



# Thailand: *Legal Developments*

## PUBLIC LIMITED COMPANY ACT: A COMPARISON OF THE OLD AND NEW ACTS

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The Public Limited Company Act (No. 2) 2001 (hereinafter called "PLCA 2001"), which amended the Public Limited Company Act 1992 (hereinafter called "PLCA 1992") was announced in the *Government Gazette* on July 3, 2001 and became effective the next day. The PLCA 2001 amended six sections of the PLCA 1992.

The amendment was proposed by an assigned working group consisting of representatives from relevant government agencies and the private sector. These included the Ministry of Commerce, the Bank of Thailand, the Securities and Exchange Commission, the Stock Exchange of Thailand, the Association of Securities Companies, and the Federation of Thai Industries, among others. The main objectives of the amendment are: (1) to resolve problems connected with accumulated losses currently borne by a number of public companies as a consequence of the economic crisis, (2) to facilitate debt restructuring, and (3) to restore investors' confidence in the Thai capital market.

The Ministry of Commerce will shortly issue Ministerial Regulations under two of the amended sections. As of this writing, details of the forthcoming Ministerial Regulations are not yet available.

Following is a comparison of the PLCA 1992 and the PLCA 2001 in six areas, as well as a brief discussion of the objectives followed by our comments.

### 1. Cancellation of Minimum Par Value

PLCA 1992	<i>"Section 50. Each share of a company shall be equal in value and each shall have a par value of not less than five baht."</i>
PLCA 2001	<i>"Section 50. Each share of a company shall be equal in value."</i>

Section 50 was amended to cancel the minimum par value requirement, which has been deemed to be an obstacle in resolving the problem of accumulated losses. The amendment is also intended to facilitate trading of securities, especially listed stocks, in the stock exchange.

Without the minimum par value requirement, a company can now reduce its registered capital to compensate for accumulated losses by means of lowering the value of its shares to less than existing par value. It should be noted that a public company is still required to have a par value for its shares. Therefore, it can lower its par value to the desired minimum, as long as it is above zero and each share has equal par value.

In addition, as a by-product of this amendment, it is expected that existing listed companies, particularly those with high share market prices, will take the opportunity to lower the par value of their shares by means of "stock splitting". This will consequently lower the market price of their shares, making them more affordable to small investors.

### 2. Debt-to-Equity Conversion with Set Off Rule

PLCA 1992	<i>"Section 54, Paragraph 2. In making payment for shares, a subscriber or purchaser shall not offset any debts with the company."</i>
PLCA 2001	The following shall be added as Section 54/1 of the Public Limited Company Act 1992: <i>"Section 54/1. The provision of Section 54 paragraph 2 shall not apply in the case of debt restructuring by a company wherein new shares are to be issued to its creditors as repayment of its debts in accordance with a debt-to-equity conversion scheme approved in a shareholders' meeting by not less than three-fourths of the total votes of shareholders attending and entitled to vote.</i> <i>The issuance of new shares for repayment of debts and the debt-to-equity conversion scheme in accordance with paragraph 1 shall follow the rules and procedures prescribed in the Ministerial Regulation."</i>

Section 54/1 was added to facilitate debt restructuring. The “set off” rule in this section has been a major hindrance in the debt restructuring process outside the Bankruptcy Act (see note below), particularly when creditors are willing to let a debtor company convert its debts into capital by issuing new shares to them as repayment. The set off rule prohibits both parties from setting off payment of shares against debt repayment. Even though in practice this rule has been circumvented by means of exchanging and/or endorsing checks or other instruments between the parties, the legitimacy of the transaction has been questioned.

A company and its creditors are allowed to set off their debts only under the following conditions:

- The debt-to-equity conversion scheme must be for debt restructuring purposes only and approved in a shareholders’ meeting by a vote of not less than three-fourths of the total votes of shareholders attending and entitled to vote.

- The company must comply with the rules and procedures prescribed in the relevant Ministerial Regulation which will soon be issued to ensure adequate disclosure of information and to prevent fraudulent debt-to-equity conversion.

(Note: The Bankruptcy Act contains a provision not to adopt Section 54 paragraph 2 of the PLCA 1992.)

### 3. Repurchase of Shares (“Treasury Stock”)

PLCA 1992	<b>“Section 66.</b> <i>A company shall not own its shares or take them in pledge.”</i>
PLCA 2001	<p>The following shall be added as Section 66/1 of the Public Limited Company Act 1992:</p> <p><b>“Section 66/1.</b> <i>The provision of Section 66 regarding a company not owning its shares shall not apply in the following circumstances:</i></p> <p>(a) <i>a company may repurchase its own shares from dissenting shareholders who have voted against a shareholders’ resolution at a shareholders’ meeting approving an amendment to its articles of association in respect of voting rights and the right to receive dividends which, in their opinion, is unfair; or</i></p> <p>(b) <i>a company may repurchase its own shares for financial management purposes when the company has accumulated profits and excessive liquidity, provided that the share repurchase will not cause financial trouble to the company.</i></p> <p><i>In this respect, shares held by the company shall not be counted to form a quorum for a shareholders’ meeting and shall not have voting rights as well as the right to receive dividends.</i></p> <p><i>The company shall dispose of the repurchased shares in paragraph 1 within the time prescribed in the Ministerial Regulation. If the company fails to do so or is unable to complete the disposal within the prescribed time, the company shall reduce its paid-up capital by writing off such unsold shares.</i></p> <p><i>The share repurchase in paragraph 1 and the disposal of repurchased shares and writing off of shares in paragraph 3 shall follow the rules and procedures prescribed in the Ministerial Regulation.”</i></p>

The amendment is aimed at providing a remedy for shareholders who believe they have been treated unfairly. The new provision will also give a company an option to manage its liquidity for corporate finance purposes.

This is considered a significant change. The old provision prohibited a public company from owning its shares or what is called “treasury stock”. Section 66/1 of PLCA 2001 allows a public company to repurchase its shares for two purposes. However, Section 66/1 (a) is deemed impractical because the situation described rarely happens. The reason is that a company whose shares consist entirely of ordinary shares can not provide for different voting rights and right to receive dividends in its Articles of Association, while for a company with both ordinary and preference shares, Section 65 of PLCA 1992 prohibits any change to preferential rights accruing to preference shares already issued.

A more likely situation is described in Section 66/1 (b), which a company may resort to if it deems that its shares are underpriced and if it is carrying a small amount of debt and thus excessively liquid. By repurchasing some of its shares, shareholders’ equity and the book value of shares can be enhanced. In addition, since the new provision requires that repurchased shares carry no right to receive dividends, the existing shareholders will indirectly benefit from the repurchase through increased earnings per share (EPS).

Notes:

- Treasury stocks shall not count to form a quorum, nor shall they carry voting rights or the right to receive dividends to prevent management from abusing this provision in order to control majority vote.

- Under accounting rules, treasury stocks are not regarded as assets but a reduction in equity, and purchase and resale of treasury stocks do not affect profit/loss.

- The new provision only gives a company an option to repurchase its shares. It is not a requirement.

- The repurchased shares can be used to support an Employee Stock Option Plan (ESOP).

- The new provision does not require a resolution of the shareholders, therefore, share repurchase can be done merely with the approval of the Board of Directors (unless required otherwise by the relevant Ministerial Regulation).

Measures expected to be issued under the Ministerial Regulation:

- Holding period of treasury stocks is not more than 3 years.

- A company determines the price of shares to be repurchased.

- A listed company can repurchase up to 10 percent of its total issued shares through the main board of the Stock Exchange of Thailand.

#### 4. Voting Rights of Preference Shares

PLCA 1992	Under Section 102, in shareholders' meetings, shareholders shall have votes equal to the number of shares held by each of them. One share, whether ordinary or preference, is entitled to one vote. This implies that a public company was not allowed to issue preference shares with different voting rights from ordinary shares.
PLCA 2001	The following shall be added as paragraph 2 of Section 102 of the Public Limited Company Act 1992: <i>"Voting as referred to in paragraph 1, which provides that one share is entitled to one vote, will not be applicable in the case where a company issues preference shares with a voting right less than that of ordinary shares."</i>

This means that public companies can now issue preference shares with a voting right *less than* that of ordinary shares (for example, one vote for one ordinary share; one vote for ten preference shares). However, it should be noted that owing to official interpretation of the new provision, public companies are still prohibited from issuing preference

shares, either with no voting right or with a voting right higher than that of ordinary shares.

As Section 65 of the PLCA 1992 prohibits change in any right accruing to preference shares already issued, this new provision will be applicable only to preference shares issued after the effective date of PLCA 2001.

#### 5. Premium and Legal Reserves to Compensate for Accumulated Losses

PLCA 1992	<i>"Section 119. Where approval of a shareholders' meeting has been granted, a company may transfer other reserves which are not from the reserve fund referred to in Section 51 (i.e., payment for shares issued in excess of the registered par value—Premium Reserve Fund) or Section 116 (i.e., Legal Reserve Fund) to compensate for the accumulated losses of the company."</i>
PLCA 2001	The provision of Section 119 shall be repealed and replaced by the following; <i>"Section 119. Where approval of a shareholders' meeting has been granted, a company may transfer reserve funds referred to in Section 51 or Section 116 or other reserve funds to compensate for the accumulated losses of the company.</i>  <i>Compensation for accumulated losses in paragraph 1 will be deducted from other reserve funds first. After that, it will be deducted from reserve funds referred to in Section 116 and Section 51, respectively."</i>

The amendment is intended to help many public companies suffering from huge amounts of accumulated losses. The old provision prohibited them from using their statutory reserve funds, in particular the premium reserve fund, which could have been used to compensate for their accumulated losses and enable them to adjust the shareholders' equity to reflect its true value. The only way they could delete such accumulated losses was through the reduction of registered capital—a very time-consuming procedure, particularly the two-month waiting period for creditor objections.

The new provision has repealed such prohibition in order to help distressed public companies in resolving their financial problems. A public company is now allowed to use

its statutory reserve funds to compensate for its accumulated losses. However, the company must compensate for accumulated losses strictly in the following order:

1. Other Reserve Funds
2. Legal Reserve Fund
3. Premium Reserve Fund

Unless one fund is exhausted, the company cannot use the next one. After all of the above items have been exhausted and there still remains some accumulated loss, then the company can delete such loss only through reduction of registered capital.

#### 6. Reduction of Capital to Less than One-Fourth of the Total Capital

PLCA 1992	<i>"Section 139. A company may reduce the amount of its registered capital by either lowering the par value of each share or by reducing the number of shares. However, the capital of the company shall not be reduced to less than one-fourth of its total capital.</i>  <i>The reduction of the par value or number of shares under the first paragraph to any amount and by any method shall be made upon a resolution passed at a shareholders' meeting by a vote of not less than three-fourths of the total votes of shareholders attending and entitled to vote. The company shall register such resolution within fourteen days after the meeting."</i>
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PLCA 2001	<p>The provision of Section 139 shall be repealed and replaced by the following:</p> <p><i>“Section 139. A company may reduce the amount of its registered capital by either lowering the par value of each share or by reducing the number of shares. However, the capital of the company shall not be reduced to less than one-fourth of its total capital.</i></p> <p><i>In case a company has accumulated losses and it has already compensated for them according to Section 119 but there still remains a balance in the accumulated losses, the company may reduce its capital to less than one-fourth of its total capital.</i></p> <p><i>The reduction of the par value or number of shares under the first and second paragraphs to any amount and by any method shall be made upon a resolution passed at a shareholders’ meeting by a vote of not less than three-fourths of the total votes of shareholders attending and entitled to vote. The company shall register such resolution within fourteen days after the meeting.”</i></p>
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The purpose of amending Section 139 is the same as that of the preceding provision. Usually, if a public company wants to reduce its share capital to less than one-fourth of its total capital, the reduction can only be accomplished by reducing the registered capital twice. As previously mentioned, such process could be very time consuming. In view of the urgency under the current situation, it was deemed necessary to remove the restriction on reduction of share capital in the previous provision.

The new provision allows a public company suffering from losses to reduce its registered capital to less than one-fourth of the total capital only if the company has already exhausted all its reserve funds stated in Section 119 without wiping out all its losses. However, the procedures and requirements for reducing registered capital remain the same, i.e., a resolution of the shareholders with a vote of not less than three-fourths of the total shareholders attending and entitled to vote and a two-month waiting period for creditor objections.

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