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SOLUTIONS TO FOREIGN OWNERSHIP PROBLEMS

by Kobkit Thienpreecha



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Most foreign investors doing business in Thailand are aware of the 49% limit on foreign ownership in reserved businesses under the Foreign Business Act (FBA). A wide range of common businesses, including trading and services, are reserved under the lists annexed to the FBA. Lacking proper legal advice on legitimate solutions, investors commonly take the easy path by engaging Thai nominees to hold a 51% stake in the business on their behalf. Even though this structure can circumvent the foreign ownership restriction, allowing the company to carry out any business and even own land, such structure is in violation of the FBA and involves risks. Therefore, aliens should first explore other possible solutions that could help them lawfully hold a majority stake or even full ownership from the outset.

Some foreigners do not know that the 49% limit in certain reserved businesses can be exceeded or exempted if an Alien Business License (ABL) is granted. Even if an ABL application is a time-consuming process with an unpredictable outcome, foreigners should consider it as a means to get full foreign ownership lawfully. If the desired business is unique, does not compete with Thai businesses, or involves dealings among members of affiliated companies, the chance of getting approval is more probable. Of course, there are conditions attached to ABL such as minimum capital requirement and transfer of technology and reporting requirements which can be points of concern.

From the FBA perspective, there are four common types of business that most foreigners wish to engage in, i.e.

manufacturing, trading, export, and service. Aside from the ABL, a few other solutions to have 100% foreign ownership in these businesses are available.

Most manufacturing is not reserved and foreigners can have full ownership. The goods produced in Thailand can be sold in both domestic and export markets. Foreign-owned manufacturing businesses should note that providing financial credit, technical services and after-sales services with costs charged to customers, such as maintenance and repairs, is considered providing services and not allowed unless an ABL is granted. Some manufacturers also engage in small trade of finished goods produced by others not knowing that it is prohibited. Foreign majority-owned or wholly-owned companies cannot own land unless they receive approval from a competent authority such as the BOI or IEAT.

Buying finished goods for resale is considered as trading. If the goods are sold only to the export market, it would be considered an export business which is not prohibited to foreigners. In contrast, trading of goods in the domestic market could be characterized as either wholesale or retail, which are businesses reserved under the FBA. In the Ministry of Commerce's interpretation, wholesale is extended to the selling of any quantity of goods to a buyer who uses them to produce other goods, which may seem strange from a business standpoint. The FBA permits foreigners to have 100% ownership in wholesale or retail business with a minimum capital of Baht 100 million. With that capital, retailers can have up to 5 retail outlets; additional stores will require a capital increase of

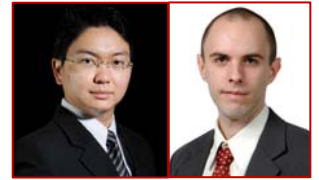
Baht 20 million per store. With that capital, wholesalers can have 1 wholesale office; additional offices will require a capital increase of Baht 100 million per office. In any case, this is not a privilege allowed to retail shops selling fresh Thai fruits or vegetables. Foreign-owned export businesses should beware not to carry out other reserved businesses, including services.

The service business will probably be the last business in which the Thais will be ready to compete, opening it to foreigners. At present, besides the ABL, there is no other solution for foreigners to have 100% ownership in a service business except to be promoted by the BOI. However, only qualifying services that fall under prescribed promotional categories (e.g., hotel, hospital, international school, public utility) can avail of this privilege. Many foreigners may be fascinated to learn that there is an infamous catch-all promotional category named "Trade and Investment Support Office" (TISO) which permits a variety of services including monitoring/servicing affiliates, consultancy services, engineering and technical services, and activities related to machinery, engines, tools and equipment such as training, installation, maintenance and repairs, calibration, and software design and development. The difficulty with TISO is not getting permission but maintaining it due to the key condition of sales and administrative expenses (shown in the audited financial statements) of at least

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IMPLICATIONS OF SEC ACT AMENDMENTS

by Yingyong Karnchanapayap and Michael Yukubousky



Left: Yingyong Karnchanapayap, Attorney-at-Law
Right: Michael Yukubousky, Editor Commercial

The current global economic crisis, the worst since the Great Depression, has financial regulators changing their views on how capital markets should be regulated. The school of thought which held widespread support prior to the crisis – that market deregulation would lead to more efficient growth of wealth – has been heavily challenged by a more cautious approach, with a push towards increased transparency and investor protection. The Thai government has been adopting the latter and steps have been taken to enact laws to address these concerns.

The Securities and Exchange Act 1992 (the “SEC Act”) was recently amended by the Securities and Exchange Act (No. 4). The updated legislation sets forth changes to three important areas of securities laws: reorganization of the structure of the Securities and Exchange Commission (the “SEC”), creation of supportive mechanisms for more effective enforcement of securities laws, and enhancement of mechanisms related to investor protection and transparency. This last area will be the main focus of this article.

The amended SEC Act is primarily intended to increase investor protection and corporate transparency, as well as address concerns over conflicts of interest at the director/management level. While company directors/management will be protected from prosecution if they perform their duties in good faith, for the best interests of the company, and based on information which they honestly believe to be sufficient for decision making, those who commit dishonest acts or perform duties with gross negligence will be prohibited from destroying/covering up their wrongful deeds by seeking resolutions/ratifications at shareholders’ or board of directors’ meetings.

In terms of investors’ rights, shareholders, either individually or

jointly, holding shares with voting right in aggregate of 5% or more, may now file a claim on behalf of the company to expel ill-gotten benefits obtained by company directors/management and claim for reasonable litigation expenses from the company. Shareholders may also bring a civil action on their own behalf to claim for compensation/damages from directors/management who disclose false information or fail to disclose material facts that should be disclosed.

Provisions regarding the acquisition of securities for business takeovers have also been revised. The amended SEC Act clarifies that the voting percentage of shares held in a company (instead of the shareholding percentage) will now be used as the basis for calculating the 5% reporting requirements on acquisitions and disposals of shares and the thresholds to trigger a tender offer, i.e. 25%, 50%, and 75%. These revised rules also expand the coverage of “securities” to include those which entitle the holder to receive securities of the acquired company such as derivatives warrants, etc.

Holdings of securities by both a “controlling person” and “controlled person” will now be taken into consideration to ensure that the securities held by related persons with a 30% shareholding relationship, both downwards and upwards throughout the corporate chain, are counted for the purpose of calculating the reporting requirements on acquisitions and disposals of shares and the thresholds to trigger a tender offer. In addition, persons who act together/collaborate to acquire and exercise power over an acquired company will be regarded as “acting in concert”, and their voting rights shall be counted together for the purpose of calculating these reporting requirements.

In terms of corporate transparency, any attempt by management to employ “anti-takeover” measures will now

require obtaining prior approval at a shareholders’ meeting in accordance with pre-specified rules; otherwise, such anti-takeover measures will not have a binding effect on the company and management will be personally liable to a third-party acting in good faith and for value.

Furthermore, transactions between directors, management, and the company or its subsidiary company, as well as material transactions such as the acquisition or disposal of assets, will also necessitate obtaining prior approval at a shareholders’ meeting in accordance with pre-specified rules. In failing to do so, such transactions will be regarded as materially in breach of conflict of interest rules.

The board of directors will now have the responsibility to appoint a company secretary to perform certain duties on behalf of the company/board, the most relevant of which is maintaining reports on directors/executives who have a vested interest in relation to a resolution. As with management, the company secretary must also adhere to the principles of business judgment, loyalty, and conflict of interest, breach of which could expose both management and the company secretary to criminal sanctions.

Although it is yet to be seen whether the amended SEC Act will achieve its intended purposes, it is viewed as a step in the right direction toward greater investor protection and corporate transparency – a timely implementation given the current economic situation. If successful, these changes to securities laws could help to foster much needed investor confidence and, in turn, lead to a better overall capital market. ♦

SOLUTIONS (from page 1)

Baht 10 million per year. Moreover, a TISO is not qualified for tax benefits.

It is common for investors from the U.S. to instead seek protection under the

Thai-U.S. Treaty of Amity and Economic Relations which allows Americans to own and operate almost all reserved businesses in Thailand. Treaty-protected companies must have a

capital of at least Baht 3 million. However, to comply with WTO principles, the Treaty will most likely be terminated by both countries in the future. ♦

E-PAYMENT PROTECTIONS FOR CONSUMERS

by John Fotiadis and Yingyong Karnchanapayap



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

Recently in Thailand and around the globe, companies have been offering more and more electronic payment services. These have either been in the form of direct debit cards, pre-paid credit cards, or counter payment centers such as Paypoint. With the continuing growth of online shopping in Thailand, these electronic payment services have seen greater and greater demand from the general public.

The new Royal Decree Governing Control and Supervision of Electronic Payment Service Business (“Electronic Payment Services Decree or EPSD”) went into effect on January 14, 2009. The general purpose of this new law is to introduce oversight of the electronic debit service business which, prior to this Royal Decree, was not fully addressed by either the finance company, credit card, or banking regulations that already existed. This is one in a series of laws recently enacted for greater consumer protection against fraud.

Enforcement of the EPSD falls within the jurisdiction of the Electronic Transactions Commission (“ETC”), as originally created under the Electronic Transactions Act (2001).

The EPSD is applicable to those certain electronic payment service providers as specifically identified in Schedules A, B and C—each schedule identifies different categories of service providers which must meet different qualifications, reporting, and/or licensing requirements.

Category A providers, who can either be individuals or juristic entities, have the least onerous obligations under the new law. This group is limited to electronic money services provided for purchases of specific goods or specific services from a single source. Category A providers are required to file reports with the BOT discussing their operations, security measures, contingency plans and other

terms to be specified by further notices issued by the BOT and/or the ETC.

Category B providers consist of electronic credit card, debit card and e-payment network service providers; switching service providers for any payment system; and any electronic money services provided for the purchase of specific goods or services from more than one source but at a place under the same distribution and servicing system. Category B providers are required to file reports as discussed above, but also must register their operations with the BOT. If their application to register meets all qualifications specified by the BOT (per future notices), then a certificate of registration will be issued.

Category C providers consist of electronic payment and credit card clearing, balance settlement, and switching services for multiple payment systems, substitute payment services and electronic money services provided for the purchase of specific goods or services from more than one source without limitations as to place or use thereof and not under the same distribution or service system. Category C providers must obtain a license from the ETC before providing such services.

Category B and C providers can only be juristic entities.

Although the EPSD became effective January 14, business operators who were already operating electronic payment services on that date are given a 120 day grace period. However, they are required to submit the necessary reports, or applications to register or for a license, as applicable, no less than 60 days prior to the lapse of such grace period. This would make March 16, 2009, the current deadline for such submissions, absent any extension.

Under the EPSD, the Bank of Thailand was tasked to issue further notices regarding qualification requirements and data security (utilizing their experience from issuing

similar notices in the finance, credit card and banking industries). Draft ETC notices have since been published and await approval by the BOT Governor which include imposing minimum capital requirements for Category C providers, regulating disclosure of service fees, complaint procedures and minimum personal and financial data security requirements.

More specifically, the current draft ETC Notice imposes a minimum registered capital requirement for Type C service providers of THB 200 million for settlement activity and E-Money services, THB 50 million for clearing activity and transaction switching activity, and THB 5 million for electronic payment service and payment service provider services.

In addition, the draft ETC Notice also lays down the specific conditions and criteria for service providers engaging in each of the following types of services e.g. e-money, credit card network, EDC network, transaction switching, clearing, settlement, electronic payments through any device or network, and payment services provider.

Finally, the draft ETC Notice mandates that electronic payment service providers must submit financial statements and periodic reports to the BOT, and those who outsource material business processes to external contractors must be liable for such contractors’ services and must have the procedures to evaluate and monitor the services of such outsourcing entity and allow auditors including the BOT to monitor their services.

Further notices are anticipated over the future from both the ETC and BOT, which may further regulate the industry as similarly exist in the finance, credit card and banking sectors. ♦

THE ESCROW ACT AS A PROPERTY DEVELOPER'S TOOL

by Cynthia Pornavalai



Cynthia Pornavalai, Partner
Commercial

In certain jurisdictions, an escrow account system is required in order to protect the interests of the purchasers of properties. This is a system whereby the buyer and the seller mutually agree to appoint a third party escrow agent who will hold the seller's documents and assets on the one hand, and on the other, the buyer's deposit or the whole purchase price. This involves a tri-party written agreement known as the escrow agreement. The escrow agent has the duty to ensure that the parties fulfill their obligations under both the contract and the escrow agreement. The escrow agent will also be responsible for the safekeeping of any money, assets or documents deposited by the parties and for handing over the money or arranging the transfer of ownership or rights to the assets when required.

No such requirement yet exists in Thailand although in a move to offer more protection to property buyers, Thailand finally enacted the Escrow Act on May 21, 2008.

Under the Act, the use of an escrow account is voluntarily entered into by the contracting parties. Only commercial banks and finance companies under the law governing financial institutional business, and banks established under a specific law may operate as escrow agents. In addition, to operate as escrow agents, they must be licensed by the Minister of Finance, based on the recommendation of the Escrow Business Operation Supervision Committee. The Act lists the conditions and requirements for engaging in the escrow business, the rights and duties of the parties to an escrow agreement and those of an escrow agent, and the powers of the Escrow Committee. Escrow agents will be monitored by the Escrow Committee, which has the authority to order them to correct or stop prohibited activities if they are detected and to perform their duties in compliance with the Act. Criminal penalties are prescribed for escrow agents committing fraud.

The Act requires the escrow agent to deal with the property in escrow as follows:

1. In case of funds deposited by the buyer, the escrow agent is required to deposit the funds with a financial institution.
2. In relation to a real estate transaction, the escrow agent is required to inform the land office in writing of the escrow arrangement whereupon the land officer shall record the existence of an escrow arrangement and disallow the registration of transfer of title of the relevant property until it receives notice in writing from the escrow agent.
3. With respect to other types of properties placed in escrow, the escrow agent is obligated to properly maintain such properties or any relevant documents thereto.

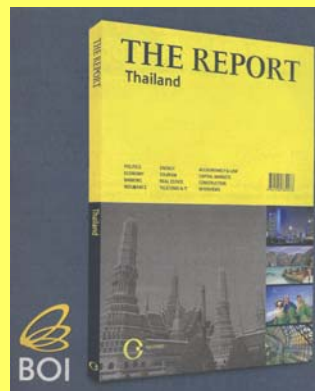
Once in escrow, the funds cannot be transferred unless the parties have reached an agreement, or a court has passed final judgment. The law also provides that in the event the escrow agent becomes bankrupt, the funds in the escrow account and the property under enforcement will be protected against attachment or seizure.

Unlike the new Condominium Act which significantly protects the interests of the buyers, the Escrow Act falls short of requiring the establishment of escrow arrangements with respect to property transactions. Developers and sellers are

still free to require deposits from buyers without much protection granted to the buyer. As is commonly practiced, buyers' deposits are used to partly finance the project. In a market that is increasingly becoming a buyer's market, however, this practice may have to change as buyers more and more become averse to risk.

Developers and sellers nonetheless can find many opportunities in a tightening property market by making use of the escrow arrangement to their benefit. Developers who are new to the market can use it to attract buyers. In a buyer's market, it makes good business sense to give buyers assurances of the soundness of their investment by minimizing their risks. Buyers do not only want to be satisfied that the project is viable and that the developers are reliable. They also want to be assured that they have non-judicial recourse in the event of developer's default. In transactions involving foreign buyers, the involvement of an independent third party lends more credibility to the seller and the subject property. As a result, buyers would not be over concerned about putting up larger deposits or even the total purchase price. This then assures the developer or the seller of buyer's payment and commitment to close the deal. ♦

COMING SOON!



Tilleke & Gibbins is the official law partner of the Oxford Business Group for the production of the Legal Section of *The Report Thailand 2009*, scheduled for release soon. Endorsed by the Board of Investment of Thailand, *The Report Thailand 2009* will feature in-depth interviews with top policymakers and provide a detailed insight and analysis on the economy, infrastructure, and business environment of Thailand.

TEMPORARY CESSATION OF OPERATIONS: AN EMPLOYER'S OPTION TO WEATHER THE CURRENT ECONOMIC STORM

by Chusert Supasitthumrong and Tiziana Sucharitkul



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

Under the current global economic circumstances of a decline in consumption and accordingly a reduction in purchasing, many businesses have been severely affected and are faced with evaluating how best to handle the drop in business and an idle workforce. One thing that always comes to mind is whether or not to cease business operations temporarily. This is because when employers adopt this measure in Thailand, they can legally pay wages at a reduced rate to the affected employees. Nevertheless, many employers lack a good understanding of the laws, which results in them then having to face court proceedings and risk a possible court order revoking the measure of “temporary cessation of operations”. This article hopes to clarify the law for ceasing business operations temporarily.

Under Section 75 of the Labor Protection Act (LPA), an employer is entitled to apply for the measure subject to the following conditions.

1. There is a necessity and a significant cause for the employer to invoke such a measure, such as the employer's business cannot operate as usual.
2. The necessity is not considered to be force majeure under Thai law. (Note that if an event is deemed to have arisen due to a force majeure event, an employer is able to withhold all wages as described below as opposed to withholding up to 25% of wages for situations warranting a temporary cessation of operations.)
3. The employer has to elect whether to seek temporary cessation of operations on a whole or partial basis.
4. The employer has to inform a labor inspection officer and the employees three business days in

advance of the intended cessation of operations.

5. The employer has to pay its employees at least 75% of the working day wages received by the employees prior to the cessation of operations.

6. The employer has to pay its employees throughout the entire period of cessation.

The LPA does not indicate what qualifies as a “necessity” in order for employers to invoke the measure; therefore, Supreme Court precedent must be reviewed for guidance.

Supreme Court precedent indicates that the following circumstances are viewed as amounting to a situation of “necessity”: (a) reduction in customer purchase orders, and (b) financial difficulties faced by the employer. However, the situation has to be significant and must seriously impact the employer's business (Supreme Court Case No. 8193/2000). Furthermore, the situation cannot be a result of the employer's own failure to conduct business efficiently.

As mentioned above, situations arising from events deemed as “force majeure” which result in the employer not being able to operate will enable the employer to withhold all wages from employees. “Force majeure” is defined under Thai law as “any event the happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition.” Earthquakes and tsunamis are examples of force majeure. The collapse of a factory due to an earthquake which results in the employer being unable to operate will justify withholding of wages.

Interestingly, the Supreme Court has ruled that the following events do not qualify as force majeure events:

- Flooding of a factory's premises (Supreme Court Case No. 118/1982).
- A factory fire (Supreme Court Case No. 2560/1986).
- A violent storm which usually occurs every season (Supreme Court Case No. 2140/1977).
- A seasonal wildfire where the party does not undertake any preventive action (Supreme Court Case No. 830/1976).

However, if the above incidents occur resulting in the shutdown of a factory, the employer would still be entitled to apply for the temporary cessation of operations under LPA Section 75.

As for the requirement on the employer to elect whether to seek temporary cessation of operations wholly or partially, the employer has to fix the cessation period. However, the employer can designate separate cessation periods based on necessity.

If the employer has in place a Collective Bargaining Agreement (“CBA”) with a labor union or the employees regarding temporary cessation of operations, the employer also has to abide by the procedures therein. Failure to do so could result in the employees claiming violation of the CBA. If the employer's business has a labor union, it is likely that the union will challenge the measures taken by the employer. Therefore, employers should act cautiously when considering measures such as the temporary cessation of operations.

Although a temporary cessation of business operations may not be the answer to all employers' problems, it may be an alternative worth considering. ♦

WARNING LETTERS: GUIDELINES FOR EMPLOYERS TO ENSURE COMPLIANCE WITH THAI LABOR LAW

by Chusert Supasitthumrong and Sally V. Mouhim



Left: Chusert Supasitthumrong, Litigator
Right: Sally V. Mouhim, Consultant
Dispute Resolution

Managers and HR personnel may have experienced situations where disciplinary actions taken by the employer are later revoked by the Labour Court in court proceedings filed by the employee. The reason for this is that the disciplinary actions may not have been procedurally correct or the punishment may have been too severe for the type of misconduct committed by the employee.

For example, one of the grounds for dismissal with cause under Section 119 of the Labour Protection Act is when an employee repeats wrongdoing for which a warning letter has previously been issued. The employer may issue a warning letter for a violation of the work rules, and when the employee later commits the same violation, the employer believes that he is within his rights to dismiss the employee for serious cause. However, if the warning letter itself is not in compliance with the law, the Court may issue a judgment that the employee has been unfairly dismissed because no proper warning letter has been issued in respect of that offense. Therefore, we will examine the requirements for a warning letter under Thai law.

Although Section 119 (4) provides for the dismissal for serious cause of an employee who has committed a repeat violation of an offense for which a written warning has already been given, it does not give any guidance as to the form or requirements for the warning letter itself. Therefore we have to look to Supreme Court precedent for such guidance.

Prior to issuing the warning letter, the employer should first consider the work rules. If the work rules contain a disciplinary procedure consisting of several stages which have to be followed step by step, the employer cannot punish the employee by skipping a stage of the procedure. For example, the employer's work rules

may provide for the following levels of disciplinary action: (1) verbal warning; (2) first warning letter; (3) second warning letter; (4) termination of employment without severance pay. If the employee violates the work rules by coming in to work late, the employer has to punish the employee by issuing a verbal warning first. This is because the work rules of the employer are more beneficial to the employee than the law requires (we refer to Supreme Court Precedent cases nos. 5679/1987 and 4921/1989).

Providing the work rules empower the employer to punish the employee by issuing the warning letter, the employer can proceed to do so. The warning letter must contain the following:

1. Date of issuance of the warning letter.
2. Name and position of the employee.
3. A description of the behavior of the employee which constitutes a violation of the work rules.
4. A reference to the work rules which the employee has violated.
5. A statement that if the employee commits the same violation of the work rules again, the employer will punish the employee pursuant to the procedure in the work rules.

In addition, the employer should ask the employee to sign to acknowledge the warning letter. If the employee refuses to sign to acknowledge the warning letter, the employer cannot punish the employee based upon a violation of the employer's order (we refer to Supreme Court Precedent case no. 5560/1987). However, the employer is entitled to read the warning letter to the employee and ask two witnesses to sign the warning letter to confirm that the employer has read it to the employee and the employee refused to sign.

Moreover, in case the employee signs a confession letter to the employer admitting that he committed

an offense and violated the work rules, and is willing to accept the disciplinary action pursuant to the work rules, the court has considered that this letter is not a warning letter under the law. Therefore, if the employee later commits the same offense, the employer cannot rely on the confession letter to dismiss the employee (we refer to Supreme Court Precedent case no 1252/1983).

In addition, we note that if the affected employee is a member of the Employee Committee formed in accordance with the Labor Relations Act, the employer may not discipline the employee, including by issuing a warning letter, even where there has been a determination of guilt. The employer must submit a petition to the Labor Court seeking an order approving the discipline of the employee. If approved, then the employer may proceed with the punishment in accordance with the work rules, which will include issuance of written notification of discipline by the employer. This Court process can be shortened if the affected employee is willing to admit guilt before the Court.

The warning letter will be effective for a period of one year from the date on which the employee commits the violation of work rules, rather than the date of the warning letter. Therefore, if the employee commits a violation of the work rules on April 1, 2008 and the employer issues a warning letter to the employee on May 1, 2008, the employer cannot terminate the employee if the employee repeats the same violation on April 10, 2009. This is because the second violation by the employee is more than one year after the first violation. In this case, the employer has to issue a first warning letter to the employee for the new violation. ♦

DIVORCING IN THAILAND

by Sasirusm B. Chunhakasikarn and Sally V. Mouhim



Left: Sasirusm B. Chunhakasikarn, Attorney-at-Law
Right: Sally V. Mouhim, Consultant
Dispute Resolution

With the increasing pace of globalization, marriages between individuals of two different nationalities are now relatively common, and there are many marriages between Thais and foreigners. When such marriages fail resulting in one or both parties wishing to divorce, unlike divorce between two Thai parties, many cross jurisdictional issues have to be considered, including location of marital assets and child custody issues. The foreign party may expect that divorce options may be similar to those in their own country, and may be surprised to find that there are distinct differences compared to other jurisdictions. In this article, we examine the options for divorcing in Thailand where one party is a Thai national.

If the parties agree to divorce, the divorce process can be easily concluded at any District Office, but the parties should have the marriage certificate to present to the officer. If they have lost it, they can request a certified true copy from the District Office that issued the marriage certificate. If the couple registered their marriage abroad, the Thai party will first have to report his or her marriage registration to the District Office in the district where the Thai party lives (some specific documents will be required such as a certified copy of the marriage certificate and its certified true translation by the Ministry of Foreign Affairs) and then register their divorce at the same District Office. The parties may wish to reach a settlement in respect of division of marital assets and other issues such as spousal/child support and custody/visitation rights. Any divorce agreement giving effect to such settlement must be filed with the officer at the time of registration of the divorce. If the parties are able to reach an amicable agreement, this method of divorce is quicker, cheaper and far less stressful than contested divorce proceedings in the Court. The registration of the divorce can be concluded within one day.

However, if the couple does not consent to divorce, the other alternative is to file a divorce action with the Thai family court. Note, however, that to do so the petitioning party must have grounds for divorce. Unlike other western countries, “irreconcilable differences” is not one of the grounds for divorce under Thai law. The grounds for divorce are contained in the Thai Civil and Commercial Code and can be summarized as follows:

- Adultery.
- Misconduct, whether or not a criminal offense, causing the other to be (a) seriously ashamed; (b) insulted or hated for being the spouse of the person committing misconduct; or (c) to sustain excessive trouble or injury taking into account the condition, position and cohabitation as husband and wife.
 - Serious harm or torture caused to the body or mind of one spouse by the other, or seriously insulting the other’s ascendants.
 - Desertion for more than one year.
 - Sentence by final judgment of the Court resulting in one party being imprisoned for one year or more, without the knowledge, consent or participation of the other party, and cohabitation as husband or wife will cause excessive injury or trouble to the other party.
 - Separation for more than three years, whether voluntary or by order of the Court.
 - One spouse has been adjudged to have disappeared or has left his or her domicile or residence for three years or more and the other spouse does not know if he or she is dead or alive.
 - Failure to give proper maintenance and support to the other spouse or committing acts seriously adverse to the relationship of husband and wife causing the other to be in excessive trouble taking into account the condition, position and cohabitation as husband and wife.

- Insanity of one party for more than three years continuously, and such insanity is unlikely to be curable so that the continuation of marriage cannot be expected.

- Breach of a bond of good behavior.
 - One spouse is suffering from a communicable and dangerous disease which is incurable and may cause injury to the other.
 - One spouse has a physical disadvantage so as to be permanently unable to cohabit as husband or wife.

It should be noted that a party cannot rely on their own adultery, misconduct, desertion, etc. as grounds for divorce. If the divorce is contested, the claimant must be able to prove one of the above grounds in order to succeed in the divorce claim. In relation to the ground of separation for at least three years, it is important to note that this must be separation by mutual agreement (which does not have to be a written agreement) rather than unilateral separation by one party leaving the other. If the claimant does not have evidence to prove that the other party agreed to the separation, the divorce claim on this ground will not succeed.

After a matter is filed with the Thai Court, if the parties can reach settlement during the Court process, they can file the settlement agreement for the Thai Court to review and approve at any time. The agreement would then be made part of the court order for dissolution of the marriage and settlement. The benefit of a court approved settlement over the first option (registering a divorce by mutual consent) is that a court order is directly enforceable and it would not be necessary to file a separate claim if one party breaches the agreement. ♦

GRAND OPENING CELEBRATION OF T&G'S NEW BANGKOK OFFICE



More than 300 guests joined T&G lawyers and staff to make the Grand Opening Celebration of T&G's new Bangkok office a very well-attended and successful event. The guests included clients, high-ranking government officials, members of the diplomatic corps, friends of T&G, suppliers, and others. The guest of honor was Minister of Justice Pirapan Salirathavibhaga, shown in left photo presenting flowers to Chairman and Chief Values Officer David Lyman. Pictured on the right are Mr. Lyman and Co-Managing Partners Tiziana Sucharitkul (left) and Darani Vachanavuttivong (right) hitting gongs to announce the opening of T&G's new Bangkok office.

NEW MEMBER OF THE COMMERCIAL TEAM



Chinachart Vatanasuchart rejoined Tilleke & Gibbins in February 2009 after 15 years spent in most part as a partner with the Bangkok office of Johnson Stokes & Master. Chinachart obtained his law degree from Ramkhamhaeng University in Bangkok, then attended Tulane University in New Orleans, Louisiana, where he completed his Master of Comparative Law and Master of Law. He joined Tilleke & Gibbins in 1988 and under the firm's auspices, attended and completed Harvard Law School's Program of Instruction for Lawyers in 1991. He is a member in good standing of the Lawyers Council of Thailand and the Thai Bar Association. He focuses on transportation, customs law, international trade, and insurance/reinsurance. He has guest-lectured on arbitration in cargo disputes, arrest of ships under Thai law, and foreclosure of Thai vessels.

LEADING PRACTITIONERS

Thawat Damsa-ard (left) is ranked in Chambers Asia 2009 as a Band 2 lawyer in dispute resolution. Sriwan Puapondh (right) has been identified as a prominent practitioner in the tax field by clients and peers, and her name appears in the PLC Cross-border Tax on Transactions Handbook 2009/10.



T&G A LEADING FIRM IN TAX

Tilleke & Gibbins is ranked as one of the leading firms in Thailand for Tax Transaction/Tax Planning Services in the International Tax Review's annual poll 2009.

VIS MOOT EAST COMPETITION

Two teams from Chulalongkorn University participated in the Vis Moot East Competition which was held in Hong Kong in March. John Fotiadis, a consultant with T&G's Commercial Department, coached the two teams, which performed well in the preliminary rounds. Michael Ramirez, a consultant with T&G's Dispute Resolution Department, assisted in coaching both Vis Moot and the Jessup moot court teams, while David Lyman, Tiziana Sucharitkul and Sally V. Mouhim sat as judges in the practice rounds held at T&G. The Chulalongkorn students benefited much from these practice sessions and are very grateful to T&G for all their support and enthusiasm.



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