



# Thailand: *Legal Developments*

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## LIVING WILL: A PATIENT'S RIGHT TO REFUSE MEDICAL TREATMENT AT TERMINAL STAGE OF LIFE

by Santhapat Periera



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Imagine yourself standing silently with your relatives in a hospital's intensive care unit, staring at the still figure of a loved one lying helplessly in bed. At that moment, your greatest wish is for that loved one to be able to speak even for the last time to let you, his doctor and everyone there know whether he would like to have his life support system and medical treatment continued, withheld or withdrawn.

Now, such an indication, or a "living will", is recognized and can be made for the first time under Thai law. Section 12, paragraph 1 of the National Health Act 2007, which became effective on March 20, 2007, provides that "a person shall have

the right to make a living will in writing to refuse public health service that is supplied merely to prolong his/her terminal stage of life or to cease the severe suffering from illnesses." The Act further defines "public health service" as "any service relating to health promotion, prevention and control of diseases and health hazards, diagnosis and treatment of illness and rehabilitation of person, family and community."

Correspondingly, paragraph 3 of Section 12 provides protection to public health professional practitioners who comply with any such living will, as it is provided that any act done by them in compliance with

the living will shall not be held an offense and they shall not be liable to any responsibility whatsoever.

The right to make an advance written living will as prescribed under Section 12 essentially represents the patient's right to refuse medical treatment at the terminal stage of his life. If a patient so wishes, he can now make a living will in advance in writing declaring his refusal of public health services or medical treatment that are administered merely to prolong his life or to stop his severe suffering from illness, so that he may die a natural death without causing

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## TEMPORARY CESSATION OF OPERATIONS

by Chusert Supasitthumrong and Tiziana Sucharitikul



Left: Chusert Supasitthumrong, Litigator  
Right: Tiziana Sucharitikul, Co-Managing Partner & Director  
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Most employers facing a financial crisis will seek to apply measures to help their businesses, including taking steps to reduce the cost of production, negotiating with banks for extension of debt repayment periods, and downsizing their operations. In the case of downsizing, many employers mistakenly think that by laying off employees, they will save money. In actuality, the employer may end up expending more money to lay off employees than to retain them during the temporary crisis period. This is

because under the Labor Protection Act ("LPA"), the employer is obliged to pay severance pay proportional to each employee's period of employment, and that amount can range from wages of 30 days to 300 days, not to mention payment of other remunerations. Additionally, during the financial crisis, the employer may have great difficulty getting the large sum of money required to lay off employees in accordance with the LPA. In such situations, the layoffs will benefit neither the employer nor

the employee. However, the LPA does provide an alternative option which may help both parties: the temporary cessation of operations.

Under Section 75 of the LPA, if an employer needs to temporarily cease operations wholly or partially for any reason other than *force majeure*, the employer is obliged to pay the affected employees 50% of

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# PRIMER FOR FOREIGN INVESTORS

by Piyanuj (Lui) Ratprasatporn



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Foreigners in Thailand derive their legal rights primarily from the domestic laws of Thailand. There are certain rights that are reserved only for Thai citizens, but this is not unusual as all countries have their own restrictions on the rights of foreigners. The rights of foreigners in Thailand are restricted to a certain extent by such statutes as the Nationality Act, Immigration Act, Foreign Business Act, Land Code, and Alien Employment Act. Restrictions on foreign ownership in special industries such as commercial banking, insurance, commercial fishing, aviation business, commercial transportation, and tourism can be found under various statutes.

## Foreign Business Act

The Foreign Business Act of 1999 ("the Act") provides a definition of "alien" and identifies the scope of foreign participation in business in Thailand.

"Alien" is defined as:

- a natural person who is not of Thai nationality.
- a juristic entity that is not registered in Thailand.
- a juristic entity incorporated in Thailand with foreign ownership accounting for one-half or more of the total number of shares and/or registered capital.
- a limited partnership or ordinary registered partnership whose managing partner or manager is a foreigner.

Please note that the definition of "alien" is being amended to include companies in which foreigners have the majority vote or management control regardless of their share ownership in the companies.

## Businesses Subject to Restrictions

Business activities that fall under Lists 1, 2, or 3 of the Act are subject to the limitations imposed by the Act. Activities that fall under List 1 are strictly prohibited to aliens for special reasons. Businesses under List 2 which relate to national safety or security, involve art and culture, or affect natural resources or environment are

prohibited to aliens unless permission is granted by the Cabinet. Businesses under List 3 in which Thai nationals are not yet ready to compete with foreigners are prohibited to aliens unless permission is granted by the Director-General of the Department of Business Development ("DBD").

Based on the above definition, if a majority of the shares of a limited company are held by Thais, it is regarded as a Thai company and thus not subject to the Act. This means that aliens are generally allowed to participate up to 49.99% in a company engaged in restricted businesses. Beyond that, the approval requirement must be complied with.

The minimum capital requirement for foreign majority-owned companies is Baht 2 million in general, and Baht 3 million for companies granted an alien business license to engage in List 2 or List 3 business activities.

## License Application

Foreigners wishing to engage in List 2 or List 3 businesses need to obtain an "alien business license" from the relevant authority before commencement of business operations. An application should be filed with the DBD, which will be reviewed by the Cabinet or Foreign Business Committee, as the case may be. Various criteria are used to assess the impact of the proposed business operation such as the advantages and disadvantages to the nation's safety and security, economic and social development, size of enterprise, and local employment. Approval of a business license application is more likely if it provides significantly more benefits than disadvantages and protects and promotes Thai interests.

## Exemptions

*Treaty of Amity and Economic Relations between the United States and Thailand.* Under this Treaty, Americans enjoy the privilege of being exempted from the foreign ownership restriction under the Act. An American-owned Thai company (i.e. majority of the shares are

owned by Americans) or a branch office of an American company is permitted to do almost anything a Thai company does except:

- own land;
- engage in business of inland communications;
- engage in business of inland transportation;
- engage in fiduciary functions;
- engage in banking involving depositary functions;
- exploit land or other natural resources; and
- engage in domestic trade in indigenous agricultural products.

To form a company under the Treaty, American shareholders must prove their American nationality. It must also demonstrate to the DBD that American shareholders have majority ownership in terms of number of shares as well as number of shareholders. Furthermore, management of such company must be controlled by either American and/or Thai directors.

*Thai-Australian Free Trade Agreement ("FTA").* Under the Thai-Australian FTA, Australians enjoy the privilege of being exempted from the foreign ownership restriction for 12 businesses reserved under the Act. Maximum ownership, however, is fixed for certain businesses. There are also other requirements such as debt-to-equity ratio, minimum number of Thai directors and minimum capital requirement.

*Protection under Various Laws.* A foreigner can engage in List 2 or List 3 businesses if granted permission under the Investment Promotion Act, the Industrial Estate Authority of Thailand Act, Petroleum Act, or other laws. Similar to the case of Treaty protection, the Act requires such a foreigner to notify the Director-General of the DBD within 30 days after such permission is granted and to obtain a certificate before starting business operations. ♦

## AMLA: A TOOL TO COMBAT TERRORISM

by C. Addy Punsan, Tiziana Sucharitkul and Thawat Damsa-ard



Top Left: C. Addy Punsan, Paralegal  
Top Right: Tiziana Sucharitkul, Director  
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The fight against terrorism has become top priority for most nations. An important part of the anti-terrorism arsenal is the availability and implementation of comprehensive anti-money laundering laws. Thailand, which itself is facing terrorist attacks in the south, is keenly aware of the link between terrorism and money laundering. Not only has the country already put measures in place to ensure that it is not used as a conduit to finance national and international terrorist activities, but it also continues to combat terrorism through its continuous review of anti-money laundering legislation: it is expected that before the next general election, there will be at least two amendments to the Anti-Money Laundering Act B.E. 2542 (1999) (the "AMLA" or the "Act").

Money laundering is the "cleaning" of funds yielded from illegal businesses. As it is difficult for criminals to use "dirty money" without being caught, they find ways to launder the money to make it appear legal for use and reinvestment. Common laundering techniques include using the money to buy a car or a piece of jewelry or transferring the money to another person. More complicated means may involve complex commercial transaction methods to conceal the actual source of the funds or assets.

In Thailand, only certain money laundering activities are subject to prosecution under the AMLA. Unlike under the US anti-money laundering laws where there are approximately 130 predicate offenses, the current AMLA only stipulates eight offenses for which one can be prosecuted for money laundering: narcotics-related charges, sexual offenses under the Penal Code and the Prostitution Prevention Act, public fraud offenses, fraud and embezzlement within financial institutions, abuse of power in civil or judicial service, extortion or blackmail, customs evasion, and terrorism. Unquestion-

ably, these eight predicate offenses fail to provide the Anti-Money Laundering Office ("AMLO") sufficient authority to investigate, enforce regulations, and confiscate proceeds and assets obtained from more complex money laundering methods. This lack of power, coupled with the rise of global and national terrorism, has prompted the government to broaden the scope of the AMLA.

The first expected amendment to the AMLA, currently pending the National Legislation Assembly's approval, would add additional prosecutable offenses to the AMLA. Under such amendment, AMLO would have the authority to prosecute money laundering offenses for matters related to the abuse of natural resources, illicit foreign exchange, unlawful stock purchases, illegal gambling, illicit arms trafficking, collusion on bids for state agency projects, labor fraud (human trafficking), and charges relating to excise tax, cigarettes and alcoholic beverages. It should be noted, however, that notwithstanding the prolific amount of counterfeit product cases in Thailand, the Council of State advised that intellectual property infringement should not be included as one of the predicate offenses as it is a compoundable offense between private parties. The inclusion of this offense may nonetheless be reconsidered in the future.

Whereas the first amendment to the AMLA aims to introduce additional prosecutable offenses to the AMLA, the second amendment is expected to focus on money laundering monitoring measures. Currently, the Act simply requires financial institutions to keep customer identification records and to report to the AMLO on transactions which (1) involve more than Baht 2 million in cash, (2) relate to property valued in excess of Baht 5 million, or (3) are otherwise suspicious. The Act also obligates land offices across the country to file

reports to AMLO in relation to transactions meeting the above criteria. In addition, the Act requires consulting businesses or operations related to investment or removal of capital to file a report with AMLO when there is reason to believe that a transaction is suspicious.

It is clear from the above that there is a lack of policies in place relating to customer identification and due diligence--policies which would apply to all financial institutions and other businesses in order to effectively detect, deter and prevent money laundering and the financing of terrorism. Hence, the second amendment. While the second amendment is still in its nascent stages, a policy statement has been issued suggesting that the amendment would bring Thailand more in line with international standards related to anti-money laundering and the countering of the financing of terrorism. The policy statement requests that financial institutions and designated non-financial businesses and professions including jewelry traders and professions related to precious stones and metals, vehicle hire-purchase businesses, certain personal loan businesses under the supervision of the Bank of Thailand, and electronic cash card businesses under the supervision of the Bank of Thailand, comply with the "Know Your Customer" and "Customer Due Diligence" ("KYC/CDD") policies.

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## NEW MINISTRY OF INTERIOR POLICY TO PREVENT PURCHASE OF LAND FOR THE BENEFIT OF FOREIGNERS



by Dussadee Rattanopas

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Thailand, with its rich culture and beautiful sites, presents a very attractive destination to foreigners from many countries—for visit, travel, or even retirement purposes. Some of these foreigners wish to own property in Thailand, either as an investment or as personal residence. Thai laws are quite explicit concerning foreign ownership of property, stating that a foreign individual, foreign entity or a Thai company with more than 49% of its shares held by foreigners cannot own land in Thailand, except for particular investment purposes under certain laws such as the Investment Promotion Act, Industrial Estate Authority of Thailand Act, and property fund regulations. These exceptions providing benefits to foreign direct investment in Thailand were intended mainly to promote the country's economy. To enjoy the benefits of these exceptions, foreign investors must meet multiple requirements set out by the relevant legislation and undergo strict scrutiny from authorities.

Foreigners wishing to own land in Thailand have attempted to circumvent Thai laws through a legal arrangement establishing a Thai entity where they own part of the shares and induce Thai nationals to act as nominees holding 51% or more of the company's shares without true control. On May 15, 2006, the Ministry of Interior issued a policy addressed to all provincial

governors regarding the avoidance of law in the acquisition of land by an entity with foreign shareholders. The policy seeks to prevent the purchase of land for the benefit of a foreigner in accordance with Section 74, paragraph 2, of the Land Code and directs competent officials to be more vigilant in the purchase of land by an entity with a foreign shareholder or director, or where reasonable grounds exist to believe that a Thai is a nominee shareholder on behalf of a foreigner. The policy requires the competent official to carefully scrutinize the supporting evidence submitted for consideration, with particular attention to the occupation, duration of work and monthly income of the Thai shareholder. If, after the investigation, it is the opinion of the competent official that the registration of transfer represents an avoidance of law or that a Thai is trying to purchase land for the benefit of a foreigner, he should conduct further investigation and submit the case to the central Land Department for a ministerial directive. As each competent official has discretion in the implementation of the policy, the method of investigation by land offices could vary from province to province.

In a further proactive step, the Ministry made clear its concern that some companies avoid the Land Code by accepting a land transfer when foreign shareholders do not

hold more than 49% of a company's shares, but foreign shareholders then acquire more shares in the company or increase their capital in the company after the transfer. This results in foreign shareholders holding more than 49% of the company, making the company a foreign entity under the Land Code subject to the requirement to sell the land within one year or a period specified by the Director-General. Land offices have, from time to time, conducted investigations by cross-checking companies holding land in their jurisdiction with the relevant authorities of the Ministry of Commerce to verify the shareholding structure of each company. If the search shows that the shareholding of foreigners amount to more than 49%, the authority will force that company to sell the acquired land.

The property sector in Thailand, especially projects targeting foreign customers, has been somehow affected by this policy. At the very least, the transfer of land to a company with foreign shareholders is not as simple or certain as before. Nonetheless, at its core, this policy presents nothing new. This policy merely reasserts, adjusts and attempts to put current practice in line with the already existing law relating to the transfer of property to companies with foreign shareholders. ♦

### AMLA (from page 3)

The KYC/CDD policies are not new to financial institutions. The KYC policy relates to the collection of customer identification information in accordance with the customer's risk level, while the CDD policy requires institutions to implement a system whereby there is gathering of enhanced information and verification of the

customer's background. Although implementation of these two policies is essential, it will cost money, take time and entail hard work and additional resources. It also means that education must be provided and awareness must be raised to ensure effective implementation of the KYC/CDD policies. This naturally will impact the designated non-financial businesses more severely than it will the larger

financial institutions. Nevertheless it must be done in order to ensure the future well-being of the world and its inhabitants.

Together with other parts of the world, Thailand is actively engaging in the war against money laundering and terrorism. Successful passage of the two AMLA amendments will bring Thailand a step closer to succeeding in that fight. ♦

## THREE TRUTHS AND INTERNATIONAL ARBITRATION

by James Norton



*James Norton, Of Counsel  
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The **first truth** is that most clients don't like litigators. It is not that they don't like the lawyer; rather they do not like litigation because it is most times unanticipated, almost always unwanted, expensive and generally a negative experience. Even if the lawyer wins the case, it is something they "do not want to go through again". This is why clients usually do not want to address and, unless lawyers coerce them, do not pay attention to, a mechanism to cost effectively resolve a potential future dispute when they are entering into a commercial agreement.

For that reason, it is incumbent on lawyers to take a client through dispute resolution options at the time the commercial deal is done and to include, if appropriate, a sound and cost effective mechanism to resolve a dispute.

The **second truth** is that commercial clients like certainty

and as much control as possible. It is possible to give them more control over how a dispute is to be resolved and to give them a degree of certainty by including clauses in their commercial agreement that provide for arbitration. There are several reasons for this.

First, because arbitration is flexible, it can be tailored to the particular needs of the parties. They can pick where the proceedings are held, what law governs the proceedings and what rules will be used to conduct the proceedings. They can use an Institution to administer the arbitration or arrange for an ad hoc arbitration (privately organized). They can agree to use, for example, UNCITRAL rules to protect themselves against a recalcitrant party and to ensure that the arbitration process will be fair and will be completed. The arbitrator can control the timing of the process to accommodate the needs of the

parties but at the same time to render an award in as reasonable a short time as possible.

Second, by choosing the "seat" of the arbitration and specifying what rules are to be used, there is certainty compared to the uncertainty of attending before the courts of an unfamiliar country.

Third, they can select an arbitrator or a panel that has expertise in the area of the dispute. This eliminates much time otherwise spent "educating" a judge who may have little or no familiarity with the particular industry, the trade practice, the terminology or the science involved, to give a few examples. There is more certainty that such an arbitrator will understand the issues and likely in less time.

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## CORPORATE GOVERNANCE UNDER THE PROPOSED AMENDMENTS TO THE SECURITIES AND EXCHANGE ACT OF 1992

by Chaiwat Keratisuthisathorn



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"Corporate governance", as defined by the Stock Exchange of Thailand ("SET"), is a system of processes by which a company is directed or controlled with the objective of protecting the rights and interests of its shareholders and other stakeholders. It includes the relationships between a company's board of directors, executive and management teams, and shareholders.

There is no law in Thailand, even the Securities and Exchange Act 1992 ("the SEC Act"), that specifically mandates the implementation of corporate governance in companies.

For listed companies, the SET only provides guidelines for cooperation ("Code of Best Practices for Directors of Listed Companies") for voluntary compliance by those companies without government enforcement.

In order to improve the operating standards of listed companies in Thailand and enhance their reliability and fairness to investors so that they are more in line with international practice, the government authorities, along with the SET and Ministry of Finance, have proposed amendments to the SEC Act. One of these amendments introduces the

concept of corporate governance in a new chapter (Chapter 3/1) consisting of thirty sections (Sections 89/1 to 89/30), and seven sections with penalty clauses for non-compliance (Sections 289/1 to 289/7).

### Duties and Responsibilities of Directors and Executives

Directors and executives are charged with the following responsibilities.

1. To operate the company with responsibility, care, good faith, and

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### THREE TRUTHS (from page 5)

An arbitrator is not just a person that holds himself out as such. There are rosters of arbitrators who are members of arbitration institutions. There are "Chartered Arbitrators" which are those individuals recognized worldwide that are accredited as such by the Chartered Institute of Arbitrators in London, England. They are certified to conduct international arbitration anywhere in the world.

Arbitration is also confidential and for those who do not want to make public the dispute, arbitration is ideal when compared to public courts systems.

The **third truth** is that clients want to maximize their profits and, therefore, be cost-effective. Although not always the case, arbitration can be less costly. At least the parties can attempt to control this, for examples, by agreeing to use one arbitrator instead of a panel of three, by choosing a convenient location, by agreeing to streamline the process or to use electronic methods to file documentary evidence and/or to hold teleconference hearings instead of personal attendances.

The trick to all of this, of course, is to get the parties to turn their attention to the issue of dispute resolution at the beginning

of their commercial relationship just like they think about tax planning and other commercial terms. And then it is the lawyers' responsibility to canvass these and other options and to draft proper and complete clauses that will provide a sound and cost-effective mechanism to help in the event of a dispute. To do this, commercial lawyers might consider consulting one of those "litigators" familiar with arbitration or consult a Chartered Arbitrator.

For all this, clients may not be grateful at the time but it is another truth that they likely will be in the event they are faced with a dispute. ♦

### CORPORATE GOVERNANCE (from page 5)

in compliance with the law, company objectives, articles of association, and resolutions of the board of directors and shareholders.

**Responsibility and care:** Make any decision for the best interests of the company and not their own, based on reasonably adequate information.

**Good faith:** Perform any act for the best interests of the company, with an appropriate and lawful purpose and not in conflict with company interests.

**Non-compliance:** a minimum fine of THB 500,000 up to the actual amount of damage caused by the directors and executives; in the case of a dishonest act, a minimum fine of THB 1,000,000 up to double the actual amount of damage.

2. Not to enter into any transaction with the company or its affiliates, or any material transaction involving personal interests or conflict of interests, either directly or indirectly, without the approval of a shareholders' meeting.

3. To report to the company any interests of their own or related persons in operating the company or its affiliates.

**Non-compliance:** a maximum fine of THB 100,000, and THB 3,000 per day of non-compliance.

4. To appoint a company secretary responsible for preparing and keeping corporate documents. **Non-compliance:** a maximum fine of THB 100,000, and THB 3,000 per day of non-compliance.

5. To arrange a system for storing documents of material

information for at least 5 years after their execution.

**Non-compliance:** a maximum fine of THB 500,000, and THB 10,000 per day of non-compliance.

6. To disclose material information to the shareholders and the public, including information provided in obtaining resolutions at shareholders' meetings; financial reports, reports on company operations, or other reports required to be disclosed by law; opinions of the company on tender offers; and other information or reports released by the company to its shareholders or the public.

**Non-compliance:** a maximum imprisonment of 2 years, or a fine of THB 500,000, or both.

### Rights of Shareholders and Investors

The draft amendment specifies the rights of shareholders and investors as follows:

1. Shareholders (individually or collectively) holding more than 5% of the total voting right may order a director or executive to return any gains to the company, or claim indemnification from a director or executive who has not acted with responsibility, care, and in good faith, or acted for his/her own interests or those of other persons.

2. Shareholders (individually or collectively) holding more than 5% of the total voting right may propose any matter as part of a shareholders' meeting agenda.

3. Shareholders (individually or collectively) holding more than 5% of the total voting right may submit a complaint to court to annul resolutions which are not in compliance with the provisions of this

new chapter.

4. Shareholders may approve matters specified in the Act, including any related transaction between a director or executive and the company or company affiliates, except those specifically described in the SEC as not requiring shareholders' approval.

5. Investors may claim against directors or executives for false disclosure or concealment of material information which is disclosed or should be disclosed to the shareholders and the public.

Moreover, the SEC Act prohibits its directors and executives from using a resolution of the board of directors or shareholders' meeting as justification for any liability in case of recklessness or dishonesty in the following matters:

1. Disclosure or non-disclosure of material information to the board of directors or a shareholders' meeting.

2. Taking the company's assets or interests.

3. Seeking advantage from the company's assets.

The principles of the draft amendments have been approved by the Cabinet and are now with the Council of State for review and revision for further submission to the Cabinet. Once approved by the Cabinet and passed by the National Legislative Assembly, the amended Act will be published in the Government Gazette and take effect 30 days after publication. At the time of this writing, indications are that the amended law could take effect by the end of this year. ♦

**LIVING WILL** (from page 1)

unnecessary burden on other persons. Such a patient's right to refuse medical treatment at the final stage of his life under Section 12 of the Act is not the same as "euthanasia" or "mercy killing". Section 12 and the living will made thereunder do not give the public health professional practitioner or any person any right or permission to kill the patient. Also, a living will (sometimes known as "advance directive" or "advance decision") is unrelated to the conventional will designed and used primarily to deal with estate/property distribution after death. It is essentially an advance written declaration of one's decisions and preferences in his health care and medical treatment.

Moreover, even though such right has just been explicitly recognized and permitted under Section 12 of the Act, every person actually

already has the basic right to control and make decisions about his medical care, including the right to agree to or refuse medical treatment. If you are competent and able to communicate, you may simply tell your doctor of your decision with respect to your medical care/treatment. But what if circumstances do not give you such option? Section 12 permits you to make such a decision and declaration ahead of time through a written living will while you are still competent and able to communicate and declare such decisions, so the public health professional practitioner can comply with them. It should be noted that this is the patient's right, and hence not compulsory.

Section 12, paragraph 2, requires that a living will must be carried out in accordance with the rules and procedures prescribed by Ministerial Regulation. To date, however, such Regulation has not yet been issued.

In any event, any person wishing to make a declaration to refuse public health service/medical treatment which is supplied merely to prolong his life in its terminal stage or to end his severe suffering from illness can now do so by making a written living will in advance. It is advisable that he make such a living will while he is totally competent and able to give direction about his own health care/medical treatment. As well, the living will's existence and content should be made known to his relatives and doctors so that they are fully aware of and can comply with his decisions or requirements as indicated in his living will promptly, before any life support system is applied or used, as arguably Section 12 and the living will made thereunder do not give any right or permission to the public health professional practitioner or any person to "pull the plug" on a person. ♦

**TEMPORARY CESSATION** (from page 1)

their normal wages prior to the cessation of operations. Section 75 further stipulates that "the employer shall give notice to the employee and the labor inspection officer in advance prior to the cessation of operations." An employer is therefore entitled to apply Section 75 only if:

1. there is a necessity for the employer;
2. the necessity is not considered to be *force majeure* under Thai law;
3. the employer informs a labor inspection officer in advance;
4. the employer pays at least 50% of the wages which the employee received before the cessation of operations; and
5. the employer pays the requisite sums during the period of cessation.

In addition, the employer has to fix the period of time for the cessation of operations.

Because the LPA does not include a definition of what qualifies as a necessity for the employer, Supreme Court precedent must be used for guidance. For example, whether or not an employer facing a marketing problem resulting in a reduction of purchase orders was a situation that could be considered a

necessity under Section 75, the Supreme Court ruled that the necessity has to be a significant one that will seriously affect the employer's business (Supreme Court Precedent Case No. 8193/2000). Consequently, if the reduction of purchase orders was simply the result of the employer's failure to conduct his business efficiently, the employer cannot apply Section 75.

It is also important to note that if an employer is required to cease operations due to *force majeure*, Section 75 does not apply and the employer is not required to pay any wages to any employee during the temporary cessation of operations. *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." In evaluating whether an event is *force majeure*, it is also helpful to look at Supreme Court precedent. The Supreme Court has ruled that the following events do not qualify as *force majeure*:

- A seasonal wildfire where the party does not undertake any preventive action (Supreme Court Precedent Case No. 830/1976).
- A violent storm which usually occurs every season (Supreme Court

Precedent Case No. 2140/1977).

- An electric pillar falling on a pedestrian because of burning grass around such pillar (Supreme Court Precedent Case No. 179/1979).
- An electric shock sustained due to a tree falling on an electrical line (Supreme Court Precedent Case No. 529/1980).
- Flooding of a factory's premises (Supreme Court Precedent Case No. 118/1982).
- A factory fire (Supreme Court Precedent Case No. 2560/1986).

Note that in reviewing precedent, one must take into account that Thailand is a civil law country and therefore does not recognize Supreme Court rulings as binding although they are considered persuasive. The above rulings were made prior to the enactment of the LPA and therefore at such time, not only did those employers, finding themselves in the circumstances described above, not have the option of avoiding paying wages altogether, they also did not have the option under Section 75 of paying 50% of the wages to affected employees. Naturally, today such latter option would be available.

Although the option under Section 75 for temporary cessation of operations may not be the answer to all employers' problems, it is nevertheless an alternative available for consideration. ♦

## ABOUT THE AUTHORS



**Santhapat Periera** (Partner, Commercial Department) obtained an LL.B. from Thammasat University, then pursued graduate studies in the U.S., earning an M.C.L. from the University of Miami and an LL.M. in International Banking Law Studies from Boston University. He also completed the Program of Instruction for Lawyers at Harvard Law School and the Arbitration Course of the Chartered Institute of Arbitrators (East Asia Branch). He was an advisor to the Thai Parliamentary Sub-Committee on Substitute Sources of Energy Derived from Plants and the Sub-Committee on the Development and Promotion of Solar Power/Solar Cells. He received his lawyer's license in 1986 and practices in banking and finance, M&A, environmental law, commercial and international trade.



**Chusert Supasitthumrong** (Litigator, Dispute Resolution Department) holds a Bachelor of Laws (second class honors) from Chulalongkorn University in Bangkok and a graduate diploma in International Trade Law from the Thai Bar Association. He received his license to practice law in Thailand in 1995. After almost ten years of experience as a litigator with Cementhai Legal Counsel Limited and Siam Cement Public Company Limited, he joined Tilleke & Gibbins in 2004. He specializes in litigation in the following areas: bankruptcy and reorganization, international trade, labor, maritime law and tax.



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