

BANKRUPTCY LAW IN THAILAND

by Cynthia Pornavalai

Cynthia Pornavalai, Partner
Commercial**Introduction**

The 1997 Asian financial crisis had crippled many Asian economies in its wake, but it had also left behind it a lasting legacy to the economies that it ravaged. Faced with sharp economic slowdown and a wave of corporate defaults, Thailand revamped its banking and financial institutions including various legal infrastructures. For one, it made a major amendment to its antiquated bankruptcy laws to allow for corporate restructuring similar to the United States' Chapter 11. The amendment which took the form of an additional section on Corporate Reorganization under Chapter 3/1 took effect in 1998. Over the years, various revisions have been made to fine tune its provisions and principles.

While there is optimism that the present financial crisis in the US will not affect the Asian economies as it did in the late 1990s, it is nevertheless worthwhile to review Thailand's bankruptcy laws in anticipation of harder times ahead. This article examines the evolution of the Thai bankruptcy law and its basic provisions.

The Thai Bankruptcy Court and Procedure

The inclusion of reorganization proceedings in the 1998 Amendments necessitated specially trained judges with an understanding of the process and appropriate knowledge of business practices. As a result, the Establishment of Bankruptcy Court and Procedure for Bankruptcy Cases Act was enacted in 1999 and following such enactment, a specialized court known simply as the Central Bankruptcy Court was established. The Court has jurisdiction over all bankruptcy cases as well as all civil matters pertaining to bankruptcy cases. More recently, the Central Bankruptcy Court was given jurisdiction over criminal matters pertaining to bankruptcy, as well.

The Bankruptcy Court proceeds with the trial of a case consecutively without adjournment, until completion thereof, unless there is unavoidable necessity. This proceeding is a substantial departure from the practice current at the time of the enactment of the 1999 Act whereby cases were generally heard on an installment basis at one-month intervals. In addition, appeals go directly to the Supreme Court.

Liquidation – Absolute Receivership

Under Thai law, bankruptcy is an involuntary act whereby the law causes the

property of a company/debtor to be distributed among its creditors. Any creditor owed more than Baht 2 million by a corporate debtor or more than Baht 1 million by an individual (natural person) debtor may file a bankruptcy action against such debtor. However, the debtor must first be proven insolvent. The article by Chusert Supasitthumrong and Sally Wrapson that follows in this publication expounds on the procedure for filing bankruptcy cases and for debt repayment claims under bankruptcy proceedings.

A bankrupt may be discharged from bankruptcy by court order or by automatic discharge. The debtor may submit an application by way of a motion to the Court asking for an order of discharge from bankruptcy. The discharge will be granted if at least 50% of the assets have been paid to creditors and the bankrupt is not a dishonest person.

An individual, and not a business, may also be discharged from bankruptcy based on the tolling of automatic discharge periods, which start running as of the date a debtor is adjudged bankrupt. A bankrupt will be automatically discharged after three years. However, if such a person has had a previous bankruptcy within five years, the automatic discharge period will be extended to five years. Also, in cases of dishonest bankrupts, the court may extend the period to ten years. However, for such bankrupts, the court is empowered to shorten the period to five years, in cases of special circumstances, on the request of the bankrupt or the receiver. Finally, in cases of public fraud, the automatic discharge period is a full ten years.

Whether discharge takes place via court order or automatically, an order for discharge is published in the Government Gazette and at least one daily newspaper. Such means of discharge do not release from liability a person who is a partner with the bankrupt, who is jointly liable with the bankrupt, or who guarantees or is in the position of a guarantor of the bankrupt. Similarly, neither means of discharge will release tax debt, nor those debts arising from dishonesty or fraud.

Business Reorganization

The proceedings for business reorganization are governed by Chapter 3/1 of the Act. The procedures under Chapter 3/1 start with

the filing of a petition for restructuring by the debtor, the creditor(s) owed more than Baht 10 million, or a relevant government authority. When the Court approves the application for restructuring, it gives the debtor protection by declaring an automatic stay which restricts the ability of creditors to take action against the company to recover any sums owing to them. The stay prevents any form of legal process being commenced or continued against the company. The stay also prevents creditors from filing dissolution or bankruptcy petitions. After the Court's approval of the application, the creditors are next required to select a plan preparer to draft a rehabilitation plan. The creditors' choice of plan preparer must be approved by the Court. Within one month after the Court's appointment of the plan preparer, all creditors must submit their claims. The plan preparer must then draft the plan, which must be submitted to the creditors for their consideration, within three months. The creditors may approve the plan through a special resolution passed by the creditors who are grouped into various categories. Once approved by the creditors, the plan is submitted to the Court for its final approval. From the time the Court approves the plan, it becomes binding on all creditors. The plan is then implemented by a plan administrator who is principally vested with the duties of managing the business and assets of the debtor according to the business reorganization plan. The plan must be implemented within a five-year time frame after the Court's approval, with two one-year extensions allowed. Within this time frame, if the Court decides that the plan is not successful, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

The plan preparer must draft a plan which in minimum must contain:

- The reasons for reorganizing the business.
- Details concerning the assets, liabilities, and other binding obligations of the debtor at the time the Court orders business reorganization.

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CREDITORS' CLAIMS FOR DEBT REPAYMENT IN BANKRUPTCY PROCEEDINGS

by Chusert Supasitthumrong and Sally Wrapson



Left: Chusert Supasitthumrong, Attorney-at-Law
Right: Sally Wrapson, Consultant
Dispute Resolution

Exacerbated by the global financial crisis, the number of bankruptcy cases and cases of dishonored checks has steadily increased over the last few years. This has a knock-on effect throughout the economy as other businesses suffer as a result of the failure of these bankrupt businesses to pay their debts. In this article we outline the procedure for making a claim for debt repayment in bankruptcy proceedings.

Under the Thai Bankruptcy Act, a creditor can file a bankruptcy case against a debtor when all of the following conditions are met:

1. The debtor is insolvent.
2. The debtor is a natural person who is indebted to one or several plaintiff creditors in an amount of not less than Baht 1 million or the debtor is a juristic person who is indebted to one or several plaintiff creditors in an amount of not less than Baht 2 million.
3. The said debt can be determined in a definite amount, irrespective of whether the debt is due for payment immediately or at a future date.

Insolvency can be proven in several ways. One method for the creditor to establish the debtor's insolvency is to send two demand letters at least 30 days apart. If the debtor does not pay the debt following receipt, insolvency is established.

On receipt of the petition, the Court will schedule a hearing to consider the facts. If the Court finds that the above conditions are met, it will issue an order for absolute receivership against the debtor. By this order, the debtor is no longer

permitted to operate his or her business and is prohibited from doing any act relating to his or her assets unless such act is approved by the Court or the official receiver.

The Court will appoint an official receiver of the bankrupt estate, who has the power and responsibility to:

1. Manage and dispose of the assets of the debtor, or do any necessary act to complete any pending business of the debtor.
2. Collect and receive money and assets belonging to the debtor, or which the debtor is entitled to receive from others.
3. Compromise, come to a settlement, file actions, or defend actions, relating to the assets of the debtor.

Therefore, the debtor must hand over all of the assets, company seals, accounting ledgers, and documents relating to his or her assets and business to the receiver.

Once the Court issues an absolute receivership order, the official receiver must publish such order in the Government Gazette and in at least one daily newspaper. All creditors, including the plaintiff creditor in the bankruptcy case, must submit an application for debt repayment to the official receiver within two months of the date of the order for absolute receivership. For creditors residing outside of Thailand, the official receiver is entitled to extend the period for submission of the application for debt repayment by another two months.

Foreign creditors must also meet the following conditions to be entitled to claim debt repayment:

1. They must prove that creditors in Thailand are similarly entitled to claim for payment of debts in bankruptcy proceedings under the laws and before the courts of their own country, which is known as reciprocity.

2. They must address whether and to what extent they have the right to receive the debtor's assets which are located outside of Thailand and they must agree that these assets will be pooled with the debtor's assets in Thailand for distribution to all creditors.

If any foreign creditor cannot establish the reciprocity principle, the official receiver and the court will not allow that foreign creditor to receive a share of the assets from the debtor in Thailand. (Supreme Court Precedent Case No. 1310/1960)

In the case of Hong Kong, although there is no law clearly stating that a foreign creditor can submit an application for debt repayment in Hong Kong, if a creditor from Hong Kong can prove to the Thai official receiver that there is no law prohibiting a foreign creditor from submitting such application in Hong Kong, the Thai official receiver and the Thai Court will allow the Hong Kong creditor to submit an application for debt repayment in Thailand. (Supreme Court Precedent Case No. 1473/1960)

As Thailand is a civil law country, Supreme Court precedents are not binding but are persuasive, and Thai Courts are likely to follow the past rulings of the Supreme Court. ♦

THAI BANKRUPTCY LAW (from page 1)

- Principles and methods of business reorganization.
- Redemption of collateral in the case where there are secured creditors and liabilities of a guarantor.
- Ways to solve problems stemming from a temporary lack of liquidity, during plan implementation.
- Action to be taken in cases in which a claim or debt is assigned.
- The name, qualifications, and letter of consent of the plan administrator, as well as information about his compensation.
- The appointment of the plan administrator and his release from the position.
- Time period in which the plan will be implemented, which must not exceed five years.
- The refusal of assets of the debtor

or refusal of contractual rights, in a case in which the assets of the debtor or contractual rights have obligations which exceed the benefits to be derived therefrom.

The debts for which repayment can be claimed will only be those that occurred before the Court issued the reorganization order, regardless of whether the debt has matured or is conditional. However, new creditors, or those injecting fresh funds into the company for its reorganization, are given the right to repayment in accordance with the plan. This procedure is one of the major changes to the old bankruptcy law. The 1998 and 1999 Amendments amended the prohibition under the 1940 Act against the repayment of a debt created when the creditor was aware of the debtor's insolvency.

If the Court does not approve the plan, or decides to terminate the business reorganization and decides not to place the

debtor company under receivership, but instead merely terminates the restructuring plan, the company is restored to its former state. This means that all rights and liabilities of the former shareholders and directors are reinstated. In such circumstances, the stay is lifted, reinstating all rights and liabilities of the former shareholders and directors. Secured creditors may then decide to foreclose on the debtor's assets.

In the event that the Court orders absolute receivership, the day that the Court accepts the petition for consideration shall be deemed as the day that it is requested that the debtor be adjudged bankrupt. The creditors must first apply for repayment with the receiver within two months following the date of publication of absolute receivership. For creditors residing outside Thailand, deadline is extended by another two months. ♦

AMENDMENT OF CONDOMINIUM ACT

by Cynthia Pornavalai and Art Sripipat

In a move to address numerous complaints from condominium buyers, the Thai government has enacted Condominium Act No. 4 (2008). Effective as of July 4, 2008, the new law significantly expands the scope of consumer protection to potential condominium buyers by amending several provisions of the existing Condominium Act (1979). Since passage almost thirty years ago, the original Act has been amended three times in an attempt to keep the law up-to-date with new private sector developments and practices. However, this latest amendment has been one of the most comprehensive overhauls of the original Act--extending buyer protection, enacting additional requirements and duties for developers, and modifying restrictions on foreign ownership.

Buyer protection. Prior to the new amendment, there were few legal provisions to protect condominium buyers. Potential buyers risked exposure to developer bankruptcies, unfair contracts, unfinished or substandard construction, disputes over maintenance fees, and various other problems. An aggrieved buyer's

only options were to file a complaint with the Consumer Protection Board and hope that the Board would take action, or initiate a potentially lengthy and expensive legal case against the developer. The new amendment contains several provisions designed to protect potential condominium buyers.

Standardized form contract. A key provision in this new set of protections is a requirement that purchase contracts between the developer and buyer conform to a standard format prescribed by the Ministry of the Interior. This standard format promotes a degree of uniformity and certainty in purchase contracts. Furthermore, any clauses in a purchase contract that deviate from the standard format and are not in favor of the buyer will not be enforceable. The required clauses include basic information such as the developer's ownership in the land and the location, price, and size of the condominium and development complex. More importantly, one of the required clauses is a detailed objective of the usage of every area of the condominium including individual condominiums, common property,



Left: Cynthia Pornavalai, Partner
Right: Art Sripipat, Summer Intern
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and facilities. This provision addresses prior buyer complaints of developers who changed the common area for other uses or built additional units over common areas.

Accurate advertising. Developers must also take careful steps to ensure that their advertisements to the public such as pictures, statements, or brochures, truthfully and accurately represent the completed condominium. Under the new amendment, any advertisement for the sale of a condominium will be regarded as forming part of the purchase contract and any inconsistencies between the advertising and the actual purchase contract will be interpreted in favor of the buyer.

Additional duties and restrictions on developers.

Payment of monthly maintenance fees for unsold units. In the past, disputes often arose between developers and

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SECURITIES AND EXCHANGE ACT UPDATE: MANDATORY APPOINTMENT OF COMPANY SECRETARY

by Ladda Phenpol and Yingyong Karnchanapayap

On August 31, 2008, Section 89/15 of the Securities and Exchange Act (No. 4) B.E. 2551 (A.D. 2008) mandating the appointment of a Company Secretary by the Board of Directors of the following companies came into force.

- Public limited companies permitted to offer shares to the public, with the exception of public limited companies specified in the notification of the Capital Market Supervisory Board.
- Public limited companies listed on the Securities Exchange of Thailand or whose shares are traded over the counter.

The key regulatory requirements and provisions required to be observed and complied with by the above companies are set forth below.

1. Appointment of a Company Secretary: The Board of Directors must appoint a Company Secretary and, within 14 days from the date of such appointment, shall notify the Office of the Securities and Exchange Commission ("SEC") of the Company Secretary's name and the location of corporate documents.

The Board of Directors must submit the first notification to the SEC by September 15, 2008. Failure to appoint a Company Secretary could expose the Board to a fine of Baht 100,000 and an additional fine of Baht 3,000 for each day of non-compliance (Section 281/4).

2. Roles and Duties of a Company Secretary: The Company Secretary shall perform the following duties on

behalf of the Company/Board of Directors:

- a. Preparing and maintaining the following documents:

- (1) Register of directors.
- (2) Notices calling for directors' meetings, minutes of Board of Directors' meetings, and Company's annual report.
- (3) Notices calling for shareholders' meetings and minutes of shareholders' meetings.

- b. Maintaining a report on directors or executives who have an interest in a resolution. The report must be submitted to the chairperson of the Board of Directors within 7 business days from the



Left: Ladda Phenpol, Attorney-at-Law
Right: Yingyong Karnchanapayap, Attorney-at-Law
Commercial

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THE CONSUMER CASE PROCEDURE ACT: A NEW TOOL FOR REAL ESTATE BUYERS

by Ittirote Klinboon, Tiziana Sucharitkul, and Addy Punsan



Top left: Ittirote Klinboon, Attorney-at-Law
Top right: Tiziana Sucharitkul, Director
Bottom: Addy Punsan, Paralegal
Dispute Resolution

Thailand's property market is still on the rise and highly competitive. Advertisements for new real estate developments are everywhere, and with them are promises of freebies. While some projects offer free air-conditioners, televisions, and furniture, others promise gyms, swimming pools, and even nurseries. Often such promotional gimmicks are in fact not referenced in the purchase agreement. So what happens if, after project completion, the developer fails to deliver on its promises?

The real estate company would, of course, refer to Section 456 of the Civil and Commercial Code which provides that an agreement to sell or to buy any real estate property, or a promise of sale of such property, is not enforceable unless there is some written evidence signed by the party liable. However, such companies fail to acknowledge a 2002 Supreme Court judgment (2729/2545) which stated that real estate companies who do not provide infrastructure as advertised are in default of the agreement. Such ruling is typically interpreted as stating that real estate advertisements form an integral part of the agreement. This decision is one example of law available to better protect consumers.

In addition, in 2007 the Supreme Court, viewing that sufficient legal tools were not available for Thai consumers to defend themselves against unfair business practices, proposed the Consumer Case

Procedure Act (the "Act") to the National Legislative Assembly. The Act was passed in February 2008 and became effective on August 23, 2008.

Under the Act, any law requiring the existence of a written and/or signed agreement prior to filing a court complaint, is not enforceable for consumers attempting to assert claims against business operators, provided that (1) the consumer has paid a deposit to the business operator, or (2) the consumer has performed part or all of his obligations under the agreement (Section 10). In addition, any announcement, advertisement, representation, or act of a business operator that leads a consumer to understand, at the time of entering into the agreement, that the business operator will provide services or other infrastructure or perform certain additional services for the consumer, will be viewed as integral to the agreement between the consumer and the business operator (Section 11).

Therefore, when purchasing property, if certain conditions or any understanding between the two parties are not set forth in the written agreements, it is important for property buyers to keep all brochures, fliers, information sheets, project layouts, and other marketing materials, including pictures of billboards, in relation to the projects. Also, it is recommended that during the sales negotiations with the real estate company, the consumer be

accompanied by someone dependable.

If things go wrong, although the agreement may have been made verbally, with such documentation in hand and a witness who is ready to testify, the consumer plaintiff may present to the court documentation and a witness to testify with respect to the unwritten conditions offered by the seller (Section 11).

The Act also contains several procedural rules aimed to ease the process by which consumers bring claims to the courts against business operators. For example, the burden of proof is shifted to the business operator, complaints can be filed verbally in some instances, the court may consider awarding punitive damages, and other such provisions. It is expected that this Act will change the landscape of consumer cases in Thailand. ♦

CONDOMINIUM ACT (from page 3)

buyers over the payment of maintenance fees for units which had not yet been sold, resulting in a shortfall of maintenance funds. Under the new amendment, the developer is responsible for paying taxes, common service expenses, and common maintenance expenses for units to which ownership has not yet been transferred.

Operation of businesses within condominium. There are also new restrictions on the operation of businesses within the condominium. Specifically, businesses are only allowed to operate in designated areas, and the developer must arrange for separate entrances and exits for these businesses in order to protect residents from noise and disturbances.

Penalties for violations. The new amendment also provides a comprehensive

list of penalties for developers who violate any of the new provisions. The biggest penalties are for violations of the standard form contract or for violations of accurate advertising. A violation of the standard format contract carries a fine of up to Baht 100,000 while a violation of accurate advertising carries a fine between Baht 50,000 and Baht 100,000. A violation of the provision regulating businesses within the condominium carries a fine of up to Baht 50,000 and an additional Baht 5,000 for each day the violation is not fixed.

Changes in restrictions on foreign ownership. Under the original Condominium Act (1979), foreigners were explicitly granted the right to purchase and own condominiums, but foreign ownership of total units within a development could not exceed 49%. Condominium Act No. 3

(1999) liberalized these restrictions and allowed foreigners or their juristic persons (holding companies) to hold in aggregate over 49% of total condominium units in certain developments (usually small developments not exceeding 5 *rai*). The new amendment repeals these exceptions and reinstates the 49% ceiling from the original Condominium Act (1979).

Viewed as a whole, the new Condominium Act is part of a larger consumer rights movement in Thailand. Along with the newly enacted Escrow Act (2008), the Thai government has been moving to address complaints of consumer fraud and abuse. In general, the new law creates some minor burdens for developers while extending significant protection to consumers. ♦

MELAMINE SCANDAL HIGHLIGHTS PRODUCT LIABILITY CHALLENGES FOR BUSINESS

by Michael Ramirez



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Dispute Resolution

Recent reports of melamine contamination of imported milk products have had a profound global impact, not only on the Chinese milk product manufacturers and exporters, but on other businesses in the supply chain. In Thailand, the effect of the melamine scandal on local business is reflected in lost sale opportunities and a general reduction in consumer confidence. The melamine scandal also highlights a point of concern for business operators providing products in Thailand: the impact of recent legislative changes on litigation of product liability claims. This article highlights these recent changes and suggests proactive strategies to reduce the potential liabilities for business operators.

Consumer Case Procedure Act of 2008

The Consumer Case Procedure Act of 2008 ("CCP"), which became effective on August 23, 2008, is a concerted effort by legislators to reduce the burden on consumers by simplifying claims against business operators and by eliminating filing fees and costs during the preliminary phase of litigation. The process is further simplified in that complaints may be filed by interested third parties, such as the Consumer Protection Board or associations acting on behalf of their members.

Not only is the cost burden removed under the CCP, but it also requires that a claimant only prove injury or damage resulting from the business operator's product or services. It is not necessary to prove fault or negligence. Furthermore, where there are factual issues known by the business operator such as those related to the manufacture, design, assembly, and the provision of services, the burden of proof falls on the business operator.

The CCP also provides broad authority to the courts. For example, the CCP

provides claimants with the right to seek, before or during trial, temporary injunctions and other protective measures against a business operator. Courts also have the right to impose punitive damages and liability on business operators, even if they have not been directly named in the complaint. Finally, where there is a judgment of liability against a business operator, that judgment can be used in a later consumer case involving the same defendant and nexus of facts.

Product Liability Act of 2008

In February of 2008 Thailand joined the ever growing list of countries with specific product liability legislation. The Product Liability Act of 2008 ("PLA"), which becomes effective on February 20, 2009, imposes strict liability on business operators involved in the manufacture and sale of a defective product which causes harm to an individual.

Under the PLA it is sufficient for an injured customer to prove that he was injured or suffered damage from the operator's defective product while using the product in the way it was intended. A defendant-operator can therefore be held liable for the harm resulting from a defective product even if he has exercised reasonable care in its manufacture and sale. Further, a claimant need not have contracted with the defendant in order to claim for damages under the PLA.

Under both the CCP and the PLA, business operators are defined broadly. For example, an entity involved in the manufacture, distribution, sales, import, or in the granting of licenses for others, could potentially face liability should the product sold contain a defect which causes harm to the user. This is particularly important for many manufacturers, who are not only involved in the manufacture and sale of products, but

who also maintain strong brand recognition and intellectual property ownership rights.

With the implementation of the PLA, any injured person can sue, even if he is not the buyer or user of the product. Additionally, the Consumer Protection Committee, set up under the PLA, as well as any consumer advocacy group recognized under consumer protection laws, can sue on behalf of injured parties. Finally, the PLA specifically provides that in addition to compensation for actual damages, the court may award compensation for mental and punitive damages. For example, the court may award punitive damages if it can be shown that the defendant produced, imported or sold the product knowing that it was defective, acted with gross negligence or where it knowingly failed to take proper action to prevent further damage, such as by prompt product recall.

Proactive Measures to Limit Liability

The Melamine scandal and the implementation of laws reducing the historic burdens on filing individual products liability claims highlight the need for businesses to act prudently and, where unforeseen product crises arise, decisively in reducing liabilities and restoring consumer confidence. This can be done in various ways, including conducting thorough due diligence of partners in the supply chain. It can also be achieved through evaluation of product recall benefits. This is particularly important since Thailand has no specific legislation regarding product recall, but otherwise provides broad regulatory authority of agencies in seeking cooperation of business operators and imposing recall where necessary. ♦

SECURITIES & EXCHANGE ACT (from page 3)

date of receipt of the report by the company.

c. Performing any other matters as specified in the notification of the Capital Market Supervisory Board.

A Company Secretary shall be subject to a fine of not more than Baht 100,000 for failing to comply with the aforementioned duties (Section 281/5).

A Company Secretary shall perform his duties with care and responsibility and in good faith as well as in compliance with

all laws, the company's objectives and articles of association, and the resolutions of the meetings of the Board of Directors and shareholders of the company.

In addition, a Company Secretary must adhere to the following principles in the performance of his duties:

- Business Judgment Rule (Section 89/8 paragraph 2).
- Duty of Loyalty (Section 89/10).
- Conflict of Interest (Section 89/11 (2) and (3)).
- Disgorgement of undue benefits to the company (Section 89/18).

A Company Secretary could be liable to a fine not exceeding the damages incurred or the benefits obtained but not less than Baht 100,000 for failing to adhere to the above principles. In addition, in cases where an offense is committed with dishonest intent, the penalty shall be an imprisonment term of not more than 1 year and/or a fine of not more than 2 times the damages incurred or the benefits obtained but not less than Baht 500,000 (Section 281/7). ♦

GETTING ACQUAINTED WITH THE NEW WORK PERMIT LAW

by Kobkit Thienpreecha



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Most aliens working in Thailand are well aware that they need a visa and work permit to stay and work in Thailand. Yet, they find the governing law and regulations of Thailand rather complicated and difficult to comprehend, especially with immigration rules dramatically evolving in the past few years and posing a challenge to the status of stay of many expatriates. Unfortunate expatriates who either lacked knowledge or failed to keep track of developments in immigration and labor laws and practices have paid a price for their oversight or negligence.

On February 23, 2008, the law governing work permits (Working of Aliens Act) generated much attention when its completely new face emerged to replace its 30-year-old version. Although the implementation of the major part of this new law has been delayed pending the issuance of several ministerial rules and regulations, it would be prudent for working aliens to familiarize themselves with some key changes.

The all-time point of interest of the new law is the punishment imposed upon both employer and employee for an employee working without a work permit.

The new Act imposes a heavy fine of Baht 2,000-100,000 upon a violating [alien] employee, significantly increased from the former Baht 5,000 fine, and/or a 5-year term of imprisonment, increased from the former term of 3 years. An employer hiring an alien without a work permit will face high fines of Baht 10,000-100,000, although the former 3-year imprisonment has been eliminated. Labor officials are now empowered to arrest (without a warrant) any alien suspected of working without a work permit. Depending on one's point of view, penalties seem to be harsher for employees and lighter for employers. The new law will allow any alien worker who pleads guilty and voluntarily leaves Thailand within 30 days to be fined without a trial.

Under the new law, a work permit of up to 2 years may be granted instead of 1 year under the old law. The most welcome change is that a work permit will no longer be tied to the duration of stay that is stamped on an alien's passport. In other words, work permit holders who do not have a 1-year duration of stay will not need to keep extending their work permit by leaving and returning to Thailand on the so-called "Visa Run" to get a new duration of

stay. Nevertheless, work permit holders will still have the duty under immigration laws to maintain a valid duration of stay while staying in Thailand.

The new work permit fee is up to Baht 20,000. Renewal of a work permit will cost the same price. In addition, an employer applying to hire alien employees who are not deemed skilled or expert will be charged a Baht 10,000 fee per alien.

Employers or employees are no longer obligated to report to the Department of Employment and return a work permit when employment has ended. Under the old law, those who failed to comply would have to pay a fine of Baht 1,000 at a police station, which was quite unnecessary and inconvenient. Nonetheless, labor officials still encourage both parties to report the end of an employment; otherwise their system would not permit the employee to get a new work permit with another employer or the employer to hire a replacement alien to fill the vacant position. The Immigration Bureau

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NEW LABOR PROTECTION LAW

by Pimvimol Vipamaneerut



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The new Labor Protection Act 2008 (LPA 2008) which came into force on May 27, 2008 provides better protection to employees than the Labor Protection Act 1998 (LPA 1998). A comparison of some of the provisions of the old and new laws is given below.

The LPA 2008 prohibits an employer from demanding or receiving from an employee security for the performance of work or security deposit for damage for the performance of work, *whether it be money, other property or personal guarantee, except where the nature or conditions of the work require that the employee be responsible for money or property belonging to the employer, which may expose employer to potential losses.* The LPA 1998 only prohibited an employer from demanding or receiving money as security for the performance of work or security deposit for damage for the performance of work, *except where the nature or conditions of the*

work require that the employee be responsible for money or property belonging to the employer, which may expose employer to potential losses.

The LPA 2008 has a new provision that where the working hours of any working day are less than 8 hours, employer and employee may agree to include the remaining working hours to any normal working day, but the total number of working hours must not exceed 9 hours per day or 48 hours per week. Employer shall pay remuneration at 1.5 times the hourly wage rate of a working day for the number of hours worked in excess of 8 hours to a daily or hourly employee, or at 1.5 times the rate for each work unit performed on a working day to an employee receiving wages based on work unit performed. The LPA 1998 did not have this provision.

Under the LPA 2008, if employee terminates the employment contract or

employer terminates employee for any reason, including the reasons below, employer shall pay wages for the accumulated annual leave days to which employee is entitled to employee. The LPA 1998 did not provide for this.

1. Employee performs assigned duties dishonestly.
2. Employee intentionally commits a criminal offense against employer.
3. Employee willfully causes damage to employer.
4. Employee violates the Work Rules and Regulations or any lawful order of employer, even after a written notice

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AMENDMENTS TO LIFE INSURANCE LAWS

by John Fotiadis and Yingyong Karnchanapayap

Readers might recall reports of policyholders being defrauded by unscrupulous insurance agents. The good news is that policyholders are now being given more protection. The bad news is that restrictions on foreign ownership, which were rejected amid much controversy with respect to the Alien Business Act, were nonetheless incorporated into the new Life Insurance Act.

The amendments to the Life Insurance Act, which became effective February 2008, impose significant changes in the insurance industry. The industry will now be regulated by the newly formed, independent Office of the Insurance Commissioner (OIC), established in 2007 to take over the responsibilities previously vested with the Department of Insurance.

Life Insurance Funds will be established, to which insurance companies are required to contribute for the protection of policyholders in the event that an insurance company goes bankrupt or its insurance license is revoked. Companies are also required to maintain "risk-based capital"--a fixed level of liquid assets as determined by its assets and contingent liabilities, to ensure liquidity.

Life insurance companies are also made more strictly liable for the misconduct of their agents. In the past, insurance agents were treated as independent contractors. Pursuant to Supreme Court Judgment No. 599/2537, an "insurance agent" was not deemed to be a true "agent". Life insurance companies would not be jointly liable for the acts of their agents as would typically be the case in a "principal-agent" relationship under Civil and Commercial Code Section 427. The new rules have effectively reversed this interpretation making a life insurance company vicariously liable for its agents.

New advertising rules also impose greater responsibility on insurance

companies to oversee all "advertised wording or images" and "solicitation documents"--all printed images and solicitation documents will be automatically deemed part of the insurance policy. If any wording or advertised image has a meaning contrary to that written in the policy, such discrepancy will be resolved in favor of the insured or beneficiary. As a result, this new law shifts from the policyholder to the insurance company the burden to check that all printed materials delivered to potential customers (including sale illustrations) comport with the policy terms. This new advertising rule is intended to ensure that potential clients are not misled or induced by exaggerated or misrepresented benefits appearing on advertised materials and solicitation documents.

Another new addition is the imposition of an affirmative duty on life insurance companies through their agents to disclose all information that is deemed necessary for the information of the policyholder. Presently there are no guidelines as to what the OIC would consider necessary to be informed. The OIC has already advised that they will issue a notification to address the scope of "information that should be informed" for compliance with the law.

Lastly, the amendments impose requirements that when persuading or inducing consumers to take out insurance, agents must identify themselves by showing their license; and when receiving premiums, agents must show their license whilst brokers have to show their power of attorney and must also issue documents "of the insurance company" evidencing receipt of payment.

Regarding corporate structure, all life insurance companies are required to be transformed into public companies under the Public Limited Companies Act B.E. 2535 (A.D. 1992) within five years' time, or by February, 2013. This will require companies



Left: John Fotiadis, Consultant
Right: Yingyong Karnchanapayap, Attorney-at-Law Commercial

to comply with stricter corporate governance and transparency rules, seen as a mechanism in achieving higher protection for policyholders.

However, coupled with the above is a new corporate structure requirement which obliges that any holding entity which is a shareholder of the life insurance company must itself have at least the majority of its voting shares held by Thai natural persons or Thai partnerships consisting exclusively of Thai natural persons. Not only do these new requirements make ownership rules applicable to voting shares (an issue heavily debated and ultimately tabled in proposed changes to the Alien Business Act last year), but they also require that the majority of shares in any holding company must be transferred to Thai natural persons. The intent here is to prevent foreign investors from taking controlling interests in Thai life insurance companies.

Accepting for the moment the potential negative impact on foreign investment, which may result from this new rule when it becomes effective in five years, there is also the practical matter of mandating that a large equity share of public life insurance companies be held by Thai individuals. Where would these multi-billion baht public insurance companies find the Thai individuals to purchase these shares? In five years, wealthy Thai individuals could potentially find in this new mandate a fire-sale opportunity to buy into these companies, which are forced to sell their shares per the new law within the deadline. ♦

NEW WORK PERMIT LAW (from page 6)

has reacted to this development. The usual 7-day period of stay after the cessation of work will no longer be automatic but will be granted upon request and payment of Baht 1,900. Most importantly, a further temporary stay while a new work permit application is under consideration will not be given anymore. As a result, aliens switching jobs would be compelled to

process their new work permit within 7 days or leave Thailand to get a new business visa from a Thai Consulate.

Several provisions dedicated to a "fund for sending aliens out of the Kingdom" have been added. In addition to the existing personal income tax and social security withholdings, the employer will soon be obligated to contribute to the fund by withholding a certain amount from the income paid to work permit holders. The criteria

and conditions relating to the contribution are to be set forth later. The fund is intended to relieve the government from the high cost of deporting guilty working aliens and illegal immigrants.

In general, the major changes in this law seem to be positive and more liberal. Hopefully, they will help resolve the enduring problems that have troubled both aliens and the Thai government in the past. ♦

T&G HO CHI MINH CITY OFFICE RELOCATION

With effect on December 8, 2008, Tilleke & Gibbins' Ho Chi Minh City Office will move to:

**Suite 1206, Citilight Tower
45 Vo Thi Sau Street, District 1
Ho Chi Minh City
Vietnam**
Tel: +84 8 3936 2068
Fax: +84 8 3936 2066



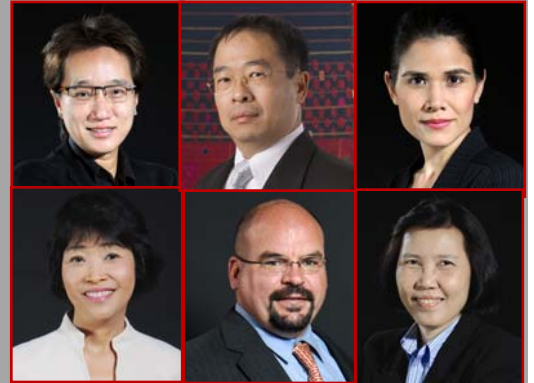
T&G'S TAX PRACTICE RECOGNIZED

Tilleke & Gibbins has been short listed to win the award for "Thailand Tax Controversy Firm of the Year" at the International Tax Review magazine's Asia Tax Awards to be held at the Island Fullerton Hotel, Singapore, on November 26, 2008. The annual event is held to recognize excellence and innovation among law firms in Asia. T&G's expanding tax practice is headed by Sriwan Puapondh, long recognized as a leading tax advisor in Thailand.



LEADING INDIVIDUALS

The 2008/2009 edition of Asia Pacific Legal 500 lists six Tilleke & Gibbins partners as leading individuals in their fields. *Top row, from left to right:* Piyanuj Ratprasatporn in Corporate & M&A, Thawat Damsa-ard and Tiziana Sucharitkul in Dispute Resolution. *Bottom row:* Darani Vachanavuttivong and Edward Kelly in Intellectual Property, and Sriwan Puapondh in Tax. Tilleke & Gibbins as a firm is recommended in the areas of Dispute Resolution, Intellectual Property, Restructuring and Insolvency, Shipping, Telecommunications/Media/Technology, Tax, Corporate/Mergers and Acquisitions, and Real Estate and Construction.



NEW LABOR LAW (from page 6)

to this effect has been given by employer. However, such written warning shall be effective for a period not exceeding one year from the date the offense was committed, except in a serious case when no warning is necessary.

5. Employee abandons his/her work for three consecutive working days, whether or not there are holidays in between, without justifiable reason.

6. Employee commits negligent acts causing employer to sustain serious damage.

7. Employee has been sentenced to imprisonment by a final court judgment. If the imprisonment is for offenses committed by negligence or a petty offense, damage must have been caused to employer.

If employer relocates or moves its place of business operation and the relocation has an important effect on the normal way of life of employee and employee wishes to terminate his/her employment agreement, under the LPA 2008, employer

is required to provide special severance pay of not less than statutory severance to employee. Under the LPA 1998, employer is required to provide special severance pay of not less than 50% of statutory severance to employee.

Statutory severance pay varies depending on the length of employee's service with employer, as follows:

Length of Service	Severance Payment
120 days but less than 1 year	30 days at the last wage rate
1 year but less than 3 years	90 days at the last wage rate
3 years but less than 6 years	180 days at the last wage rate
6 years but less than 10 years	240 days at the last wage rate
10 years and more	300 days at the last wage rate

Under the LPA 2008, when it is necessary for employer to temporarily halt operations, wholly or partially, for any cause other than force majeure, employer is obligated to pay employees at least 75% of a normal working day's wages which employees received before the halt of operations, for the entire period employer does not allow employees to work. Under the LPA 1998, employer is obligated to pay only 50% of a normal working day's wages to employees.

In order to avoid any possible violation of the LPA 2008, employers should study the LPA 2008 as well as review and revise, if necessary, its Work Rules and Regulations, Employee Handbook, or policies to comply with the LPA 2008 and submit the revised Work Rules and Regulations in the Thai language to the relevant Labor Protection and Welfare office without delay. ♦

Contact Persons

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