



Thailand: *Legal Developments*

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INTELLECTUAL PROPERTY AND THAILAND'S TRADE COMPETITION ACT: CAN AN OWNER REFUSE TO IMPORT OR REFUSE TO SELL AT A LOWER PRICE?

by John Fotiadis



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There has been much discussion recently concerning the compulsory licensing by Thailand of certain patented drugs under Article 31 of the WTO TRIPS Agreement. Thailand has granted a license to generic manufacturers to produce a cheaper version of certain drugs over the objection of the drugs' patent owners. Now at least one of these patent owners may choose not to import its other patented drugs into Thailand.

While many focus on the issue of compulsory licensing under TRIPS, a broader question is being discussed in the background. Does IP ownership

constitute a monopoly? If so, does refusal to import licensed goods or do high prices of IP constitute a violation of Thailand's Trade Competition Act (TCA)?

By virtue of the protection of the IP law, someone who owns a patent in a particular product has the exclusive right to produce or sell such patented product. This applies to other IP as well, e.g., music and films. But how far does that exclusive right go? For example, does the owner of a song have the right to license that song at whatever price they wish, or even to refuse to publish the song within

Thailand? Should a patented pharmaceutical be entitled to the same treatment?

In the past, even legal monopolies granted by the Thai government have been held subject to the TCA and charged with violations for unfair conduct thereunder. UBC, which held a legal monopoly in the cable TV market, was charged with unfairly refusing to provide service to certain customers. Surathip Group, which held a legal monopoly in the alcoholic beverages market, was charged with

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HANDLING LABOR DISPUTES: HOW EMPLOYERS SHOULD DEAL WITH UNION OR EMPLOYEE DEMANDS

by Chusert Supasitthumrong



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With Thailand enjoying steady economic growth these past few years, many companies have reached or surpassed their targeted profits. When businesses make more profit, employees also earn more money, and things seem to be happy and smooth—until one day the employees submit a demand and the employer refuses to grant it. Just like that, a labor dispute is born!

The employees go on strike, causing business to slow down or stop altogether. What an inopportune time for a labor dispute to take place when business is good. Why? The answer is simple: When business is prosper-

ous, the employees would like to share in that prosperity through increased benefits from the employer. If such circumstances befall your company, as the employer, how should you handle the situation?

Should the company comply with the employees' demands to avert trouble? Practically, it is not possible, or even advisable. The company cannot give the employees everything they want even though its operation is profitable, because the money may be needed for other purposes, such as expanding the business.

Ideally, employers should be able to anticipate problems before

they develop, but if they fail to do so, what should they do in such a situation? The answer is, employers should be aware of their rights and duties under the Labor Relations Act in order to control and manage the situation properly.

According to the Labor Relations Act, not only employees are entitled to submit demands for changes in employment conditions. Employers are also entitled to do so, but in most situations, it is not the employer who initiates such demands. Thus, when

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IMPLICATIONS OF FOREIGN BUSINESS ACT AMENDMENTS

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On April 25, 2007, the bill to amend the Foreign Business Act of 1999 (FBA) passed the first reading of the National Legislative Assembly (NLA). The NLA has appointed a committee to study the bill and provide recommendations, a process which should take a few months. The NLA will then reconvene to consider the bill with the committee's recommendations and if the bill passes the second and third readings, then it will be enacted into law and published in the Government Gazette.

The most significant issue on the bill is to amend the definition of "alien" to also include companies in which foreigners have the majority vote regardless of their ownership in the companies. Under the current FBA, a company with foreign shareholding is regarded as "alien" if the

majority of its registered capital is held by foreigners. Various businesses are reserved for Thais under the FBA for different reasons, and foreigners wishing to conduct a reserved business have to apply for an alien business license from the relevant authority. To avoid such requirement, many foreign investors opt for a joint venture with Thais in which the Thais hold the majority of the registered capital but the foreign minority shareholders have management control over the company and get higher returns. This is accomplished through a structure that gives voting control to the (foreign) minority shareholders. Such arrangement per se is legal and recognized by Thai law.

If such structure is legal and recognized by Thai law, the question now arises as to why the new bill

contemplates on illegalizing it. This brings us to the real issue, which is the use of this minority voting control as a circumvention of the letter and principle of the FBA. It should be noted that the FBA has provisions prohibiting "nominee" arrangements whereby the Thais are not real investors but merely act as "nominees" to hold shares for and on behalf of the "beneficial" (foreign) owners. While said nominee arrangements are explicitly prohibited under the FBA, minority voting control is not.

What are the highlights of the bill? A company with foreign shareholders having majority voting rights will be regarded as "alien". Therefore, if

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A GUIDE TO THE ALCOHOL AD BAN

by Michael Ramirez and Joshua Hauserman



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Recently the Thai government has expressed its intent to enforce a total ban on alcohol advertising in the Kingdom. The ban, which was originally introduced by the Thai Food and Drug Administration ("FDA"), was scheduled to take force on December 3, 2006. However, the bill provoked considerable debate regarding its scope and the FDA's legitimacy to institute such restrictions. This debate, including the Council of State's December 2006 ruling that the FDA lacked authority to implement the ban, resulted in a decision to withdraw the draft law.

Despite growing commercial opposition, the Thai government has been resolute in its desire to impose a comprehensive advertising ban and, in early 2007, the Public Health Ministry introduced a modified Alcohol Control Bill, which contains specific provisions banning nearly all forms of alcohol advertising. The bill,

which was passed by the Cabinet and is undergoing continued debate and scrutiny with the National Legislative Assembly, could become law in 2007, with significant effect.

While much of the discussion focuses on how this will affect major liquor producers and advertisers, there has been little analysis of the impact on other business sectors, such as restaurants, hoteliers and operators of entertainment venues. This is partly the result of the broad draft of the advertising ban, which has been criticized for lacking clarity. By providing a basic analysis of how we believe the proposed law will affect these operators, we hope to assist in planning for its inevitable arrival.

Statutory Prohibitions

The Alcohol Control Act provides, in part, that advertising alcohol products is prohibited by all means of advertising media or by any

other methods. This extremely broad prohibition extends, but is not limited, to all forms of traditional and non-traditional electronic and print media, as well as to advertising through sponsorships, promotions or in the staging of public events and displays. In addition, the use of established logos or branding, or those confusingly similar, in the promotion of non-alcoholic brands is strictly prohibited. Further, advertisements containing the names or trademarks of alcohol manufacturers, importers or distributors are prohibited. The only exceptions to these strict prohibitions are for print media and live television broadcasts originating abroad and not intended for specific distribution in Thailand.

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NON-COMPETITION CONTRACT ENFORCEMENT

by Noppramart Thammateeradaycho, Sasirusm (Roll) B. Chunhakasikarn
and Tiziana Sucharitkul



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Non-competition clauses are often inserted in employment contracts by employers for many reasons. But perhaps the main reason is to ensure that should the employee leave employment, the employer's trade secrets, confidential customer information, confidential business know-how and other confidential matters with which the employee had contact remain protected and cannot be used by such employee in a manner detrimental to the employer. Some employers also insert non-competition clauses in employment agreements to deter employees from leaving for the competition. Many employers invest a substantial amount of time and money in training staff and do not want to see such investment benefit their competitors to whom employees may seek to migrate.

As we see more and more employers seeking to protect their business interests by inserting non-competition clauses in employment contracts, we must ask how much protection such clauses really offer employers. Furthermore, are such clauses enforceable in Thailand, and if so, to what extent?

Generally speaking, employment agreements between employer and employee are based on the general legal principle of freedom of contract. Both contractual parties are free to bind themselves to any condition as long as the contract is not otherwise prohibited by law. However, in today's labor market, employers have the upper hand and most employees are in the unfortunate position of having to accept employment on the terms of the employer and having to sign employment contracts, as drafted unilaterally by the employer, most of which contain non-competition clauses.

However, to counterbalance employers' positions and to ensure that employees' rights are adequately protected, employees can seek protection under Thailand's Unfair Contract

Terms Act of 1997. Such Act allows the Thai Courts to review terms relating to the restraint of trade in the professional field in eight types of contracts, including employment contracts.

Under Section 5 of the Act, the Court has the authority to review terms of employment contracts and determine whether such terms place unnecessary burden on the employee or unfairly restrict the employee's professional freedom. As such, the Court has the ability to assess whether non-competition clauses are fair and reasonable to the employee.

In evaluating whether a non-competition clause is fair and reasonable to the employee, Section 5, paragraph 2 of the Unfair Contract Terms Act stipulates that the following factors be taken into consideration:

- Geographic area to which the clause limits the employee's future employment.
- Duration of time during which the employee is prohibited from working in a similar field.
- Competence and opportunity of the employee to seek or work in other careers.
- Advantages and disadvantages caused by the non-competition clause to both employer and employee.

Thai case precedent indicates that where the employee is in a position to obtain sensitive information, the non-competition clause is upheld as enforceable. For example, in Supreme Court (Dika) case 1275/2543, a logistics company filed a lawsuit against a former employee, claiming that such employee breached the non-competition clause by accepting employment with another logistics firm only one year after leaving the company.

The non-competition clause prohibited the employee, who was the regional branch manager, from working with any of the employer's competitors in the logistics business or

from holding shares in any such companies in Thailand, Vietnam, Cambodia, Laos and Burma for a period of five years after leaving the employer.

The Court granted judgment in favor of the employer, ruling that the non-competition clause was fair and, therefore, enforceable. The Court reasoned that although the clause prohibited the employee from working in the logistics field, it did not prohibit the employee from working in other fields. As for the geographical limitation placed on the employee, i.e. prohibiting him from working in five countries in the Indochina region, the Court ruled that this was not unfairly restrictive. The Court also opined that the five-year time period during which the employee was prohibited from working with any of the employer's competitors was a time frame mutually agreed by both parties. Furthermore, as the time frame was limited, it did not limit the employee's earning opportunity indefinitely. Consequently, the Court ruled that the clause was not contrary to public order or good morals, and was enforceable. The employee was ordered to pay a fine to the employer.

We can see from such precedent and similar others that non-competition clauses tend to be upheld by Thai Courts where it is viewed that the employee had access to sensitive information, the restrictions imposed have limitations, and the employee is not unduly burdened by the restrictions. However, where such conditions do not exist, it remains unclear how the Courts will rule. ♦

LEGAL ORIENTATION FOR FOREIGN DIRECTORS

by Kobkit Thienpreecha



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Many foreigners hold the high and respected position of director of their respective companies because they know how to manage a company, run a business, make profits, etc. But acting in that capacity, do they know how to comply with Thai law? In other words, do they know and understand what the legal implications of the job are? This article will discuss certain basic legal requirements and responsibilities as well as practice guidelines which beginning directors should be familiar with.

At the stage of business startup, foreign directors should be aware that the minimum number of directors is only one unless stated otherwise by a company's Articles of Association. Except in special cases, there is no

requirement with respect to a director's nationality, and it is permissible for a company to have a sole foreign director.

Legally, foreign directors and Thai directors are not treated differently. The distinction is that foreign directors need a work permit to work in Thailand (and the term "work" is defined quite broadly under the law). Thus, foreign directors residing abroad should apply for a work permit to work in Thailand for more than 15 days. Even if they only intend to attend a meeting or training of less than 15 days, it is recommended that their companies file a 15-day notification with Labor officials to keep on the right side of the law.

While a director's position may

bring money and prestige, it also brings issues of a more serious nature, i.e. power, responsibility, and duty. Power enables directors to manage a company by all lawful means necessary within the scope stipulated in the company's Memorandum of Association, Articles of Association, resolutions of shareholders' meetings, and applicable Thai laws. As long as directors act within such scope, their actions are legally binding on the company and they shall not be held personally liable for such acts if done in good faith and due care.

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ALCOHOL AD BAN (from page 2)

Practical Implications of Statutory Provisions

Retail stores will be allowed to display alcoholic products on their shelves. When the ban takes effect, however, these stores will no longer be allowed to display alcohol at or near the cashier's counter. Instead, products must be stocked on shelves having no greater prominence than any other products. Further, displays of alcohol must not be visible outside the establishment in which alcohol is sold. Consequently, measures must be taken to avoid the alcohol being viewed by the public, such as by installing tinted or frosted windows.

It will be possible, however, to publicly represent alcohol products using color, provided the brand or logo is not displayed. Therefore, uniforms worn by salespersons in colors associated with a particular brand will be allowed, as will bar decorations, but the brand name or logo must not be used. One example of use of color without brand or logo is the Bangkok "Greenspace" beer garden, sponsored by Heineken.

Those business operators seeking to advertise using print or electronic media may do so, but such advertisements may not contain alcohol brand names or logos. In addition, the proposed ban prohibits the use of

alcohol-related words such as liquor, brewery and winery.

It is also clear from the draft ban that any person in violation of the ban may be prosecuted without advance warning and subject to punishment of imprisonment of up to three months and/or a fine of Baht 30,000. It is our expectation, however, that actual enforcement will be less aggressive, particularly in the initial phases of the ban.

Legal Uncertainties

While advertising strategies of alcohol producers are at the forefront of the debate, there has been little effort to adequately explain to other affected business operators how they may safely advertise their alcohol products. For example, it is uncertain whether external advertisements for reduced price drinks will be allowed if they do not refer to specific brands.

The rules are also ambiguous on whether the ban extends to advertisements inside restaurants and bars if they cannot be seen from outside. However, legislative comment points to the intent to prohibit the advertising of products, in all forms, both inside and outside public venues. This means that the prohibition will extend to any and all form of product logos or branding within restaurants, bars and retail establishments.

Although it is uncertain how strict

enforcement of the law will be, particularly with respect to signage or logos within retail establishments, it is expected that restaurants are more likely to face enforcement than bars or entertainment venues, since they are also frequented by the non-drinking public, including children.

It also remains to be seen whether the ban will be interpreted as applying to the signage of an establishment if its name includes a word associated with alcohol, such as "beer," "spirits" or "wine," as this is technically descriptive alcohol advertising.

Conclusion

Although the new law was passed in principle by the Cabinet, it did advise certain amendments. The advised amendments include a grace period allowing business operators time to plan for and adapt to implementation of the law. In addition, there has been significant comment and debate from alcohol producers and lawmakers over implementation of a consistent, industry-wide taxing scheme. Details will become clearer as efforts to modify the bill continue, but we suggest that specific operating and advertising strategies be discussed with legal counsel to prepare for the inevitable restrictions on advertising, whatever form they may take. ❖

FAMILY LAWS FOREIGNERS SHOULD BE FAMILIAR WITH

by Pimvimol (June) Vipamaneerut



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Foreigners (and Thais with foreign spouses) can encounter certain family laws in Thailand that are unique to the Kingdom. Given below are some selected parts of the law that may apply to you.

Marriage

Marriage is legal at age 17, but the Court may, for appropriate reasons, allow the marriage before attaining such age. It is registrable at any of the nation's district offices or at any Thai embassy abroad. Registered under a foreign law, marriage between Thais or between a Thai and a foreigner is considered legal in Thailand under Section 1459 of the Civil and Commercial Code.

Marriage is not registrable if it is

1. with a brother or sister;
2. with any blood relation;
3. by an adopter with any person he/she has adopted;
4. with the spouse of another living person;
5. with or between widowed or divorced persons within 310 days after the termination of the previous marriage, except when
 - a baby is born within the 310-day period;
 - remarrying a former spouse;
 - a certificate is provided by a medical doctor that certifies the female partner is not pregnant; or
 - a court order is granted that permits the marriage.

Property

Property ownership by a couple falls into two categories:

1. Separate property is owned by either the husband or the wife and includes
 - property acquired and gifts received before marriage;
 - items for personal use and tools;
 - property acquired by inheritance or as gifts after marriage; and
 - property given by a man to a woman as evidence of betrothal and security that the marriage will take place, usually the engagement ring.

2. Communal property is owned jointly by husband and wife and includes

- property acquired during marriage (other than by inheritance or as gifts);
- property acquired through a will or as gifts, and specified in writing as communal property; and
- interest, profits and benefits earned or accumulated from separate property.

Where there is any doubt over the category of property ownership, it is presumed to be communal property.

Land Ownership

1. Land Ownership by a Thai National Married to a Foreigner

A Thai national married to a foreigner can purchase land, which will be categorized as separate property of the Thai spouse. When the Thai spouse is purchasing land, the foreign spouse must furnish written confirmation that the land is being purchased with the Thai spouse's own financial resources.

2. Land Ownership by a Foreigner

A foreigner may own a maximum of 1 rai (one-fifth of an acre) of land if the following conditions are met:

- Investment of at least Baht 40 million in Thailand for a minimum period of 3 years.
- The investment must be in a business beneficial to Thailand as listed by the Ministry of Interior.
- The land is in Bangkok, Pattaya or a municipal residential area in any province in accordance with city planning laws.
- The land is used only for residential purposes.
- The Land Department is notified within 60 days from starting use of the land.

Divorce

Thai law permits two divorce modes:

1. By mutual consent, which must be
 - agreed in writing;
 - witnessed by two persons; and

- registered at a district office or a Thai embassy.

2. By court judgment, which

- is granted only if the application is based on one of the ten legal grounds for divorce;
- becomes effective on the date of the court's final judgment; and
- must be registered at a district office or a Thai embassy.

Inheritance and Wills

When a person dies, his/her estate is bequeathed to his/her heirs: (1) statutory heirs (heirs by law), or (2) legatees (heirs by a will).

If there is no will, statutory heirs will inherit in the following order:

- children, parents and spouse of the deceased – equal shares.
- parents and spouse of the deceased – spouse receives half.
- full brothers, full sisters – spouse of the deceased receives half.
- half-brothers, half-sisters – spouse of the deceased receives two-thirds.
- grandfathers, grandmothers – spouse of the deceased receives two-thirds.
- uncles, aunts – spouse of the deceased receives two-thirds.
- none of the above – spouse of the deceased receives all.

If an heir in a higher order exists, heirs in the lower orders have no rights at all.

Wills

The regulations under Thai law governing the making of a will state:

- Any person can make a will, including a minor aged at least 15.
- A will must be made in the form prescribed by law.
- A person making a will can disinherit any/all heirs in the will.
- Probate is not required under Thai law.
- Trusts are not allowed under Thai law.
- Currently, inheritance tax is not levied. ❖

INTELLECTUAL PROPERTY (from page 1)

unfair product tie-ins intended to restrict competition.

It is equally possible for a patent or IP owner to use its exclusive legal rights to effect anti-competitive behavior, behavior which is expressly prohibited by the TCA. For example, a patent owner cannot tie-in sales of its patented product with its other products. It similarly cannot require that its licensees use their products exclusively. In sum, IP ownership is not excluded from the application of the TCA. However, the TCA restrictions are specific and not uniformly applicable.

It is important to note at the outset that the TCA is directed solely at the conduct of Thai entities, excluding from its coverage any misconduct by foreign entities which do not maintain any presence in Thailand. This is in keeping with Thailand's historical interpretation of law to apply only within Thailand (which contrasts with the extraterritorial effect applied to the interpretation of US laws, for example).

Furthermore, there are different types of restricted conduct depending on the applicable TCA section for each kind of circumstance. Thailand's TCA restrictions on unfair trade apply in three distinct circumstances: (1) when two or more companies work together in restricting fair trade; (2) when one market-dominant company acts to limit fair trade; or (3) when a Thai

distributor acts together with a foreign supplier to require Thai purchasers to buy exclusively from the Thai distributor.

Market dominance also has a specific meaning. By ministerial regulation issued January 18, 2007, "market dominance" is defined as either being one operator with 50% or more of market share and total sales in the past year equal to or exceeding THB 1 Billion; or the top three operators having a market share of at least 75% and total sales in the prior year of over THB 1 Billion.

Section 25 of the TCA prescribes that a market-dominant player cannot set or maintain price levels which are "either unsuitable or unfair". It also prohibits a market-dominant player from reducing import of its products without justifiable reason in order to reduce the amount to less than market demand. However, the same express restrictions do not appear in Section 27 as relates to two or more co-conspirators nor to any single operator who is not a market-dominant player.

It can, therefore, be argued that (1) foreign manufacturers without a presence in Thailand, and/or (2) non market-dominant players, are not restricted by the TCA from either (a) setting unfair prices for their products or IP; or (b) limiting/restricting the quantity of such products that are imported to Thailand.

Section 29 of the TCA also offers a general catch-all set of restrictions which applies to all business opera-

tors. This Section which applies to all entities (with a Thai presence) prohibits conduct which limits "the engagement in business of another business operator" by either preventing the other operator from engaging in such business or forcing them to go out of business. However, it is unlikely that the restriction of imports or unfair pricing would be deemed affected by this Section 29 which seeks to address more direct interference with business by unfair competitors.

While the primary purpose of the TCA is to avoid anti-competitive behavior, only certain kinds of behavior are restricted and even these are separately defined according to the kind of party perpetrating same under what circumstances. With respect to IP owners, they too are subject to the TCA. However, this does not mean that in every circumstance they are prohibited from charging whatever price they wish for their IP licenses, nor that they are prohibited in all cases from even refraining to grant such licenses or import such licensed goods.

Each case and each circumstance must be reviewed as against the TCA to determine if the particular conduct is prohibited or not. Some limiting factors include whether the party has a Thai presence, or whether they are a market-dominant player. In sum, there is no blanket application of all TCA restrictions to all IP owners of whatever size, origin or type. ❖

FBA AMENDMENTS (from page 2)

the amendment to the FBA is promulgated, all companies with foreign shareholders having voting control will be regarded as "alien" regardless of their shareholding. Such companies have to notify the Director-General of the Department of Business Development (DBD) (in accordance with the rules and procedures to be prescribed by the DBD) within one year after the effective date of the law. After the notification to the DBD, such companies have to comply with the following conditions depending on their business:

1. Companies engaging in List 3 businesses, e.g., construction, services, retail, wholesale, broker and agent,

and hotel: After the notification, these companies will be allowed to continue their business operation until they are dissolved.

2. Companies engaging in List 1 and 2 businesses, e.g., domestic air transport, mining, newspaper, and television: After the notification, these companies will be allowed to continue their business for three years after the promulgation of the law.

3. Companies that fail to notify the DBD within one year and continue their business operations will be subject to imprisonment or fines, or both, as fixed in the FBA. The FBA amendment carries higher fines than the current FBA.

The above conditions are applicable to companies that are not

regarded as "alien" under the current definition of the FBA but will be regarded as "alien" after the enactment of the new amendment.

It should be noted that the FBA and the new amendment are applicable only to companies engaged in businesses reserved for Thais under the FBA and/or other local laws. Foreigners or companies that are defined as "alien" under the FBA but engaged in businesses which are not reserved under the FBA, such as most manufacturing and all export activities, or companies granted approval by the Board of Investment to conduct reserved businesses, are not subject to the FBA or the proposed amendment to the FBA. ❖

LABOR DISPUTES (from page 1)

employees or unions submit demands to employers, the latter should respond by submitting counter-demands in order to achieve a better bargaining position.

The employer, after receiving the demands, shall provide the names of its representatives to the employees. Both parties begin negotiations within 3 days from the date of receiving the demands. If both parties are able to reach a settlement, they enter into a written agreement signed by their representatives. Within 3 days from the signing, the employer shall display such agreement in an open area in the work place for at least 30 days. The employer must also register the agreement with the Ministry of Labor within 15 days from the date of signing.

If no negotiation takes place within the prescribed period or both parties fail to reach an agreement after the negotiation, it is deemed that a labor dispute has arisen. The party submitting the demand has to inform the labor dispute mediation officer in writing within 24 hours after the lapse of the 3-day period or from the time the negotiation failed, as the case may be. The officer shall attempt a settlement between the parties within 5 days. If a settlement is reached, the employer shall proceed as described in the

previous paragraph. If not, both parties may appoint a labor dispute arbitrator, or the employer can order closure of work without paying wages to the employees, or the employees can go on strike. Prior to taking action, however, both parties have to give at least 24 hours' notice to the labor dispute mediation officer and to the other party.

Should the Ministry of Labor and Social Welfare be of the opinion that the closure of work or strike will adversely affect the economy or cause public hardship or endanger national security or constitute a threat to peace and order, the minister shall have the authority to do as follows:

1. Order the employer to cease closure of work and pay wages.
2. Order the employees to stop the strike and return to work.
3. Arrange substitute workers in place of those employees not working because of closure of work or strike.
4. Order the Labor Relations Committee to arrange for dispute arbitration.

It must be noted that after the employees submit their demands, the employer cannot terminate employment or take any action which may result in the employees, representatives of employees, committee members of the labor union or labor federation being unable to continue working by

reason of the employees or labor union calling a rally, lodging a demand, etc. Violation by the employer shall result in punishment by imprisonment for a term not exceeding 6 months or a fine not exceeding Baht 10,000, or both. Furthermore, the employer may also have to pay compensation to the employees.

Some employers have had the unfortunate experience of making this mistake and paying dearly for it. In the case of one company, the recipient of a recent demand from a union, it fired one employee for violating company regulations during the same period without enough evidence. The employee filed a lawsuit against the employer in Labor Court, which found the employer guilty and ordered it to reinstate the employee and pay compensation. It is possible that the employer could have been prosecuted in a criminal case under charges of unfair treatment and would have had to pay substantial lawyer fees and waste time in court. Not only would the case have destroyed the image of the employer, but it would also have caused subsequent problems in managing the employees.

Labor disputes are a very sensitive issue and if the employer doesn't deal with them carefully, he may have to spend some time in jail instead of his house. ❖

LEGAL ORIENTATION (from page 4)

Directors are appointed by shareholders to manage the company for them and in their best interests. Consequently, directors bear responsibility towards the shareholders, a principle known as fiduciary duty. Directors shall exercise the judgment of careful business persons, a concept which was expanded on by the Thai Supreme Court in a past ruling that such judgment should be comparable to that of business persons in the same industry or business. In addition to loyalty to their companies, directors shall not participate in competing businesses or put themselves in situations of conflict of interest without full disclosure to the shareholders.

Thai corporate law sets forth certain joint statutory duties for all directors such as ensuring that payment for shares is actually made by the shareholders. In this respect, directors shall not allow the offsetting of share payment against any debts of the company to shareholders. Other joint tasks of directors include the maintenance of books and accounts,

lawful payment of dividends, and enforcement of shareholders' resolutions.

Of utmost concern to Thai and foreign directors alike is limited personal liability. The guiding principle is to act faithfully with due care and within the scope of their powers in order to avoid personal liability brought against them by injured persons. However, negligence, omissions, mismanagement, and self-dealing could lead to derivative suit brought by the shareholders on behalf of the company. Directors could avoid such liability if they seek prior approval or post-action ratification from the shareholders. Resigning from the Board will not bring immunity since directors are still liable for wrongdoing 2 years after the offense. Directors' and officers' liability insurance is becoming an increasingly popular means of protection.

Criminal liability is another issue that is of paramount concern to directors as it can be initiated by injured persons such as employees, shareholders, and the public prosecutor, and may involve statutes such as

the Revenue Code and labor law. Even commendable and effective management actions could trigger a violation of the criminal provisions of a statute without intention. Fortunately, some statutes provide directors a safety clause whereby they can raise the defense that they had nothing to do with the wrongful act or tried their best to prevent the same. Still, directors should watch out for other statutes that provide no such clause.

Finally, foreign directors should be aware of binding signatory power which may sound unfamiliar. Only directors registered as binding signatories with the Ministry of Commerce can sign documents on behalf of a company. Such signatory power is often checked by third parties, e.g., banks and authorities, before dealing with the company. It is common practice to affix the company seal along with a director's signature. Non-director personnel may be delegated such powers through a Power of Attorney.

In summary, it would be wise for foreign directors to familiarize themselves with the above lessons to avoid committing costly mistakes. ❖

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John Fotiadis (Consultant, Commercial Department) obtained a B.A. in political science from Columbia University and a J.D. from Stanford Law School. He is admitted to the New York State Bar (1989) and Washington, D.C. Bar (1993). He joined Tilleke & Gibbins in 2002 as a consultant on anti-dumping and trade, energy, commercial matters, bankruptcy, and franchising.

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