts

In addition to filing charges under the Criminal Code, workers and jobseekers can file suit against a private employment agency or broker for a wrongful act under Sections 420 and 424 of the Civil and Commercial Code, last amended in 2008:

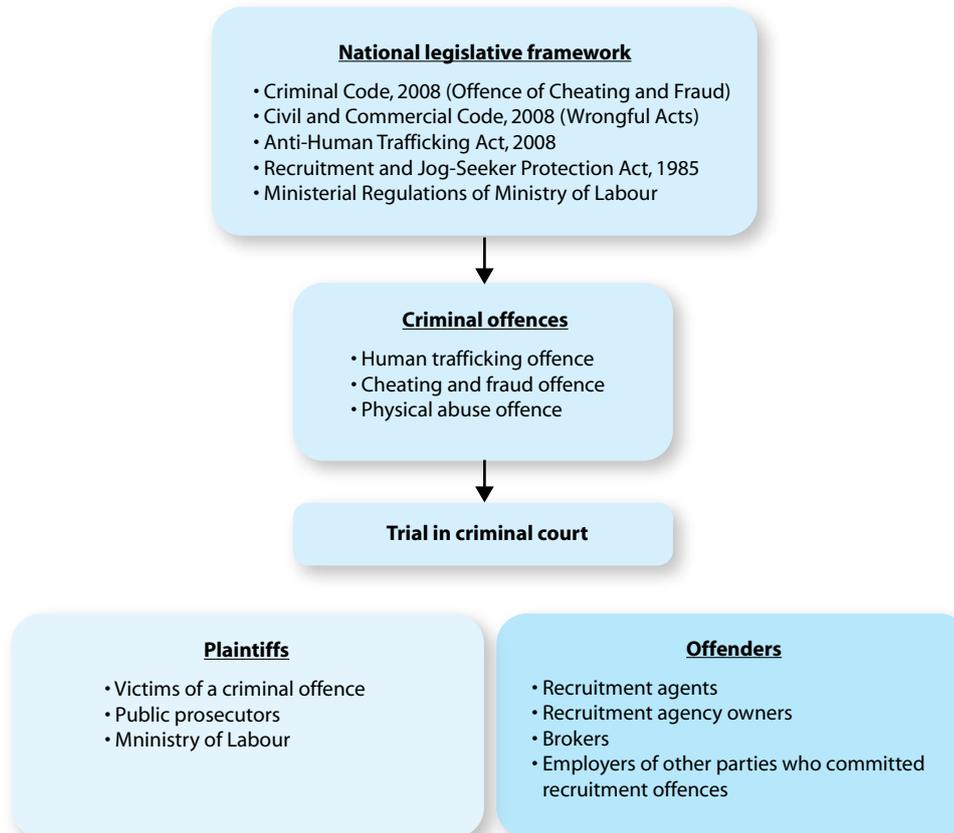
- **Section 420:** A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation.
- **Section 424:** The Court, when given judgement as to the liability for a wrongful act and the amount of compensation, shall not be bound by the provisions of the criminal law concerning liability to punishment or by the conviction or non-conviction of the wrongdoer for a criminal offence.

If the livelihood or assets of a worker or jobseeker are negatively affected due to a wrongful act committed by a private employment agency or broker, it can be argued that their rights were violated and the private employment agency or broker would be liable to pay compensation. The judge in such a case is granted the authority to order a private employment agency or broker to pay a compensation amount to workers or jobseekers commensurate

with the evidence provided plus damages (such as from loss of the opportunity to work abroad) when warranted.

Figure 4.1 outlines the process for prosecution of a recruitment-related offence under the Thai judicial system, which is, at least in principle, applicable for both inbound foreign migrant workers and outbound Thai migrant workers. In practice, the vast majority of such cases would be for Thai workers or jobseekers who were the victims of a criminal offence.

Figure 4.1. Process for prosecution of recruitment-related offences under the Thai judicial system



4.2 Regional and bilateral agreements relevant to the regulation of migrant worker recruitment in Thailand

In general, international instruments developed by the United Nations (treaties and conventions) include legally binding mechanisms for monitoring their implementation. States that are a party to such instruments have a legal obligation to fulfill the responsibilities outlined therein after ratifying them. Conversely, regional and bilateral instruments are often not legally binding upon States parties, although such instruments do require certain commitments and/or statements of intention from States. In that respect, signatory States to these types of agreements do have a moral obligation to comply with the principles and tenets agreed to under the instruments. It is also the intent of such instruments that States parties use their guidelines and provisions to further develop their legislation and policy frameworks.

The most significant regional and bilateral instruments relevant to migrant worker recruitment in Thailand are the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007); the Recommended Guidelines for Migrant Recruitment Policy and Practice in the Greater Mekong Subregion (2007); the MOUs on Cooperation in the Employment of Workers between Thailand and Cambodia, Lao PDR and Myanmar; and the Bangkok Declaration on Irregular Migration (1999).

Table 4.2. Non-legally binding regional and bilateral instruments related to the recruitment of inbound and outbound migrant workers

Regional instruments	Aims and objectives
Bangkok Declaration on Irregular Migration (1999)	To raise concerns about international migration matters, in particular irregular migration and human trafficking, and to call for a joint management approach in confronting such problems among Asia–Pacific countries.
Recommended Guidelines for Migrant Recruitment Policy and Practice in the Greater Mekong Subregion (2007)	To provide guidelines on the development of policies, legislation and mechanisms to ensure compliance concerning migrant worker recruitment for labour sending and receiving countries in the Mekong subregion.
ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)	To establish obligations for both sending and receiving countries concerning the protection of migrant workers, including the establishment of mechanisms to facilitate the formal recruitment of migrant workers.
Bilateral MOUs on Cooperation in the Employment of Workers between Thailand and Cambodia, Lao PDR and Myanmar (1999)	To establish a formal bilateral process for regular labour migration from Cambodia, Lao PDR and Myanmar to Thailand.

Sources: ASEAN, ILO and IOM, 2011.

4.2.1 MOUs on employment cooperation

The MOUs on Employment Cooperation between Thailand and Cambodia, Lao PDR and Myanmar are bilateral instruments created to formalize the process of recruitment for inbound migrant workers from those countries to Thailand. These MOUs are non-legally binding instruments that were signed to establish and promote a shared understanding and a mutually managed process for labour migration. However, there have been major delays in implementing the agreements due to the complexity of the administrative procedures developed as well as the expense and duration of the recruitment process for migrant workers. As a result, recruitment and placement of migrant workers under the MOUs had progressed rather slowly until recent increases in use.

As they are operational agreements as opposed to a statement of shared principles or ideals, the MOUs have very practical implications for the protection of migrant workers during recruitment that warrant more in-depth analysis.

Migrant worker protections provided under the MOUs

Although the MOUs were developed to promote a jointly managed formal labour migration process that would assist in the protection of workers, practicalities would suggest that the Thai Government’s main policy objective was to achieve a greater ability to monitor and control labour migration within its borders due to the increasing numbers of irregular migrants. Although the MOU provisions state that both Thailand and the labour-sending countries are to develop regulations concerning migrant worker recruitment and protection, little policy development progress has been made so far. The number of migrants participating in the MOU process has finally begun to increase in recent years, but the outcomes of the policy cannot be said to have had a particularly significant net impact on strengthening protections for migrant workers during recruitment or employment.

The most current instrument pertaining to the recruitment and protection of inbound migrant workers from Cambodia, Lao PDR and Myanmar is the ministerial regulation of June 2007: Legal Employment of Migrants in Thailand according to the Memoranda of Understanding.

The regulation elaborates and clarifies the steps involved in the process for employing inbound migrant workers, including obtaining a quota to employ migrant workers, submission of a petition to import migrant workers, request for a work permit on behalf of migrant workers and issuance of work permits. However, it does not contain any provisions related to the licensing of, grievances against or punishment of recruitment agencies involved with the MOU process.

With the exception of this notable policy gap, the MOUs are explicit in outlining the administrative requirements for the recruitment and job placement process with respect to visas, work permits, health insurance, taxes, employment contracts and the mandatory 15 per cent salary deduction for contribution to a “repatriation fund”. The Government had originally stated that it intended to use these funds to cover the costs of deporting irregular migrants (regular migrants would have the money paid back if they returned to their country voluntarily at the end of their employment contract). Although a legal framework for the fund was established in the latest amendment of the Alien Employment Act (2008), the policy remains questionable in terms of its compliance with Thailand’s obligations under international agreements and has never been implemented.

Under the MOUs, migrant workers are also required to pay income tax in Thailand if their salaries are high enough to fall within the minimum taxable income brackets. As a result, some migrant workers face double taxation on their income between paying taxes to Thailand as well as their country of origin (such as Myanmar) (Vasuprasat, 2008).

In addition to concerns about the policy gaps in the agreements related to the protection of migrant workers, the field research discovered unsettling findings regarding how the MOUs have been implemented in practice. According to multiple sources, the expense of the recruitment process for the MOUs, including private employment agencies’ service fees, are usually borne by the migrant workers themselves. The costs are quite high relative to the income of an average migrant worker (frequently totalling three to four months’ salary) and a large number of migrant workers cannot afford such payments without going heavily into debt. This is a major deterrent for most migrant workers to participate because they can use the informal recruitment networks more quickly, more easily and at a lower cost than the MOU recruitment channel. For those workers who choose to participate, many are forced into paying for the fees by indebting themselves to their recruitment agency and/or employer in Thailand. There is little transparency in how these debts are managed and workers are frequently overcharged on the initial service fee by the recruitment agency (Vasuprasat, 2008).

The field research also found that migrant workers from Cambodia are often told to sign two employment contracts, one with the recruitment agency in Cambodia in Khmer language and later a second bilingual contract. The workers are not encouraged to read and fully understand the details of such contracts and are usually not provided with their own copy. As a result, they are vulnerable to exploitation related to the amount of deductions from their salaries for various fees and expenses and deception by the broker or recruitment agency on the provision of accommodation, food, welfare and compensation.

Complaint mechanism under the MOUs

Although Article 17 of all three MOUs establishes broadly defined protection for formally recruited migrant workers, these provisions have largely not been implemented or enforced in practice. Consequently, there has been no official channel created for migrants recruited through the MOU process to file complaints or seek assistance under the national legislative framework or within the Ministry of Labour’s policies and procedures. Although many sources have documented how migrant workers continue to experience mistreatment and abuse as a consequence of recruitment practices under the MOUs (including overcharging on fees, providing false information and coercion), migrant workers rarely attempt to claim their rights under the Thai labour laws because the complaint mechanisms are generally unavailable or inaccessible to them. Language barriers and discriminatory attitudes of government authorities towards migrant workers create many of the difficulties. There were no interpreters or other mechanisms available for providing language assistance in the Provincial Employment Offices visited during the field research.

It can be concluded that although the MOUs state that both sending and receiving governments should ensure that migrant workers receive labour protections in accordance with the provisions of their domestic laws and are entitled to the same wages and welfare benefits as Thai workers, little has been accomplished on the practical level to guarantee that these protections occur in real terms. An important aspect of this is that the formal channels for recruitment-related grievances are essentially non-existent under the MOUs because they do not cite specific complaint mechanisms to which migrant workers are entitled.

4.2.2 Bangkok Declaration on Irregular Migration

The Bangkok Declaration on Irregular Migration is a non-binding agreement that was developed during an international symposium on migration in Bangkok (April 1999). The event, Towards Regional Cooperation on Irregular Undocumented Migration, was hosted by the Thai Government, with the participation of high-level representatives from 19 countries in the Asia-Pacific region. The discussions focused on the importance of joint management of international labour migration matters, including irregular migration and human trafficking. Importantly, the symposium paved the way for GMS countries to develop bilateral migration management agreements (which became the MOUS between Thailand and Cambodia, Lao PDR and Myanmar) (Vasuprasat, 2008, p. 2).

4.2.3 Recommended Guidelines for Migrant Recruitment Policy and Practice in the Greater Mekong Subregion

The Recommended Guidelines for Migrant Recruitment Policy and Practice in the Greater Mekong Subregion were developed under the Coordinated Mekong Ministerial Initiative Against Human Trafficking (COMMIT Process). The Guidelines emphasize the importance of improving the recruitment processes to encourage safe migration and reduce the potential vulnerability of migrant workers to labour exploitation, including the worst forms of child labour and human trafficking. The document provides comprehensive guidelines for both labour-sending and receiving countries to develop migrant worker recruitment policies and practices.

Table 4.3. Guidelines for migrant worker recruitment

The guiding principles for formal recruitment should be transparency, accessibility, efficiency and affordability

1) Pre-departure procedures and services: Recruitment agencies should ensure that selected workers are informed in their own language, clearly understand and freely accept the terms and conditions of employment. Copies of all relevant employment and recruitment contracts should be provided to them.

2) Regulation of recruitment agencies: Governments in receiving and sending countries should manage labour migration by licensing and supervising recruitment agencies and their subcontractors in a transparent and accountable manner and in accordance with international labour standards (such as Convention No. 181). In addition, recruitment agencies should be held fully accountable for the activities of their recruiting agents and subcontractors, and governments should regularly monitor the activities of recruitment agencies. Penalties for malpractice should include suspension or cancellation of license to recruit. To provide remedy for abuses, governments should establish complaint mechanisms and systems for migrant workers to claim compensation from recruitment agencies.

3) Fees for recruitment services: Fees for recruitment services should be borne by employers. Recruitment agencies should reveal all fees and terms of agreement to employers and workers, ensuring transparency about the expenses involved. In addition, governments should regulate and monitor salary deductions of migrant workers' paychecks by recruitment agencies. Written consent must be obtained from migrant workers for any salary deductions by employers and recruitment agencies, and migrant workers should be provided with a written statement showing their gross salary and all deductions made. Finally, governments should promote the development of lending mechanisms under government, financial institutions or other organizations that can provide low-interest loans to migrant workers who cannot afford to pay recruitment agency fees upfront.

Source: COMMIT, 2008.

4.2.4 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers is a non-legally binding instrument signed by all ten member States in 2007 to demonstrate their commitment to protecting migrant workers. The Declaration establishes obligations for both sending and receiving countries in respect to the rights of migrant workers. Additionally, the Declaration specifically mentions the necessity of the governments of Cambodia, Lao PDR, Myanmar and Thailand to establish mechanisms to facilitate the formal recruitment of migrant workers and to ensure the protection of their human rights. It also creates a commitment for labour-receiving countries to promote fair wages, decent living and working conditions, welfare support and access to justice for inbound migrant workers.

Table 4.4. Obligations of sending and receiving States to protect migrant workers under the ASEAN Declaration

Sending states have the following obligations:

- To establish procedures to facilitate recruitment, to prepare migrants for deployment abroad and to ensure the protection of migrant workers in receiving countries. (Section 13)
- To establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractice through legal contracts, regulation, licensing and blacklisting of recruitment agencies and employers. (Section 14)

Receiving states have the following obligations:

- To intensify efforts to protect the fundamental human rights and promote the welfare and uphold the human dignity of migrant workers. (Section 5)
- To facilitate access to resources and remedies through information, training and education, access to justice and social welfare services in accordance with the legislation of the receiving State and provided that they fulfil the requirements under applicable laws, regulations and policies of said State. (Section 7)
- To promote fair and appropriate employment protection, payment of wages and adequate access to decent working and living conditions for migrant workers. (Section 8)
- To provide migrant workers who are victims of discrimination, abuse, exploitation or violence with adequate access to the legal and judicial system of receiving States. (Section 9)

Source: ASEAN, 2007.

4.3 Mandates of the agencies under the Ministry of Labour responsible for regulating migrant worker recruitment

To regulate inbound and outbound migrant worker recruitment in Thailand, the agencies involved within the Ministry of Labour are the Department of Employment, the Office of Foreign Workers Administration and the Thailand Overseas Employment Administration.

The Department of Employment is responsible for providing recruitment protection for jobseekers, including a specific channel for them to file their complaints. This responsibility can be interpreted as applying to both inbound and outbound migrant workers. As stipulated under the Ministerial Regulation (2011) for the MOUs: "The Department of Employment serves to import migrants for work in Thailand legally and in accordance with the bilateral MOUs between Thailand and Lao PDR, Cambodia and Myanmar."

"The Department of Employment's function is to promote employment and the protection of jobseekers. The DOE also has the function of developing and enhancing the administrative system for employment promotion with a view to helping people to find employment suitable to their knowledge, abilities and skill. It is also responsible to ensure that they are not cheated and that their rights and benefits are secured duly and fairly." (MOL, 2011)

None of these statements of policy have been actively applied in terms of providing protections for inbound migrant workers during the recruitment process. The field research determined that many of the provincial Department of Employment offices have a limited understanding of their responsibilities in ensuring the protection of foreign jobseekers and there is a significant lack of awareness about the problems migrant workers endure during the recruitment process.

Table 4.5. Mandate of the Department of Employment

The Department of Employment's function is to promote employment and protection of jobseekers. The Department also develops and enhances the administrative system for employment promotion with a view to helping people find employment suitable to their knowledge, abilities and skill. It also must ensure that they are not cheated and that their rights and benefits are fairly secured. For these functions, it has the following powers and duties:

- 1) To carry out its functions under the law on employment services and jobseeker protection as well as those under the law on alien employment and other related laws.
- 2) To develop a system of oversight for employment services; to formulate and coordinate the Department's action plans in line with the Ministry's policies and strategies on labour matters; and to perform other functions as prescribed by law or as requested by the Ministry or the Cabinet.

Source: MOL, 2011.

The main goal of the Office of Foreign Workers Administration is to promote legal migrant worker recruitment in Thailand; however, its mission primarily relates to labour migration management rather than protection of jobseekers. The Office develops and carries out regulations concerning the management of migrants, notably the migrant worker registration schemes.

Table 4.6. Mandate of the Office of Foreign Workers Administration

Vision	The Office's vision is to establish a systematic migrant worker administration. This includes provision of comprehensive and useful information as well as additional services to clients.	Mission and duties:	<ul style="list-style-type: none"> • To develop a systematic migrant worker administration. • To assess migrant worker employment.
Strategy	The Office's strategic approach is management of labour migration.		<ul style="list-style-type: none"> • To manage migrant worker employment registration schemes.
Goal	The Office's goal is to regularize recruitment of migrant workers in Thailand.		<ul style="list-style-type: none"> • To provide and disseminate information concerning migrant workers.

Source: MOL, 2011.

The mission of the Thailand Overseas Employment Administration is to promote employment and provide protection services for Thai migrant workers who work overseas. This mandate includes extensive responsibilities for the protection of migrant workers during the recruitment process.

Table 4.7. Mandate of the Thailand Overseas Employment Administration

<p>Mission:</p> <ul style="list-style-type: none"> • To generate revenue for Thailand. • To protect the rights and benefits of Thai workers and their families. • To strengthen the markets for Thai labourers in foreign countries. <p>Strategies:</p> <ul style="list-style-type: none"> • To enhance the ability of Thai workers to compete in the global labour market. • To develop capacities for the management of overseas employment. • To expand networks and alliances both in Thailand and with other countries. <p>Goals:</p> <ul style="list-style-type: none"> • To maintain quality and quantity of expansion of overseas employment. • To assist family members of overseas workers to gain more income and have a better quality of life. • To ensure that Thai overseas workers have access to services and protections. 	<p>Duties:</p> <ul style="list-style-type: none"> • To manage and provide services for sending Thai workers to work abroad. • To serve as a centre for data management and monitoring for Thai workers abroad. • To protect the rights and benefits of jobseekers who want to work abroad. • To develop and strengthen the system for sending Thai workers abroad. • To provide training and build worker capacities prior to sending them to work abroad. • To strengthen and expand the market for Thai workers in foreign countries.
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Source: TOEA, 2011.

4.4 Conclusions on the national legal framework

The assessment of the policy gaps in the national legislative framework for migrant worker complaint mechanisms in relation to the international labour standards, particularly the Private Employment Agencies Convention No. 181, revealed the following discrepancies:

4.4.1 Definition of private employment agency

Although it is recommended that national legislation clearly define the types of private employment agencies that fall under its jurisdiction, Section 4 of the Employment and Job-Seekers Protection Act fails to provide specific definitions for the categories of agencies that the law is meant to regulate. Thus, it is often assumed that the law applies only to private employment agencies recruiting Thai nationals and outbound migrant workers because there is no discrete provision related to the recruitment of inbound migrant workers. This has left the private employment agencies conducting this type of recruitment activity largely unrecognized and unregulated. There is clearly a need to define and supervise the operations of such agencies, particularly those recruiting low-skilled migrant workers from Cambodia, Lao PDR and Myanmar into Thailand, given their high levels of vulnerability to exploitation and abuse.

4.4.2 Institutional framework

The ILO also recommends that the institution given responsibility for regulating private employment agencies should be clearly designated and given a well-defined mandate so as to avoid overlapping responsibilities. The field research revealed that the Recruitment and Job-Seekers Protection Act and its related ministerial regulations do an adequate job of specifying such roles for outbound recruitment (through the Department of Employment and the Thailand Overseas Employment Administration) but that such an institutional mandate for regulation is clearly lacking for inbound migrant workers. Thus, provisions within the Act need to be developed to address the specific roles and functions of Ministry of Labour departments concerning the recruitment of inbound migrant workers.

4.4.3 Registration and licensing of private employment agencies

Member States that ratify Convention No. 181 are obligated to “determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice” (ILO, 1997a).

Although there are provisions for the registration and licensing of private employment agencies recruiting outbound Thai migrant workers under the Recruitment and Job-Seekers Protection Act, law enforcement and compliance remain inadequate (particularly related to unlicensed agencies, protection of jobseekers and fair compensation for abuses). Furthermore, there is no provision within the Act for the licensing and registration of private employment agencies providing inbound recruitment services.

To effectively and comprehensively regulate the private employment agencies sector, it is therefore necessary to both increase compliance of private employment agencies engaging in outbound recruitment through strengthened enforcement efforts and requiring adequate compensation for abuses, as well as to establish specific provisions governing the licensing and registration of private employment agencies engaging in the recruitment of inbound migrant workers.

4.4.4 Monitoring of private employment agency operations and activities

The ILO recommends that the recruitment activities of private employment agencies be closely monitored to ensure compliance with applicable laws and regulations. Although, this type of monitoring is mandated and carried out by the Department of Employment to a certain extent for outbound migrant workers, there is an almost total lack of such monitoring occurring for the recruitment of inbound migrant workers.

To address this gap, a clear directive expanding the existing mandate of the Department of Employment to include conducting active monitoring of the recruitment and job placement process for inbound migrant workers should be issued and enforced.

4.4.5 Penalties for non-compliance by private employment agencies

Member States that ratify Convention No. 181 are also obligated to “provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations [that] provide for penalties, including prohibition of those private employment agencies [that] engage in fraudulent practices and abuses” (ILO, 1997a).

Although the Recruitment and Job-Seekers Protection Act and other national legislation in Thailand do provide such penalties for malpractice by private employment agencies, inadequate law enforcement (enabled by inappropriate interference in disciplinary proceedings and corruption of government officials) has hindered their application in practice. In addition, there are no specific provisions within the legislation for punishing private employment agencies that commit unlawful acts during the recruitment of inbound migrant workers.

To address these concerns, stringent penalties for meddling in disciplinary proceedings and corruption of government officials as well as specific provisions establishing penalties for recruitment malpractice against inbound migrant workers should be enacted.

4.4.6 Complaint mechanisms

The ILO recommends the establishment of complaint mechanisms so that jobseekers who have been exploited during the recruitment process have the opportunity to access justice and seek remedies. However, the ILO also stresses the importance of basing complaint mechanisms on a differentiated approach, allowing for alternatives to adjudication in courts to resolve disputes when appropriate.

Although a complaint mechanism for outbound Thai migrant workers does exist under the auspices of the Department of Employment, the mechanism does not provide adequate protection against abuses. The only two options available for resolution of disputes within the official complaint process are settling out of court through arbitration or a trial in criminal court. Between these two choices, the majority of workers opt for out-of-court settlement because they are heavily compelled to do so by both the difficulty and expense of a trial in criminal court and also frequently by the other actors involved. As a result, plaintiffs often receive insufficient compensation for their grievances. Meanwhile, there is no official complaint mechanism for inbound migrant workers that is systematically available under the administrative structure of the Ministry of Labour. Even if such a mechanism did exist, language barriers and fears about retaliation would make accessing them difficult for the majority of migrant workers.

To ameliorate the situation, a legislative framework establishing the right of inbound migrant workers to access the Department of Employment complaint mechanism and prevent retaliation from private employment agents and employers needs to be enacted. Additionally, programmes to increase the awareness and access ability of the mechanism need to be implemented. For the existing complaint mechanisms for outbound Thai migrant workers, an additional forum for fair resolution of grievances should be established through an impartial administrative grievance procedure.

Chapter 5

Conclusions and Recommendations

5.1 Conclusions

Establishing policies to protect migrant workers from exploitation and abuse during the recruitment process has proven to be a complex and intractable challenge in many countries. Even in States such as the Philippines, with its long history of managing large-scale labour migration, the amendment of laws and regulations to apply stiffer penalties in response to complaints of recruitment violations have not always conclusively resulted in the reduced incidence of malpractice by private employment agencies. Nevertheless, while well-designed complaint policies have not been found to entirely prevent the continued occurrence of recruitment abuses, they have been successful in contributing towards establishing an environment of order and regulation for recruitment industries in several Asian countries (Mughal and Padilla, 2005).

In terms of instituting regulatory policies for migrant worker recruitment, Thailand's policies towards outbound workers have gone through a much longer period of development than those enacted for inbound workers. It is still a relatively recent phenomenon that Thailand has emerged from being a net labour-sending country to becoming a net labour-receiving country, a transition completed during the 1990s (Sciortino and Punpuing, 2009, p. 14). Partly as a result, the policies for regulating migrant worker recruitment remain focused primarily on protecting nationals recruited to work abroad.

Policies in Thailand that acknowledge the structural change in migration flows that have taken place have so far largely come in piecemeal steps to fill perceived low-skilled labour shortages in the form of short-term amnesty programmes and bilateral labour importation agreements. Despite these attempts, the country's labour migration policies have yet to achieve a comprehensive or coherent long-term strategy approach for managing migration in Thailand.

When these ad hoc policies have been implemented, they have primarily been responsive to the needs of private sector business interests and national security concerns rather than the human and labour rights concerns of workers. As a consequence, formal labour protections for inbound migrant workers provided by government authorities remain limited in availability, accessibility and effectiveness. This broader situation of inadequate labour protection for migrant workers is acutely reflected by the lack of any formal complaint mechanism provided within the migrant recruitment and regularization regimes.

At the same time, the regulation of recruitment for outbound migrant workers remains porous with loopholes, biased in application, ineffectually enforced and inadequately respected as the rule of law by private employment agencies. Although there is a mechanism available for outbound migrant workers to register complaints about unfair recruitment practices under the Recruitment and Job-Seekers Protection Act, it has so far proven only partially effective at holding private employment agencies accountable for their actions, creating an enabling legal environment for further abuses and ongoing impunity for offenders.

The impact of recruitment and regularization regimes on the availability of complaint mechanisms and other legal protections for inbound migrant workers

As a part of the policy response to the massive private sector demand for low-skilled labour in Thailand, substantial efforts have been made to establish a system for legalizing the status of migrant workers. However, as a result of the lack of a fully coherent approach to migration management within those policies and their inconsistent implementation, the recruitment and regularization regimes have yet to fulfil their promise for instituting a safe and orderly labour migration process. The absence of a clearly established legal basis for resolving migrant worker

grievances has further exacerbated the vulnerability of migrants to exploitation and abuse during recruitment. In many respects, they have primarily become policies of surveillance, control and even coercion in practice rather than genuine legal channels for labour migration offering substantive protection to workers.

There are no universally accepted definitions of irregular migration within the international community (IOM, 2004), and the situation in Thailand has become increasingly esoteric in this regard. There have now emerged three distinct channels for workers to access full, partial or proxy regular status. In addition, due to the duration, complexity and expense of the nationality verification process, even different stages must be considered independently for the protection and freedom that they offer to migrant workers.

The most desirable regularization regime for many migrants was found to be using what could be described as migrant worker protection rackets established by local authorities. Depending upon the location, many of these rackets are highly organized, charging regular monthly fees of THB300-500 and even issuing picture ID cards to participants, listing their name and employer. These types of local schemes appear to be operating in direct competition with official channels for recruitment and regularization established by the national authorities.

Although it could not be definitively determined whether these types of local rackets are indeed “beating out” the national policies in terms of quantitative participation, Ministry of Labour estimates suggest that the majority of migrant workers still have not enrolled in the official regularization programmes (Taweessit and Napaumporn, 2011, p. 134), which at least circumstantially suggests that this may be the case in certain areas. Qualitatively speaking, however, these rackets are clearly superior at meeting the needs of many migrant workers – allowing for small monthly payments, less contact with authorities, a quicker and easier administrative process and considerable protection benefits from local authorities because of the direct financial benefit they receive.

A much smaller number of migrant workers were found to be choosing the option of recruitment through the MOU channel due to the cost, complexity and duration of the process. For many, completing recruitment under the MOU required the services of a private employment agency, approximately a three-month time period and a total expense of between THB18,000 and THB20,000, which was borne by the migrant workers through a combination of upfront payments and payroll deductions.

Most of the MOU process now appears to have been captured by Thailand’s private employment agencies, with some even establishing themselves as the de facto employer for foreign workers and contracting out their labour to larger companies. As a result, there are critical questions to be asked about who is really benefitting from the MOU labour importation process.

One Cambodian migrant who had recently entered Thailand through the MOU process but had experienced all of the different statuses for migrant workers over the years, commented in an interview that he preferred working in an irregular status due to the debt incurred through the MOU process. He saw “no practical benefits” to going through the process in comparison to working irregularly. Although he had obtained a passport and theoretically had more freedom of movement under the MOU process, he was virtually destitute due to the payroll deductions for taxes, social security, housing and recruitment expenses, resulting in a state of virtual pecuniary captivity. Workers under the MOU are generally bound to their employer for a two-year period without the option to change jobs if they want to retain their regular status.

A local NGO officer providing support services to migrant workers argued that the MOU process even amounts to “official human trafficking” in certain ways because of the debt bondage and the widespread deceptive practices of recruitment companies regarding wages and terms of employment. Another Cambodian migrant worker recruited through the MOU process also explained the fears about the threat of violence and repossession of property by recruitment companies in countries of origin for those workers who run away before their employment contract is completed.

There appears to be a growing awareness among migrant workers that the MOU process offers insufficient benefits to justify their participation. As one agent with a private employment agency engaging in MOU facilitation services

noted, the quotas established under the policy are not a limitation on her agency's activities because they cannot find enough workers willing to go through the recruitment process anyway.

Migrant workers registered during the amnesty period and who applied for or had completed the nationality verification process appear to occupy a middle ground of protection benefits. Although the head of the Department of Employment in one province stated that those workers who had completed the entire NV process are free to move to other provinces, change employers, receive social security and health care benefits and register complaints with the Department of Employment, there are practical obstacles to actually taking advantage of those options for many migrant workers.

In actuality, movement outside of a fairly restricted local area is still at the discretion of police. And even though there is an administrative process for changing employers while maintaining regular status, it is only possible within the same industry and under certain specific conditions (the employer dies, the business goes bankrupt, the employer is found guilty of exploitation or abuse or the employer approves of the change). Even under those circumstances, workers are only granted a short period of time to find a new employer. Additionally, the social security benefits that migrant workers are entitled to receive require employers to register them for the programme, which many employers choose not to do, and the access to health care services at public hospitals and health centres remains daunting for many migrants because of the language barrier and fears of discrimination. Finally, the supposed access to justice available through the Department of Employment complaint mechanism appear to be simply lip service because no complaints from foreign migrant workers have been received or accepted in the provinces visited during the field research.

In the absence of a fully functional policy channel for regular labour migration to Thailand that provides comprehensive legal protections, foreign workers wanting to find employment are forced to conduct a cost-benefit analysis of the regularization options available to them, based upon the information they receive from friends, family members, brokers and recruitment agencies. Unfortunately, this information is often quite limited or biased (depending on the source's agenda and their understanding of the labyrinthine system of migration policy in Thailand) and the options actually accessible to workers are heavily dependent upon their employment sector and the volition of their employer to assist in facilitating their enrolment.

Due to the paucity of options for seeking remedy or redress in cases of unscrupulous recruitment practices or exploitation during employment, migrants have frequently concluded from their calculations that avoiding regular channels for migration is the most effective coping strategy for the state of vulnerability they face. A strategy of disappearance allows many irregular migrants to assert relatively more control over their day-to-day lives in comparison to those who have regular status. As a result of the lack of useful protection protocols for migrant workers under Thai laws, those migrants with the least amount of contact with authorities appear able to maintain the highest degree of autonomy and freedom and thus are the most comfortable with their state of vulnerability, regardless of their legal status.

Critical constraints for outbound migrant worker complaint mechanisms: Impunity of offenders, circumvention of laws, capacity and resource constraints and limited adjudication forums

The field research revealed four main factors that restrict the effectiveness and accessibility of justice for Thai migrant workers who want to file grievances for abuses during the recruitment process: i) impunity of offenders through patronage and corruption; ii) circumvention of laws by private employment agencies and migrant workers; iii) capacity constraints for authorities enforcing the laws; and iv) the lack of impartial alternatives to hearings in criminal courts for adjudication.

Although clear attribution is difficult due to the number of variables involved, between 2006 and 2010 there was a nearly 32 per cent decline in the number of complaints filed while the number of Thai migrant workers deployed overseas decreased by only 11 per cent. No evidence was found during the research to show that this reduction in complaints registered reflects a corresponding reduction in incidence of abuse, suggesting that accessibility

and confidence in the mechanism may be declining and that circumvention by private employment agencies also appears to be increasing.

Addressing the widespread corruption and patronage within the private employment agency industry that permits high levels of impunity for malpractice during the recruitment of outbound migrant workers poses a major challenge for authorities. Nevertheless, it appears to be an essential step towards making further progress on enforcing the regulations enacted under the Recruitment and Job-Seekers Protection Act. Unlike the current situation for inbound migrant workers, there has been a legal framework in place to allow for workers to file grievances against unlawful recruitment practices for decades. However, the research found that the effectiveness of this mechanism is seriously constrained by patronage and corruption within the process of administration of justice. This includes:

- Politicians and government officials being offered, or taking collections of, sums of money from recruitment agencies in exchange for political favours or shelter from prosecution.
- Retired government officials being paid for “consulting services” and using their connections to influence regulatory officials to overlook misconduct by private employment agencies.
- Politicians who run their own recruitment agency or have a proxy ownership arrangement in which they possess a controlling interest and who improperly use their positions of authority to enable personal gain through graft or to shield their company from disciplinary actions.

This is undoubtedly not an exhaustive list of the types of corruption that exist within the industry for outbound recruitment. The systemic nature of these problems has become a direct obstruction to the administration of justice for exploitive recruitment practices and has also created a major breach of trust for many migrant workers in the impartiality of the adjudications of their complaints. The result appears to be not only unfair compensation for victims and impunity for offenders but also a lack of faith in the credibility of the process.

Since its enactment in 1968, the Recruitment and Job-Seekers Protection Act has been amended three times – in 1985, 1994 and 2001 – largely as an attempt to reduce circumvention of the law by private employment agencies. In spite of this, the law and its enforcement by authorities still have limitations that allow a great number of offences to continue to take place. Some of the most common infractions include:

- recruiting without a license to avoid the required security deposit of THB5 million;
- failure to obtain a proper visa or permission to work abroad for migrant workers in countries of destination;
- failure of workers to declare their intent to travel abroad for purposes of employment, sometimes directly at the instruction of private employment agencies to avoid legal procedures;
- sending workers as informal replacements for already existing employment contracts without proper permission;
- announcing jobs abroad without the prior permission of the Department of Employment;
- charging more than the amounts permitted for commissions and fees; and
- fraudulently accepting payments for job placements when no job actually exists.

This list also is certainly not a comprehensive detailing of the types of violations of the Recruitment and Job-Seekers Protection Act but it reveals the disregard for the rule of law exhibited by some private employment agencies. Further efforts are necessary to strengthen the enforcement of the current provisions of the Act and to close the loopholes that allow agencies to avoid punishment and compensation for malpractice.

Capacity and resource constraints for authorities further limit migrant workers’ access to justice through the complaint mechanisms. These range from simply inadequate staffing to inability to provide sufficient assistance to workers on how to exercise their rights, including the following limitations:

- personnel shortages among responsible authorities;
- ineffectiveness of the orientation programme for workers in raising awareness about how to access and use the complaint mechanisms; and
- lack of availability of assistance from government officials in countries of destination.

These constraints amount to workers overseas receiving minimal information about how to access legal assistance while deployed. Moreover, in many destination countries, there is limited availability of assistance regardless of worker awareness. The result has been that complaints about recruitment malpractice often are not addressed until after the worker returns home, making a fair adjudication of grievances more difficult; this convinces many workers to simply accept unfair recruitment practices and remain with their overseas employers. To confront these constraints, the Department of Employment should reassess its allocation of personnel, both domestically and internationally, build the capacity of its staff to provide legal assistance while overseas and increase the rigor of the pre-departure orientation programme for migrant workers.

Finally, the limited forums available for workers to have their complaints adjudicated means that they frequently choose to settle their grievances out of court rather than proceed with their cases. The only legal forum for recruitment complaint cases filed by workers is through a hearing in a criminal court. The complexity, expense and duration of these hearings have led to a situation in which informal out-of-court settlement of complaints is the norm and the compensation paid to workers is less than 35 per cent of the claimed amounts (Chantavanich et al., 2010, p. 87). Establishing an impartial administrative grievance procedure to supplement adjudication in criminal courts would allow for improved access to justice as well as a more unbiased and timely adjudication of cases for workers wanting to file complaints against private employment agencies.

Assessment of existing complaint mechanisms

The conclusion reached through this study's analysis of the available complaint mechanisms is that the existing mechanisms are inadequate for regulating recruitment of inbound migrant workers in Thailand. There is no systematically available legal channel for inbound migrant workers to register complaints about recruitment abuses, and it appears that fears of discrimination and retaliation would prevent most low-skilled migrant workers from accessing such channels even if they did exist.

Even though some legal specialists contend that the complaint mechanism available to Thai workers who are recruited for work overseas under the Recruitment and Job-Seekers Protection Act should be interpreted as applying equally to inbound migrant workers, there are barriers in access to justice in practice that render such an opinion largely academic in nature. In one province visited during the field research, the head of the Department of Labour Protection and Welfare openly stated that foreign workers simply do not fall under their protection mandate.

In addition to the legal and institutional barriers revealed during the research, the migrant workers who were interviewed were extremely reluctant to seek redress for abuses they experienced during their recruitment due to fears of discrimination from authorities and retaliation by agents and employers. In general, the workers appeared to view their continued residence and employment in Thailand as dependent upon keeping a low profile and maintaining deferential relationships with those in charge. Only in cases in which their well-being was clearly threatened did some migrant workers say that they would consider making a complaint. However, even in those dire circumstances, migrant workers would need to file their complaints through informal channels.

To make progress on regularizing labour migration to Thailand, a vital element must be establishing substantive legal protections for workers within official migration channels and ensuring compliance by local employers and authorities. Fair and accessible complaint mechanisms for recruitment malpractice are a critical tool for challenging the impunity of employers and private employment agencies to exploit and defraud migrant workers.

For outbound Thai migrant workers, the complaint mechanism provided under the Recruitment and Job-Seekers Protection Act remains only moderately effective at deterring or addressing abuses. Many of the obstacles and

constraints to a fair hearing and resolution of grievances described here have now become well-entrenched within the complaint process. As a result, out-of-court settlements that provide inequitable compensation are the norm and further punitive measures applied for unlawful practices are a rarity, leading to a deeply rooted culture of impunity within Thailand's recruitment industry.

Although the long-term solutions for reducing the vulnerability of both inbound and outbound migrant workers to recruitment abuses must include initiatives on poverty reduction and improving livelihood options in countries of origin, establishing effective complaint mechanisms under a legal framework that are based upon international labour standards will help to ensure the protection of the rights of jobseekers. Such mechanisms not only support the rights of workers to access justice and receive fair compensation but also act as an important deterrent against unlawful practices by employers and private employment agencies.

While accounting for the context-specific scale, activities and problems of the recruitment industry in Thailand as well as the capabilities of the Government to implement the policy effectively and systematically, the complaint mechanisms established should be based upon the principles of international labour law contained within the Private Employment Agencies Convention No. 181 and its companion Recommendation No. 188. The practical guidelines for the institution of recruitment complaint mechanisms documented within *the Guide to Private Employment Agencies*, the *Handbook on Establishing Effective Labour Migration Policies* and the Multilateral Framework on Labour Migration also provide essential insights and lessons that can be used to strengthen Thailand's regulation of migrant worker recruitment.

5.2 Recommendations for the recruitment complaint mechanism for inbound migrant workers

1. Amendment of the Recruitment and Job-Seekers Protection Act should include provisions that explicitly state that the complaint mechanism to address grievances during recruitment must be equally available for inbound migrant workers and should clearly designate the institution responsible for administering the mechanism on their behalf.
2. Standard operating procedures for handling grievances received from inbound migrant workers should be developed and distributed to all provincial Department of Employment offices.
3. Provisions within the amended Recruitment and Job-Seekers Protection Act should be added to ensure the right to fair compensation of foreign jobseekers for victimization during recruitment. The amounts provided in compensation should reflect the actual expenses paid and wages promised to workers during recruitment.
4. Access to justice for inbound migrant workers should be ensured by classifying discrimination, intimidation or retaliation for registering a complaint as a violation of the law, with appropriate sanctions in the form of fines, penalties and compensation imposed.
5. Accessibility of the complaint mechanism to inbound migrant workers should be facilitated through the provision of translation services.
6. Capacity building and awareness-raising trainings should be provided to government officials responsible for the administration of the complaint mechanism to ensure a systematic and non-discriminatory policy implementation process.
7. To act as an effective deterrent against abuses during the recruitment process, further amendment to the Recruitment and Job-Seekers Protection Act should include provisions for appropriately severe penalties and sanctions to be taken against private employment agencies that fail to comply with regulations on inbound migrant worker recruitment. Conversely, the amendments should also include incentives for good practice, such as reduced fees or administrative requirements.

8. A provision should be included within the amended Recruitment and Job-Seekers Protection Act that allows migrant workers who register a complaint the opportunity to change employers without losing their legal status to work.
9. Private employment agencies should be obliged to provide migrants with information on the procedures for filing complaints as part of the pre-departure training. In addition, the Department of Employment should provide orientation training during the registration process, which also contains this information.

5.3 Recommendations for the recruitment complaint mechanism for outbound migrant workers

1. The rigour of the orientation course for all migrant workers recruited for overseas employment should be increased to ensure their understanding of their rights under the Recruitment and Job-Seekers Protection Act. This should include additional information about how to access the complaint mechanism for airing of grievances. The current pre-departure training of five hours should be extended and the curriculum refined to cover common abuses and forms of exploitation as well as resources and procedures for obtaining remedy.
2. Accessibility to labour attachés should be ensured at overseas embassy locations in countries where Thai migrant workers have been deployed in significant numbers.
3. A fairly apportioned system of penalties for private employment agencies that violate the laws that govern their operations should be established to accurately reflect the severity of the acts of malpractice committed. This should be coupled with transparent procedures that ensure that penalties are meted out impartially.
4. Recruitment agencies and brokers should not be allowed to escape prosecution for alleged offences by settling out of court with complainants. The Department of Employment and law enforcement authorities should follow through with prosecution on criminal charges or imposition of licensing sanctions regardless of any compensation paid.
5. For more serious offences, severe sanctions in the form of suspending or permanently cancelling a license to operate, prison sentences of significant duration and punitive damage fines should be imposed. The Department of Employment and law enforcement authorities need to be more aggressive in pursuing stringent disciplinary action against private employment agencies that violate the law, particularly for repeat offenders.
6. Relevant ministries and departments should work collaboratively to develop a shared database for monitoring private employment agencies and brokers who have been accused or convicted of malpractice.
7. Penal sanctions for government officials and politicians implicated in fraud or corruption cases related to recruitment should be treated as particularly serious offences, with correspondingly higher penalties imposed.
8. Public officials directly involved with labour migration, as well their immediate family members, should be prohibited from possessing a financial stake in any private employment agency while they hold their office or position and for five years afterwards.
9. Measures should be enacted to prevent circumvention of recruitment laws by private employment agencies and jobseekers. Strict sanctions should be enforced against private employment agencies that provide recruiting services to jobseekers but coerce them into reporting to authorities that they have been recruited directly by the employer. The levying of a departure tax on migrant workers departing for work overseas without contracts approved by the Thailand Overseas Employment Administration channels should also be considered.
10. The amounts provided to workers in compensation for fraud, exploitation and other abuses should fairly reflect the actual expenses paid and wages promised to workers during recruitment.

11. Greater efforts should be made to monitor compensation amounts paid to workers in complaint cases against unlicensed recruitment agencies. Accurate statistics are currently lacking for these cases, despite the fact that they make up the majority of complaints filed.
12. A joint and solidary liability principle for private employment agencies recruiting workers for overseas employment should be enacted so that the THB5 million security deposit required for private employment agencies licensing can be seized to provide compensation in cases of violation of employment contracts by employers or other parties.
13. A study tour should be arranged for Department of Employment personnel and other relevant government officials to the Philippines Overseas Employment Administration and the National Labor Relations Commission of the Philippines to learn about some of the regional good practices for the regulation of private employment agencies in Asia.

5.4 General recommendations for the regulation of private employment agencies

1. Consider ratifying the ILO Private Employment Agencies Convention No. 181, which will assist with establishing international standards for the regulation of private employment agencies to ensure fair recruitment practices, and prevent human trafficking and other forms of exploitation.
2. There is a need to clarify the services permitted as well the policies and procedures for the regulation of Thai private employment agencies and their sending-country counterparts who recruit inbound migrant workers under the MOUs. The MOU process has crystallized an ongoing market for such services but no regulatory framework has been put in place to monitor and supervise their operations. If private employment agencies providing “consulting services” on the recruitment of inbound migrant workers are allowed to continue to do business, they should be required to follow the same registration, licensing and operating procedures as those recruiting Thai workers for employment overseas.
3. The recruitment process under the MOU agreements remains too expensive, complex and protracted to be effective at encouraging regular migration. As a result, the benefits of the agreements are currently flowing primarily to private employment agencies. To prevent their capture of the process, the role of agencies under the MOUs should be reduced and further rent-seeking activities under the policy prevented.
4. A fair and impartial administrative grievance procedure should be established to avoid the necessity of adjudication in criminal courts for lesser infractions while retaining the ability to enforce sanctions against private employment agencies found guilty of malpractice. Instituting a tiered system, including the option of arbitration by a genuinely independent authority, will provide a differentiated approach for resolution of complaints that will allow for greater accessibility to justice for workers as well as the more timely adjudication of cases.
5. The Department of Employment should increase its awareness-raising activities among responsible authorities and jobseekers about the methods used by disreputable private employment agencies to manipulate and deceive migrant workers.
6. A tripartite governing board for overseeing the regulation of private employment agencies should be created in Thailand, providing equal representation for the interests of government institutions, employers and workers when adopting regulatory policies and procedures.
7. There should be an increase in the types of media used for dissemination and the amount of information disclosed by the Department of Employment’s public registry of licensed private employment agencies. This should include providing full information about those agencies that have been suspended or who have had their licenses revoked for regulatory violations.

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8. Funds should be provided to support NGO programming that facilitates greater access to justice for migrant workers through the use of complaint mechanisms.
9. Additional personnel should be recruited for monitoring activities and enforcement of laws governing the operation of private employment agencies, with thorough and ongoing training provided. These supplementary staff members should be used to increase the frequency of field audits of private employment agencies offices (including through unannounced monitoring inspections) as well as to reduce the backlog of complaint cases.

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Appendix I

Nationality verification process for migrant workers from Myanmar (as of 2011)

Step 1: The employer receives the application forms for nationality verification from the Department of Employment (DOE) and distributes them to their migrant employees for completion.

Step 2: The employer submits the following documents to the Provincial Employment Office (PEO):

- Copy of migrant's *Tor Ror* 38/1 (registration documents) or copy of work permit. (Only workers with valid work permits are eligible)
- Nationality verification application form
- Migrant hiring quota document.

Step 3: The PEO sends the application to the DOE office in Bangkok.

Step 4: On the 25th day of each month, the DOE sends all of the applications for nationality verification it has received to the relevant authorities in Myanmar.

Step 5: The Myanmar authorities verify the information and send a list of the migrants that qualify for nationality verification to the Thai Ministry of Foreign Affairs (MOFA).

Step 6: The MOFA informs the DOE about the results of the nationality verification screening and submits a list of migrants eligible to complete the NV process. The DOE then makes an appointment for the migrants who have been accepted at one of three national verification centres (NVCs) situated in Mae Sai, Mae Sot and Ranong. It then informs the relevant centre and the migrants through their employers about the date and time of the appointment. The PEO then provides the migrants with a paper that authorizes them to travel freely from their workplace to the relevant NVC location.

Step 7: The migrants, together with their employer (or a nominee), report to the specified NVC, bringing with them all of the necessary documentation. The officials at the centre then prepare and release to them a "delivery letter" for the migrants to submit to one of the Myanmar Temporary Passport Issuance Offices (TPIOs).

Step 8: The migrants can then cross the border and report to one of the TPIOs in Kawthoung, Myawaddy and Tachileik.

Step 9: These offices then verify the identity of the migrants and charge them 3,000 Myanmar kyat to issue each worker a temporary passport.

Step 10: The offices also provide migrants with a paper stating the result of their nationality verification process and whether or not they were issued with a temporary passport. This paper must be handed in to the previously visited NVC, which has to provide monthly updates to the Thai Ministry of Labour on the outcomes of the nationality verification process for their region.

Step 11: The migrants, together with their employer (or a nominee), can then request a visa from the nearest Immigration Bureau checkpoint. The following documents are needed to apply for a visa:

- Temporary passport and a photocopy
- Application form with 1 photograph (4x6 cm)
- Completed TM.6 arrival/departure card
- Visa fee of THB500

- Pink card with one photocopy
- *Tor Ror* 38/1 application form and receipt of the fee payment (if the applicant cannot provide a pink card)
- Migrant hiring quota document with one photocopy
- Identification card of employer with one photocopy
- Company registration document.

After having obtained a visa, migrants must notify their local Immigration Bureau checkpoint of their place of residence every 90 days.

Step 12: Migrants who work in the fisheries, agriculture, livestock and domestic work sectors are not permitted to enrol in the Social Security Scheme. Instead, they must apply for health care benefits through the migrant health insurance programme, which charges THB600 for an initial medical examination and THB1,300 per year for health insurance. All other workers can enrol in the Social Security Scheme, in which case 3.5 per cent of their wages are deducted together with a matching contribution from their employer and paid into the Social Security Fund.

Step 13: Migrant workers must then pay a THB100 application fee to apply for a work permit when their current permit expires. A one-year work permit costs THB1,800 and a two-year permit costs THB3,600. A two-year permit can be renewed for another two years.

Appendix II

MOU process for migrant workers from Myanmar (as of 2011)

Step 1: An employer in Thailand applies with a Provincial Employment Office (PEO) for a quota of migrants they are allowed to employ.

Step 2: The PEO approves the quota.

Step 3: The employer applies for recruitment of Myanmar migrant workers at a PEO with a request letter to employ foreign workers and an employment contract. The Thai Ministry of Labour (MOL) collects the applications and sends them to the Myanmar MOL through its embassy in Bangkok.

Step 4: Upon approval, the Department of Labour of Myanmar posts vacancy announcements through its local offices in Kawthoung, Myawaddy and Tachileik.

Step 5: The local Department of Labour offices in Myanmar process the received applications, arrange for a pre-screening medical examination of the applicants and send a list of approved candidates to the Thai Department of Employment (DOE) through the Myanmar embassy.

Step 6: Upon notification of approval from the DOE, Thai employers go to a Nationality Verification Center (NVC) in Chiang Rai, Mae Sot or Ranong and interview the candidates (who come to Thailand using a border pass). A second medical examination is then arranged at this time. Migrants and employers have to report to the PEO in Chiang Rai, Mae Sot or Ranong before and after undertaking the medical examination. The Myanmar MOL and local Myanmar DOL offices are then informed by the NVC of the successful candidates, and the local DOL in Myanmar notifies the candidates of their selection.

Step 7: The Thai MOL notifies the Myanmar MOL through the Myanmar embassy of the name of the employer who will pick up the selected workers at one of the Temporary Passport Issuance Offices (TPIOs) in Myanmar located in Kawthoung, Myawaddy and Tachileik. Additionally, the PEO gives an English-language version of the document to the employer, indicating the names of their approved workers. The employer can then present this document to the Myanmar authorities to prove their permission to employ the workers.

Step 8: The selected migrant workers then apply for a temporary passport in one of the three Myanmar TPIOs (fee: THB500).

Step 9: The employer travels to Myanmar to meet the migrant workers at one of the Myanmar TPIOs to assist them with the immigration process. Upon arrival in Thailand, migrants must contact an Immigration Bureau office to apply for a visa and stay permit. The visa fee for the first 10,000 workers was set at THB500 per person, with the normal rate being THB2,000 per person. The visa is valid for two years and is renewable for another two years. A re-entry permit or a multiple entry visa must be purchased by migrants before travelling back to Myanmar in order to return to Thailand afterwards.

Step 10: Migrant workers whose health clearance has expired (more than 60 days have passed between the first examination and their actual arrival in Thailand) must undergo the health examination again, either at the border or in the province in which the worker is employed.

Step 11: Migrants must apply for a work permit at a PEO within 30 days of receiving their visa. Work permit fees vary according to the rates stipulated in the ministerial regulations on work fees.

Regulating recruitment of migrant workers: An assessment of complaint mechanisms in Thailand

Regular abuses against migrant workers during the recruitment process have been documented by the Thai Government and other stakeholders for many years, but due to gaps in the legal framework and operation of complaint mechanisms, both foreign and Thai migrant workers are left without sufficient access to seek legal remedies for these unfair and illicit recruitment practices by private employment agencies and unlicensed brokers. To increase the knowledge base about the changes needed to strengthen the regulatory system, a comprehensive analysis of policy and implementation for the existing mechanisms was completed by the Asian Research Center for Migration, in partnership with the ILO's GMS TRIANGLE project. The report produced by the study, *Regulating recruitment of migrant workers: An assessment of complaint mechanisms in Thailand*, fills a vital gap in the understanding of complaint mechanisms, in support of increased access to justice for migrant workers in Thailand.

The **Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion (GMS TRIANGLE project)** is a five-year project that aims to strengthen the formulation and implementation of recruitment and labour protection policies and practices in the Greater Mekong Subregion, to ensure safer migration resulting in decent work. The project is operational in six countries: Cambodia, Lao PDR, Malaysia, Myanmar, Thailand and Vietnam. In each country, tripartite constituents (government, workers' and employers' organisations) are engaged in each of the GMS TRIANGLE project objectives - strengthening policy and legislation, building capacity of stakeholders and providing services to migrant workers. These goals are interdependent, with policy advocacy and capacity building activities driven by the voices, needs and experiences of workers, employers and service providers.

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