



Thailand: Legal Developments

A Joint Publication of Tilleke & Gibbins' Commercial and Dispute Resolution Departments

May 2008

PARTNERSHIP AND CORPORATE LAW UPGRADES

by Kobkit Thienpreecha



Kobkit Thienpreecha, Attorney Commercial Department

"Why 7 shareholders?" is a question businessmen have pestered corporate lawyers with for years, but it is about to become a thing of the past. The Thai government, prodded by the Ministry of Commerce (MOC), is adopting major amendments to several partnership and corporate law provisions with the aim to simplify or do away with unnecessary statutory procedures under the Civil and Commercial Code. The amendment was published in the Government Gazette on March 3, 2008 and will be effective on July 1, 2008.

Among other things, the mandatory 7 minimum shareholders in a limited company shall be reduced to 3. The new rule will benefit both new and old companies. Having only 3 persons instead of 7 sign the Memo-

randum of Association (MoA) will make the incorporation process easier and faster. A senior MOC official claims that a fringe benefit to existing companies will be that nominee shareholders holding minority shares (typically 1 share each) will have a chance to make an exit. Many companies are getting ready to reduce the number of their shareholders. Unlike the number 7, which has never been clarified, there is an explanation as to why at least 3 shareholders must be maintained, i.e. the requirement of majority number of shareholders still exists in certain statutes.

Another welcome change is that the process of incorporation which takes at least 9 days under the present law can be done in 1 day under the new law. The new law

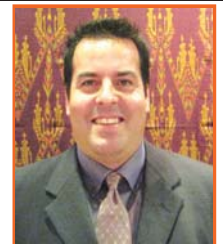
provides for one-day registration of both the MoA and the company together if all requirements are met at the statutory meeting and all the papers are in order. This is a step forward which will put Thailand more in line with international practice.

The rules about shareholders' resolutions are simplified. Currently, a special resolution is required for important matters such as change of company name, address from one province to another, capital, objectives, or Articles of Association, which must be adopted and then confirmed by two successive shareholders' meetings.

Continued on page 6

THAILAND'S ANTI-MONEY LAUNDERING ACT: A RENEWED COMMITMENT TO ENFORCEMENT AND PROPERTY SEIZURE

by Michael Ramirez



Michael Ramirez, Consultant Dispute Resolution Department

Historically, Thailand has had the reputation as being a crossroads of numerous illegal activities and of the laundering of huge sums of tainted money. While it is debatable whether such a reputation is fully deserved, the Thai legislature has acted firmly in combating these activities by implementing a comprehensive anti-money laundering law. The law, known as the Anti-Money Laundering Act (the "Act"), was passed in March of 1999 with the purpose of combating not only the drug trade, but other illicit activities, such as corruption, criminal fraud and prostitution.

Enforcement of the Act was not immediate, however. There were

some initial delays in the establishment of an enforcement agency and in passing implementing legislation. Once established, enforcement of the Act commenced in October 2000 and during the first five months alone approximately Baht 150 million in assets were seized. Since that time, hundreds of millions of Baht have been frozen and/or seized under the Act.

On March 2, 2008, recent amendments to the Act became effective, with the intent to broaden the overall scope of targeted offenses, increase the powers to conduct investigation and seizures, and attack the controversial issue of perceived government corruption.

The Anti-Money Laundering Prevention and Suppression Office (AMLO), which was established under the Act, has reported that financial institutions have been cooperative in reporting transactions subject to the Act, with AMLO receiving over 10,000 reports a week from commercial banks alone shortly after implementation of the Act. However, AMLO has noticed that the number of transactions subject to mandatory reporting under the Act have decreased

Continued on page 5

GOVERNMENT PROCUREMENT CONTRACTS IN THE FACE OF CHANGING GOVERNMENTS: A Tale of Two Cities

by John Fotiadis



John Fotiadis, Consultant
Commercial Department

When governments contract for products and services, they enter into what is commonly known as "procurement" contracts. Normally, regulations are enacted to ensure that such contracts are entered into fairly and transparently. Thailand has such a procurement law entitled the Regulation of the Office of the Prime Minister on Procurement (1992).

As these are contracts with governments, the question will arise as to what can be expected when there is a change of government. How can companies best deal with changes in government and what effects can such changes have on procurement contracts?

Thailand's PTTEP has recently succeeded in bidding on an Exploration and Production Sharing Agreement (EPSA) in Bahrain. Over the course of the five years of negotiations between PTTEP and the Government of Bahrain, there was a change of governments both here in Thailand and in Bahrain. A review of this contract's history is a perfect study in the issues that may arise with procurement contracts in the face of changing laws and governments.

In 2003, the Bahrain Petroleum Company (BAPCO) issued a notice of public tender under the auspices of the Bahrain Ministry of Oil to fifteen international oil companies (IOCs) to seek bids for petroleum exploration in Bahrain's offshore blocks 1, 2 and 3. This was followed by a formal notice by the Bahrain Ministry of Oil which restated the terms and expressly offered the following:

Whether your company might be interested in entering into a Technical Evaluation Agreement under which existing seismic data would be reprocessed and interpreted in return for the right of first negotiation with regard to one or more or part of these Three Blocks, or a "promote license" whereby you may select an exclusive area within Bahrain's

offshore area to study all available data for a limited period with the right to roll over into a PSA or a Tax and Royalty on agreed terms.

When none of the IOCs made a bid, HH Sheikh Salman bin Khalifa Al-Khalifa, then Vice Chairman of BAPCO, made exhausting efforts to meet with the IOCs and create interest in Bahrain's offer. Owing to these efforts, PTTEP ultimately accepted the invitation and offer of BAPCO and the Ministry of Oil. A Technical Evaluation Agreement (TEA) was executed between the parties in May 2005. The TEA was in the form of a first option, giving PTTEP the right to evaluate Offshore Bahrain Blocks 1 and 2 for petroleum potential and then move to enter into an EPSA to explore and develop such petroleum if it saw potential.

During the course of the bidding and PTTEP's one-year evaluation, Bahrain saw several changes in government. First, a significant amendment to the constitution was enacted revising the makeup of the Bahrain government. A new government agency was also created named the National Oil & Gas Authority (NOGA) to oversee BAPCO.

When PTTEP completed its evaluation and sought to enter into an EPSA for Blocks 1 and 2 under its right of first negotiation, per the terms of the original tender and the TEA agreement, NOGA interceded and blocked BAPCO from doing so. Utilizing its new authority, NOGA's Chairman directed that a new bidding round be initiated under the Bahrain Government Tender Law which dealt with government procurement contracts. BAPCO, through its newly appointed Chairman HH Sheikh Salman, objected to the NOGA Chairman's implicit breach of the agreement with PTTEP.

Under Thai law, while government procurement and bidding is controlled by the Regulation on Procurement, petroleum exploration

and production itself is governed by the Petroleum Act. Thailand's Regulation on Procurement is limited to "purchase", "service" and "employment" agreements. EPSAs are legally treated as "concessions", which differentiate them from either a "purchase", "service" or "employment" agreement. For this reason, the Thai Ministry of Energy (through the Department of Mineral Fuels) issues announcements for bids following their own internal bidding procedures. The Bahrain Government Tender Law similarly did not apply to EPSAs or petroleum concessions.

Notwithstanding, Bahrain's NOGA Chairman (who also acts as Bahrain's Tender Board Chairman) directed that a new public tender be started in 2007. That second public tender has since been completed, and PTTEP was again successful as bidder.

PTTEP and Bahrain both suffered a three-year delay as a result of the re-bidding which, by the time of its conclusion, resulted in a decreased offer from PTTEP than had been originally obtained following the original efforts of BAPCO and its Chairman HH Sheikh Salman. While Thailand's government also saw a military coup during the course of these events, this had no effect on PTTEP and its dealings with Bahrain during the entire process.

Government procurement agreements can be a risky proposition for contractors in the face of government change, owing primarily to the fact that there is little control or influence a party may have to ensure that contract terms are duly recognized and enforced following the government change. Even the strongest procurement contract will normally provide for adjudication under the law and in the jurisdiction of the foreign government.

Continued on page 4

CONSIDERATIONS FOR TERMINATING EMPLOYEES

by Chusert Supasitthumrong and Tiziana Sucharitkul



Left: Chusert Supasitthumrong, Litigator
Right: Tiziana Sucharitkul, Director
Dispute Resolution Department

A while back, media reported as to the financial relief employers obtained during the economic crisis period as a consequence of being able to terminate employees. However, shortly thereafter, labor issues ensued. A large number of complaints were lodged with the Labor Department by employees seeking severance from employers. Some employees also filed cases with the Labor Court seeking benefits, remuneration, severance and compensation for unfair termination.

It is undeniable that many employers now find themselves in a similar economic crisis and are seeking to terminate employees. If so, correct procedures must be adhered to and employers should also be informed as to when severance and/or other benefits must be paid to employees.

Pursuant to various Thai laws, if an employer terminates an employee, it has an obligation to pay severance, remuneration, and compensation to the employee. Exceptions apply and are discussed below.

Severance. With regard to severance pay, under the Labor Protection Act, an employer can terminate its employees without severance pay only if the employee:

- (1) is dishonest in his duties or intentionally commits a criminal act against the employer.
- (2) intentionally causes the employer to suffer losses.
- (3) performs an act of gross negligence which causes the employer to suffer severe losses.
- (4) violates the employer's work rules or regulations or orders which are legal and fair, and the employer has already given a written warning (except for serious violations of work rule for which the employer is not required to give warning). Note that the written warning shall be effective for a

period of one year from the date of the commission of the violation by the employee.

(5) neglects his duties for a period of three consecutive work days without reasonable cause, regardless of whether there is an intervening holiday during such period.

(6) is imprisoned by a final judgment, unless the offenses arise out of negligent acts or are petty.

We refer to item (4) above regarding the possibility of terminating an employee without payment of severance and without issuance of a warning letter in instances where there is serious violation of an employer's work rules. Note that in addition to the fact that the "serious violation" for which the employee is being terminated must be stipulated as such in the employer's work rules, the court will also consider whether or not the violation is "serious" to warrant a termination without issuance of a warning letter and without severance. Following are examples of Thai court precedent on this issue:

(1) Cigarette smoking beside a box of papers on the employer's premises is a serious violation. (Supreme Court Precedent Case No. 3495/1983)

(2) Cigarette smoking in an area approximately 2.5 metres from the paper warehouse and while standing on a wet floor is not a serious violation. (Supreme Court Precedent Case No. 1269/1983)

(3) Tearing a warning letter or refusing to sign/acknowledge a warning letter issued by the employer is not a serious violation. (Supreme Court Precedent Case No. 1458/1981, 3999/1981)

Remuneration. With respect to remuneration, if an employer wishes to terminate an employee (where there is no fixed period of employment), the employer will have to provide advance notice of at

least one payment period before any termination is to take effect, otherwise the employer will have to pay remuneration. However, an employer is excepted from paying remuneration if the employee (i) disobeys or habitually neglects the lawful commands of his employer, (ii) is absent from service, (iii) is guilty of gross misconduct or otherwise acts in a manner incompatible with the due and faithful discharge of his duty. Following are examples of court orders relieving the employer from paying remuneration.

(1) Where the employee sold personal goods to other employees during working hours. (Supreme Court Precedent Case No. 2299/1985)

(2) Where the employee operated a business to compete with the employer. (Supreme Court Precedent Case No. 3862 /1987)

Note, however, that the court found that an employer was obligated to pay remuneration to its employee who invited other employees to work at another company. (Supreme Court Precedent Case No. 1378/1992)

Compensation. If an employer terminates an employee without sufficient grounds, the employer will have to pay compensation for the unfair termination. Note also that where it has been determined that a termination is unfair, courts may issue orders forcing employers to reinstate employees instead of paying compensation.

With regard to termination of employees as a result of loss of/failure in business, the court has opined that such termination is fair. Accordingly, employers do not have to pay compensation although they do have to pay severance and remuneration (unless the exceptions listed above apply). ♦

A SUPPLIER'S LOOK AT DISTRIBUTORSHIP AGREEMENTS

by Charunun Sathitsuksomboon



Charunun Sathitsuksomboon, Attorney
Commercial Department

Under Thai law, a distributorship agreement is generally considered to be a type of sales agreement whereby a seller sells products to a distributor and the distributor resells the products for his own account and at his own risk to his customers. Unless the parties agree otherwise, this type of agreement is governed principally by the general principles of contract and sales provisions under the Thai Civil and Commercial Code.

Does a supplier need to enter into a distributorship agreement? Looking at the business practice of most local companies in Thailand, sale and purchase transactions are normally made by way of issuing quotations, purchase orders, invoices and/or receipts without entering into long-term or substantial sale and purchase agreements or supply/distributorship/agency agreements. Why is this so? The answer is simple. Trust. Trust is all very well and good, if only all the parties honored their word. However, in our substantial experience as legal advisors, we have seen too many disputes taking place because of trust.

Another reason why many local businesses do not consider it necessary to enter into written contracts is that they believe that all terms and conditions are already embedded in the Civil and Commercial Code of Thailand, which is a code country. Most terms such as transfer of ownership, duties and liabilities of the seller, liability for defects and eviction, and duties of the buyer are already

specified in the sales provisions of Sections 453 to 517 of the CCC. If that is the case, then why is it still advisable or even necessary to enter written contracts under Thai laws? This is because the sales provisions under Book III of the CCC were enacted and came into force in 1929, so many decades ago. With the modernization of business practices and the rapid development and increasing complexity of the business environment, it is almost impossible for the sales provisions of the CCC to cover and cope with all the techniques, disputes and other matters concerning trading.

Moreover, Thailand ranks among the world's major export countries. Exports are the major contributor to the growth of the Thai economy in the present day. Internal trade has faded into insignificance when compared with the sheer volume of global/international trade of goods. As a supplier, should you place your trust in a new customer in a foreign country whom you have never dealt with? And vice versa, should the new customer place his trust in you? The answer is obviously "no", so the written contract has become a must in international commercial/business transactions.

What issues should typically be covered in a distributorship agreement? Negotiating and drafting a distributorship agreement is very crucial to ensure that it does not only serve the business purposes of the parties but also covers both commercial and legal issues in order

to reduce or avoid any potential conflict and risks. More importantly, the provisions of the distributorship agreement must be valid and enforceable under the applicable laws of the countries involved.

At least the following issues should be taken into consideration when drafting the distributorship agreement, especially if the supplier is desirous of appointing a sole and exclusive distributor:

- Definition of the territory and products.
- Marketing obligations and expenses.
- Minimum purchase or sales target.
- Price and resale price.
- Term and mode of delivery.
- Payment terms.
- Duties of the distributor.
- Non-competition clause.
- Use of intellectual property rights.
- Confidentiality of information.
- Term of the agreement.
- Events of default or termination.
- Arrangements regarding the disposal of stock after termination.
- Governing law and dispute resolution.

By clearly providing for the above items in a written distributorship agreement, the supplier can be secure in the fact that he has taken the proper precautionary measures to save himself potential grief. ♦

GOVERNMENT PROCUREMENT

(from page 2)

Unless such foreign jurisdiction has a strong and independent adjudicating body, they are likely to be influenced in favor of their own government. One potential solution is to provide for arbitration in a neutral jurisdiction with enforcement against collateral (e.g., bank letters of credit) which cannot be affected by any

government change.

However, even where it is possible to litigate a breach of a procurement agreement and obtain a fair and enforceable judgment, few such cases are initiated. Contractors fear that even if successful, they will hurt their relationship with the government and suffer repercussions in the future through lost opportunities.

However, any government will

lose credibility if it fails to uphold the contract terms entered into under its predecessors (and as a result, obtain less valuable bids in its tenders of procurement contracts, as was the case with NOGA's rebidding in Bahrain). This economic principle will normally keep governments honest in their dealings with contractors, despite government change. ♦

TAX LITIGATION

by Chusert Supasitthumrong and Sally Wrapson



Left: Chusert Supasitthumrong, Litigator
Right: Sally Wrapson, Consultant
Dispute Resolution Department

It is difficult for any reader to forget the recent news concerning the sale, to a foreign entity, of shares in a company belonging to one of the most influential politicians in Thai history, and the subsequent assessment of such sale by the Revenue Department. The defense of such assessment, and the legal procedures related thereto, confused many. In this article, we attempt to clarify such process.

In general, when an individual is assessed by the Revenue Department, he is entitled to appeal the assessment to the Board of Appeals within 30 days of receipt of the assessment. Once the Board has completed its review, it will issue an order. If the individual wishes to object to the order, he must submit a complaint to the Central Tax Court within 30 days after receipt of the Board's order.

However, this process may vary depending on the specific circumstances. For example, to determine the correct procedure, when filing an appeal, the appellant should give consideration to the following factors.

Geographical jurisdiction. In the future, Provincial Tax Courts will be established which will have jurisdiction over specific provinces. The Central Tax Court will have jurisdiction throughout Bangkok, Samut Prakarn, Samut Sakon, Nakhonpathom, Nonthaburi and Pathumthani provinces. However, until the Provincial Tax Courts are established, the Central Tax Court has jurisdiction over all provinces.

Legal jurisdiction. The Tax Court has jurisdiction to hear the following types of civil cases:

1. Cases related to an appeal against an order of the officer or

committee under tax law.

2. Cases related to disputing the state's claim as to a tax obligation.

3. Cases related to disputes over refunds of tax.

4. Cases related to disputes as to the rights and duties under the obligation made for the benefit of collection of tax and duty.

5. Other cases prescribed by the law to be under the jurisdiction of the Tax Court.

For appeals in cases decided under a revenue code (such as personal income tax, tax on a juristic person, company or partnership, value added tax, and specific business tax), the assessed person must appeal to the Board of Appeals under the revenue code within 30 days after receipt of the assessment, prior to filing the case to the court. If not, the court will dismiss the case (Supreme Court Precedent Case No. 498/1974).

In the case of an industrial operator or importer who has been assessed by the officer regarding excise tax under an Excise Act, the industrial operator or importer is entitled to file an objection to a director of the Excise Department, or a person authorized by the director, within 45 days after receipt of the assessment. If the order issued is not favorable, the industrial operator or importer is entitled to file an appeal to the Board of Appeals within 45 days thereafter. Once the Board of Appeals issues an order, the industrial operator or importer can appeal to the Court within 30 days. If the proper procedure has not been followed, the Court will not accept the complaint (Supreme Court Precedent Case No. 7199/2000).

If there is any dispute as to whether a particular case falls within the jurisdiction of the Tax Court or any other Court of Justice, the President of the Supreme Court is authorized to make a final determination as to jurisdiction. It should be noted that neither the Court of First Instance nor the Supreme Court is entitled to consider this issue. In addition, if the issue is submitted to the Supreme Court for consideration, the Supreme Court will deliver a copy of the petition to the President of the Supreme Court to issue an order (Supreme Court Precedent Case No. 9240/1996).

The Chief Justice of the Central Tax Court, subject to the approval of the President of the Supreme Court, is authorized to issue rules of the Court on the procedure for the hearing of evidence in the tax cases. The current rule in the Tax Court is the rule in tax case B.E. 2001. Consequently, if this rule is silent on a particular procedural issue, the Court must apply the Civil Procedure Code to consider the case (Supreme Court Precedent Case No. 7819/1997).

A taxpayer can file a complaint against the Revenue Department as the principal and sole defendant, or against the Revenue Department and one or all of the members of the Board of Appeals as co-defendants.

A decision of the Tax Court may be appealed directly to the Supreme Court. There are no further routes of appeal and the decision of the Supreme Court is final. ♦

ANTI-MONEY (from page 1)

sharply through time. This is a clear indication that those suspect transactions that were previously made directly with reputable financial institutions are now being made in smaller, diversified amounts or through other methods entirely. Of the total number of transactions reported to AMLO, only a small portion result in further investigation for violation of the Act.

What Are Targeted Crimes?

Thai law enforcement officials initially proposed the enactment of a money laundering act to target the regular transfer of money and property derived from the rampant trade in illegal narcotics, as well as to comply with requirements for membership under the 1988 Convention Against Illegal Traffic in Narcotic Drugs and Psycho-toxic substances. Additional criminal offenses were added during the legislative process and during the

March 2008 amendments, with the Act now covering the transfer or conversion of funds or property obtained from:

- 1) Narcotics trafficking;
- 2) Prostitution and other sexual offenses;
- 3) Fraud against the public;
- 4) Fraud involving financial institutions;
- 5) Abuse of position by a government official;

Continued on page 6

PARTNERSHIP (from page 1)

Said double approval takes at least 21 days and is the key reason why in practice it has been ignored and circumvented by backdating meetings. The new amendment will allow the passing of a special resolution by only one shareholders' meeting by at least ¾ of the votes of the shareholders in attendance and entitled to vote. It is interesting to note that calling a shareholders' meeting has always required prior notice either by publication twice in a local newspaper or delivery to all shareholders via registered post. It came as a surprise to the MOC that this provision was altered during the draft approval procedures such that it will take "both" newspaper publication and mail delivery to call a shareholders' meeting once the law is enacted. Doing otherwise cannot be agreed under a company's Articles of Association. Many have criticized that this is impractical and inconsistent with other relaxations. The drawback

foreseeable at this point is the extra cost that will be incurred.

Another change is that a company can no longer opt to inform its shareholders of dividend declaration by means of publication in a newspaper instead of delivery by mail. The first will be removed under the new amendment, making it mandatory to individually notify shareholders about dividends by mail. It is hoped that this will fix the current loophole and uphold the right of shareholders under the law.

Although reduction of a company's capital and merger of two companies are not common occurrences, the processing and timeframe are improved. Reduction of capital shall require only 1-time publication in a local newspaper (instead of 7 times) plus 30 days (instead of 3 months) objection period for creditors. To merge two companies, publication in a newspaper is reduced from 7 times to 1, and the objection period for creditors is reduced to 60 days instead of 6 months.

Finally, the new law makes it possible for an existing partnership to be converted to a limited company, subject to certain formalities. A partnership is nowadays not a popular form of business organization, as liability has increasingly become a concern to business owners, both Thais and foreigners. A great number of medium-to-large partnerships are opting to become a limited company with the aim of going public in the future. Without a legal channel for such transformation, partners would have to transfer the business and assets of a partnership to a new company, hindered by many issues, especially tax implications on the transferring partnership and/or the recipient company.

Even though cutting down and shortening some procedural redundancies will not change the easy and common way of practice in Thailand, such as backdating and paper meetings, one cannot really argue that this is not a real upgrade we all have been waiting for. ♦

ANTI-MONEY (from page 5)

- 6) Extortion;
- 7) Trade in contraband; and
- 8) Offenses of gambling under gambling law, with particular emphasis on large-scale organization of gambling games.

What Does the Law Prohibit?

Under the Act, it is a crime to transfer, convert or receive the transfer of funds or property arising from the above referenced criminal offenses for the purpose of hiding or concealing the source of the funds. Violators are punishable by imprisonment of up to 10 years plus a fine of up to Baht 200,000. Violators are defined under the Act as persons who commit or attempt to commit a money laundering offense or aid another person in committing a money laundering offense.

It is also important to note that the March 2008 amendments include provisions targeted specifically at government officials, whereby the aforementioned fines are doubled for both the principals and accomplices if they are government officials, as defined under the Act. This represents a concerted effort to tackle the consistent problem of institutional corruption in Thailand.

Banking transactions are a primary activity subject to scrutiny under the Act, but other financial transactions are also covered. For

example, an individual who secretly uses money from a drug sale to purchase shares of publicly traded stocks on the Stock Exchange of Thailand could be prosecuted under the Act. Further, a corrupt government official who uses money obtained from a bribe to then purchase land runs the risk of being exposed, having the land confiscated, and being subject to double scale fines. Even property developers, if they knowingly hold or accept monies for concealment that they know are derived from one of the stated criminal offenses, can be subject to enforcement under the Act.

Perhaps the most effective tool in combating crime is the ability of enforcement officials to seize, without a warrant, money or property connected with the commission of one of the enumerated criminal offenses, or a money laundering offense. In such case, the owner of the seized property must convincingly demonstrate that the property is unrelated to the commission of one of the enumerated crimes or a money laundering offense, in order to recover the property.

Reporting Requirements

A key provision of the Act is the requirement that banks and other financial institutions report all cash transactions over Baht 2 million. Property transactions in excess of Baht 5 million must also be reported. Also

required for reporting are all suspicious transactions that may be related to one of the enumerated criminal offenses, are more complex than normal, lack economic plausibility, or appear to have been undertaken to avoid compliance with the anti-money laundering law. For such transactions, the financial institutions must require their customers to provide a detailed record of the transactions. The latter requirement is generally left to the practical discretion of the financial institution which must then choose between customer confidentiality concerns and compliance with the Act.

AMLO has also implemented separate regulations which require all persons entering or leaving Thailand to declare currency in their possession where the amount meets or exceeds certain statutory minimum levels.

Failure to comply with the Act's reporting requirements is punishable by a fine of up to Baht 300,000. Filing a false report is punishable by a fine of up to Baht 500,000 and imprisonment of up to two years.

Thailand has made great progress in its legislative efforts to combat illicit crime and the transfer of funds related to such crimes. While much has been done and the laws are in place, ultimate success depends on the practical enforcement of the law, enforcement that we are hopeful will continue to increase. ♦

(First written by Timothy Wales on April 17, 2001)

MARKET DOMINANCE UNDER THE COMPETITION LAW

by Chaiwat Keratisuthisathorn and John Fotiadis



Left: Chaiwat Keratisuthisathorn, Attorney
Right: John Fotiadis, Consultant
Commercial Department

The Trade Competition Act B.E. 2542 (1999) (TCA) seeks to maintain a fair and open market by prohibiting business operators from exerting unfair influence through monopoly, exclusivity, price fixing, quantity fixing, tying/bundling, etc. If any two business operators act together to effect such conduct, they may be liable for violating the TCA which carries a prison term of up to three years and/or a fine of up to Baht 6 million per violation.

The TCA applies not only to any two or more business operators who are working together, but also to a single business operator acting alone if that single operator has "market dominance".

A "dominant business operator" is clearly defined by Ministerial Regulation issued January 18, 2007 as (a) one with 50% or more of market share, or (b) one of the three largest business operators within a market who together hold at least 75% or more of market share and individually hold at least 10%--regardless of whether the three business operators act jointly to carry on anti-competitive activities. In either case, the business operator must also have total sales for the previous year within the subject market of at least Baht 1 billion.

For example, if Company A has 60% market share, Company B has 20%, and Company C has 11% and each has total sales of at least Baht 1 billion, then Company C with only 11% may be treated as market dominant.

Determining market share and documenting sales are relatively simple, which would make determining which business operators are "market dominant" and which are not appear to be a simple task. Actually, the true

difficulty lies in how to define the market.

For example, consider a company that creates a new hybrid motorcycle that works on gas and electricity. What if it is the only company in Thailand that manufactures such hybrid motorcycles? If the market is defined as hybrid motorcycles, then this motorcycle company will have 100% market share. On the other hand, if the market is defined as all motorcycles, the company's market share may be as little as 1%. How the "market" is defined plays a very significant role in identifying which business operators are "dominant" and which are not.

The TCA does not provide any express definition for "market", leaving it to the Trade Competition Commission to define on a case-by-case basis.

One simple method for determining the market of any good or service is by considering whether a product can be substituted by another good or service. If it can be substituted by another product, both shall be considered as being part of the same market. For example, in the soap market, a bar of soap can be substituted by liquid soap. Therefore, bars of soap and liquid soap may be categorized as one unified "soap" market.

The question becomes a bit more difficult when considering something like medicine. When a new and better chemotherapy treatment for cancer is discovered, what market should this be categorized under: (a) all medicines (very large group), or (b) all cancer medicines (smaller group), or (c) all chemotherapy treatments (even smaller group)?

In the US and the EU, the SSNIP (Small but Significant and Non-transitory Increase in Price)

test has been offered as a valid method for defining a "market" for trade competition purposes. The SSNIP test looks at the "elasticity of demand" for a particular product versus other products. The SSNIP test asks: if a product's price were increased by 5%, would this significantly decrease the number of sales of the product? In the case of the hybrid motorcycle, if there was only one company that made this product and they raised their price by 5%--would customers continue to buy it or would they buy a cheaper gas bike instead? A significant enough loss in customers caused by the price increase would suggest that the hybrid motorcycle does not constitute a market in itself.

Clearly there is a difference between cancer treatment and motorcycles. While a consumer may choose between a hybrid bike or a gas bike, medical treatments are usually given in conjunction--i.e. there is oftentimes no choosing between one or the other. A cancer patient will utilize all available treatments until the disease is successfully defeated. If the initial treatment works, the others become unnecessary. The SSNIP test only contemplates market definition based on price and becomes less effective in defining markets where (a) the consumer is not choosing between products, and (b) price is of minimal importance in the consumer's choice.

Ultimately the determination of market dominance is not a simple numerical calculation but does, instead, turn on many different legal and economic factors which must be taken into account together. ♦

LEADING INDIVIDUALS

The 2007/2008 edition of the Asia-Pacific Legal 500 released recently recognizes six Tilleke & Gibbins partners as "Leading Individuals" in their areas of practice. They are:

- Piyanuj Ratprasatporn - for Corporate/M&A
- Thawat Damsa-ard – for Dispute Resolution
- Tiziana Sucharitkul – for Dispute Resolution
- Darani Vachanavuttivong – for Intellectual Property
- Edward J. Kelly – for Intellectual Property
- Sriwan Puapondh – for Tax

In addition, in law firm practice areas, Tilleke & Gibbins was listed in the "First Tier" for Dispute Resolution, Intellectual Property, Real Estate and Construction; and in the "Second Tier" for Corporate/M&A, Restructuring and Insolvency, Shipping, Tax and Telecoms.



Piyanuj



Thawat



Tiziana



Darani



Kelly



Sriwan

DEAL OF THE YEAR



Cynthia

Kobkit

Tilleke & Gibbins has been recognized in the "Asian-Counsel Deals of the Year 2007" and appeared in the cover story of the January/February 2008 issue of Asian-Counsel magazine along with all the other top deals completed between November 2006 and November 2007.

The winning deal is "Saudi Basic Industries Corporation Acquisition of GE Plastics" which was handled by Cynthia Pornavalai and Kobkit Thienpreecha of the Commercial Department. T&G acted as the local counsel of SABIC Innovative Plastics, the acquirer, both on the acquisition, financing and restructuring of the local GE Plastics (Thailand)

Co., Ltd. The lead law firm was Shearman & Sterling in New York City. Forty international law firm offices were utilized in the transaction.

VIS MOOT COMPETITIONS

James Norton, Tilleke & Gibbins' Of Counsel, served as an arbitrator in the Fifth Annual William C. Vis (East) International Commercial Arbitration Moot which was held in Hong Kong during March 3-9, 2008. Photo shows Mr. Norton (seated, first from right) with officers and staff of Vis East Moot. Mr. Hew R. Dundas, President of the Chartered Institute England, is seated center.



Michael Ramirez, Consultant, Dispute Resolution Department (inset), accompanied the Chulalongkorn University team as coach to the Willem C. Vis International Commercial Arbitration Moot held in Vienna during March 14-20, 2008. The competition included 204 teams comprising around 1,400 law students from over 50 countries in the world. The Chulalongkorn University team was Thailand's only entrant.

Contact Persons

Commercial Department: Piyanuj (Lui) Ratprasatporn, Director (lui.r@tillekeandgibbins.com)

Dispute Resolution Department: Tiziana Sucharitkul, Director (tiziana.s@tillekeandgibbins.com)

Tilleke & Gibbins International Ltd., Tilleke & Gibbins Building, 64/1 Soi Tonson, Ploenchit Road, Bangkok 10330, Thailand

Tel: +66 2263 7700, +66 2254 2640 Fax: +66 2263 7710, +66 2401 0034/5 Website: www.tillekeandgibbins.com

Thailand: Legal Developments is intended to provide general information on commercial matters and dispute resolution in Thailand. The contents do not constitute legal advice and should not be relied upon as such. If legal advice or other expert assistance is required, the services of competent professionals should be sought.