The Judicial System in Thailand:
An Outlook for a New Century

Joint-Project between

the Central Intellectual Property and International Trade Court and

the Institute of Developing Economies, Japan External Trade Organization

Content

Chapter One: Historical Background and Overview of the Thai Judicial System

1. Introduction

"The Judicial System in Thailand: An Outlook for a New Century", is a joint undertaking between the Central Intellectual Property and International Trade Court in Thailand and the Institute of Developing Economies (JETRO-IDE) of Japan. Members of the working group for the research comprise of seven judges from various courts of justice in Thailand and two legal officers acting as secretariat. Each judge is assigned to write a chapter on his expertise. A few meetings are conducted to interview players in each compartment of the legal profession. Meetings among the working group members are conducted to discuss matters of controversies and try to arrive at certain consensus. All members are responsible for the final draft. *Justice Prasobsook Boondech,* the Chief Justice of the Central Intellectual Property and International Trade Court graciously acts as the honorary advisor to the programme, which is chaired by *Judge Vichai Ariyanuntaka* of the Intellectual Property and International Trade Court. A brief bibliography of the members are included in the annex to this Research.

Perhaps we are blessed with living in interesting times. In 1997 Thailand witnessed the transition of its economy from phenomenal success and double-digit or near double-digit growth to near collapse verging on the state of bankruptcy in many financial quarters. Lawyers, like any other profession, bear the burden of bringing Thailand out of this predicament. This is a time for re-thinking, re-planning and re-structuring Thai's legal infra-structure to create the legal environment friendly to international trade and investment. The legal environment whereby legal rights, local and foreign, shall be equally protected and enforced under Thai law and the dispute resolution mechanism in Thailand. The legal environment of good faith and trust worthiness. The legal environment which will lead Thailand to the more glorified days of international trade and investment and the recovery of Thai economy as a whole.

Under the new Constitution promulgated in 1997, substantial changes have been made in Thai political, social and legal environments. A Constitutional Court has been established. The system of administrative courts has also been established. In the field of criminal justice system, a human right oriented approach is preferred to the traditional strict

appliance of *'law and order'* approach. In the field of civil justice system, case management by the judge and alternative dispute resolution (ADR) are encouraged.

Contents of the Research

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Over a hundred years ago when Thailand started the modernization of its legal system and establishing a modern court structure, a young prince, *Prince Rajburi Direkrit,* reputed to be the brightest son of *King Chulalongkorn,* and later to be known as *"father of modern Thai law and judicial system"* was sent to Christchurch College Oxford to read jurisprudence. This was around the Meiji era in Japan.

The Thai judicial system in the earlier time, under the administration of *Prince Rajburi Direkrit's* Ministry of Justice, was jewel in the crown in the Thai administration. Walter Graham, in his book, *Siam*, has this to say on the Ministry of Justice of the Kingdom of

Siam:[1]

...The Ministry has built up a service probably the cleanest and straightest Siam has ever seen, and containing in its ranks officers who could compare favourably with the members of the judiciary of many European countries. In fact, about the year 1909, the Ministry of Justice was the bright particular star in the administration of the country. ---End of quote.

The first law school in Thailand, the Law School of the Ministry of Justice, whereby future judges were trained was modeled upon the "Inn of Courts" in London. The most prestigious legal qualification for legal practice in Thailand is to pass the Thai Bar Examinations, taught and organized by the Thai Bar Association. The qualification is called "Thai Barrister-at-Law" – Nei ti ban dit Thai - It is so called to distinguish itself from the Inn of Courts' Barrister-at-Law in England.

Although Thailand may be classified as a Civil Law country whereby the Continental style of codification is evidenced in its systematic and diversified codes of law, the English legal system has much influence in its development, particularly in the field of commercial law, procedural law and the law of evidence. The notion of proof beyond reasonable doubt in a criminal case and proof on the balance of probabilities in a civil case, and adversarial system of procedure where the judge acts in a passive role as an umpire are some of the common law influences. No doubt much of the English influence comes from the part-English trained lawyers and judges of the earlier days.

Legal education abroad represents a trend in the legal development. In the older days Thai government and private well-to-do individuals used to send its officers or their sons to England for legal studies. Higher tuition fees in the UK first introduced by the Thacher government in 1970s and the world-famous, cost-effective postgraduate legal studies in North American law schools, notably Harvard, Yale, Berkeley, Columbia etc with their one year master of laws programmes create a much competitive choice. One sees an influx of Thai law graduates to the United States law schools to the detriment of UK law schools. The late 1990s saw UK law schools fought back with more competitive one-year masters' programmes for law graduates from civil law countries whose first language is not English. Although the variety of subjects may be as wide-ranging as US law schools, the UK law

[1] Walter A Graham, *Siam* (3rd edn, London: Alexandra Moring, 1924) Vol. I, pp 372-373. The quotation was cited (in Thai) by Professor Thanin Kraivixien in his monumental work, *The Reform of Law and Court Administration in the Reign of King Chulalongkorn,* (Bangkok: Office of the Prime Minister Press, 1968).

schools do not offer core subjects in the masters' programmes for the benefit of the examination leading to a judicial career in Thailand. Recently, with the reform of judicial salary, judicial career in Thailand has once again gained popularity. The entrance of judicial career is by way of competitive examination, perhaps the toughest of any law exams in this country. Post graduates from an approved Thai or foreign law school have a particular advantage for the judicial examinations since they will be tested in a different set of papers, reputedly softer and more general. However, there are certain core subjects to be fulfilled e.g. contract, tort, criminal law, procedure law and evidence. Not all of these subjects are offered in standard masters of law programmes in the UK since they are considered undergraduate-subjects and hence one cannot use an UK master of law degree to qualify in the judicial examination. American law schools, on the other hand, may offer these courses through their undergraduate law degree (J.D.Programme) and treat it as part of a masters' programme for individual student interested in the course. This is a matter of administrative arrangements to fit the purpose of the student. It benefits both. We can now see more American influence in the Thai law, particularly in the field of Alternative Dispute Resolution and American legal thinking in general.

ADR is a new terminology of an old concept. Non-aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous *'win-win solution'* trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation. It represents a new challenge to the legal profession. This Research, in many aspects, proposes to examine some of the lessons we have learned from introducing or perhaps more accurately, reintroducing ADR into the dispute resolution mechanism in Thailand.

Chapter Two: Court System under the Constitution

1. Introduction

The constitution is the supreme law of the country that establishes the powers, functions and duties as well as the structure of the cabinet, the parliament and the courts. Since the first constitution has been granted in B.E.2475 (1932), Thailand has amended its constitutions from time to time in order to meet the rapid change of social and political. The present constitution, the Constitution of the Kingdom of Thailand B.E. 2540 (1997)(the "1997 Constitution"), has been drafted by the Constitution Drafting Assembly, a special body established under the Constitution of the Kingdom of Thailand B.E.2534 (1991) (the"1991 Constitution"). The purpose of drafting a new constitution was to reform the political system to a better and transparency system. Since the Constitution Drafting Assembly was represented by members, selected from each province throughout the country as well as the experts in public law, politics, and public administration for a total number of 99 members, it was the first time the people of Thailand having the opportunity of drafting a whole new constitution by their own. Consequently, the 1997 Constitution has substantial impact on the reorganization of political system as well as the judicial system in Thailand.

The 1997 Constitution gives the power to try and adjudicate of cases to the Courts. The Courts recognized by the 1997 Constitution are as follows:

1. The Constitutional Court
2. The Court of Justice
3. The Administrative Court
4. The Military Court

If there is a need for establishing the new court, it may be established only by an act. However, a new court specifically established for the trial and adjudication of any particular case or for a case of any particular charge in place of an ordinary court existing under the law which is having jurisdiction over such case shall not be established. It is also a prohibition for enacting a law having an effect of changing or amending the law on the organization of the Courts or on judicial procedure for the purpose of its application to a particular case.

The proceeding of the Courts must be in accordance with the Constitution and the law. Since the King exercises the judicial power through the Court, the proceeding of the Courts, however, must be in the name of the King.

2. Constitutional Court

Since the constitution is the supreme law of the country, therefore, no any provision of law shall be in contradiction with the constitution. Otherwise, it shall be void and unenforceable. However, the issue of whether or not a bill or the existing law is inconsistency with the constitution might not be an easy task to solve. Therefore, it is the duty of the Constitutional Court to render judgment or decision on whether or not the laws as well as rules and regulations are unconstitutional. The Constitutional Court is a new institution established under the 1997 Constitution. It comes to substitute the Constitution Tribunal formed under the 1991 Constitution.

The Constitutional Court consists of one president and fourteen judges appointed by the King upon the advice of the Senate. The Senate shall approve the list of the nominees selected from the following persons:

(1) 5 Supreme Court judges elected at the general meeting of the Supreme Court
(2) 2 Supreme Administrative Court judges elected at the general meeting of the Supreme Administrative Court
(3) 5 qualified persons in law, and
(4) 3 qualified persons in political science

They shall elect one judge, among themselves, to be the President of the Constitutional Court. The president and judges of the Constitutional Court shall be in the office for only one term of 9 years.

The decision of the Constitutional Court shall have the binding effect upon the cabinet, court, parliament and other organizations. Cases in which the Constitutional Court has jurisdictions are as follows:

(1) in the case when a bill or an organic law has been approved by the National Assembly but before the Prime Minister presents it to the King for signature,
(2) in the case when there is a dispute arises as to the powers and duties of the organizations under the constitution, such organizations or the President of the

National Assembly shall submit such matter along with the opinion to the Constitutional Court for decision.

(a) if members of the House of Representatives, senators or members of both Houses of not less than one-tenth of the total number of the existing members of both Houses challenge that such bill has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, who shall in turn refer such opinion to the Constitutional Court for decision.

(b) if members of the House of Representatives, senators or members of both Houses of not less than 20 members challenge that such organic law has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, who shall in turn refer such opinion to the Constitutional Court for decision.

(c) if the Prime Minister is of the opinion that such bill or organic law has the provision in contrary to or inconsistent with the constitution, or has been enacted in contrary to the constitution, he shall refer such opinion to the Constitutional Court for decision.

If the Constitutional Court decides that such bill or organic law has the provision in contrary to or inconsistent with the constitution and such provision forms the essential element of the said bill or organic law, therefore, the said bill or organic law shall be terminated. However, if such provision is not forms the essential element of the said bill or organic law, only that contrary or inconsistent provision shall be terminated. During the consideration of the Constitutional Court, the Prime Minister shall suspend the proceedings in respect of the promulgation of the said bill or organic law until the Constitutional Court has reached the decision.

(3) in the case when the court, in applying the provisions of any law to any case, is of the opinion, or the parties to the case raise the objection that the provisions of the said law are in contrary to or inconsistent with the constitution and there has yet been any

decision of the Constitutional Court on such provisions, the Court shall stay the proceeding of such case and refer such opinion to the Constitutional Court for decision. However, if the Constitutional Court is of the opinion that such objection of the parties is not essential for decision, the Constitutional Court may refuse to accept the case. The decision of the Constitutional Court shall apply to all cases but shall not have any affect to the judgment of the court which has already been final.

The quorum of judges of the Constitutional Court for hearing and making the decision shall consist of Constitutional Court judges for not less than 9 judges. The decision shall be made by majority vote. To facilitate the proceeding, the Constitutional Court shall have the power to demand documents or relevant evidences from any person or summon any person to give statements as well as request the court, inquiry official, state agency, state enterprise or local government organization to carry out an act for the purpose of its consideration.

For the purpose of managing and organizing the Constitutional Court, the Secretary General of the Office of the Constitutional Court shall be responsible for the management of the Constitutional Court's personnel and budget. The appointment of the Secretary General must be approved by judges of the Constitutional Court, and the Secretary General shall be responsible directly to the President of the Constitutional Court.

3. Court of Justice

The Court of Justice has a long history which can be dated back to the time of the establishment of the Ministry of Justice, in B.E. 2434 (1891). At that time, there were several courts under the administration of various ministries. The Ministry of Justice was established with the purpose to unify all of the different courts of the different ministries to be under the administration of the Ministry of Justice. All of the courts, at the time, became the Court of Justice and came under the auspices of the Ministry of Justice. The Court of Justice since then has both civil and criminal jurisdictions over all of the cases. The Ministry of Justice was only responsible for the administrative works of the Court of Justice while the Court of Justice can concentrate independently on the trial and adjudication of cases. But when the 1997 Constitution came into force, it brought the new change to the Court of Justice that the Court of Justice shall be independent institution and separating from the Ministry of Justice.

Under the 1997 Constitution, judges are independent in the trial and adjudication of cases and shall not be subjected to hierarchical supervision. Regarding the distribution of case files to judges, it shall be in accordance with the rules prescribed by law. The recall or transfer of case files shall not be permitted except in the case where there shall be affected to the justice in trial and adjudication of the case. Moreover, the transfer of a judge without prior consent of the said judge shall not be permitted except in the case of transfer at the end of term as provided by law, promotion to the higher position, being under the disciplinary action or the said judge is becoming a defendant in a criminal case.

The separation of the Court of Justice from the Ministry of Justice took place on 20 August B.E. 2543(2000). The works under the responsibility of the Office of the Permanent Secretary to the Ministry of Justice, the Minister, and the Permanent Secretary shall be transferred to the Office of the Court of Justice, the President of the Supreme Court, and the Secretary General of the Office of the Court of Justice, respectively. The Office of the Court of Justice shall be headed by the Secretary General of the Office of the Court of Justice and shall have powers and duties concerning the administrative works of the Court of Justice, judicial affairs and legal affairs. The tasks of the Office of the Court of Justice shall be aimed to provide facilitation to the Court of Justice as well as improving the efficiency, speedy and convenience of trial and adjudication of the Court of Justice.

The Secretary General of the Office of the Court of Justice shall play a significant role in administration the works of the Court of Justice. The Secretary General has the duties to govern and monitor the administrative work of the Court of Justice and assure that they has been carried out completely and in compliance with the laws concerned, and shall directly respond to the President of the Supreme Court. Since the duties of the Secretary General shall normally involved with the interconnection between the judges and court officials, therefore, the Secretary General shall be nominated from judge or former judge to make sure of a better understanding and handling of the tasks.

In governing the policy of the Court of Justice, there shall be the responsibility of the "Court of Justice Executives Board". The Board consists of judges and qualified persons as follows:

(1) The President of the Supreme Court as the chairman,

(2) 4 members elected from judges in the Supreme Court,

(3) 4 members elected from judges in the Court of Appeals and the Court of Appeal Region 1 to Region 9,
(4) 4 members elected from all of the Court of First Instance,
(5) 2 to 4 qualified members elected from the qualified person in the field of budget management, organization development, or management and administration.

The Secretary General of the Office of Court of Justice shall be the secretary of the Board in order to assure the successful implementation of the policy set out by the Board.

The duties of the Court of Justice Executives Board shall be as follows:
(1) to issue regulations, notifications or resolutions for the purpose of administration the Court of Justice in compliance with the policy set forth by the President of the Supreme Court;
(2) to give approval of submission of the bill concerning the administration and providing justice of the Court of Justice to the Cabinet;
(3) to give approval of the estimated budget of the Court of Justice;
(4) to give approval of the budget management of the Court of Justice and the Office of the Court of Justice;
(5) to set the workdays, public holidays, and leave for the judges and personnel of the Court of Justice;
(6) to consider the sign and symbol to be used for the Court of Justice and set the rules and conditions of using such sign and symbol.

The term of the Board is 2 years but members of the Board shall not hold the office for more than 2 consecutive terms.

In taking care of the judges, there shall be the responsibility of the Court of Justice Judicial Commission. The Commission shall be charged with the duties of promoting, transferring as well as punishing of the judges.
In taking care of the administrative officers of the Court of Justice, there is the duty of the Board of the Court of Justice Administrative Officers. The Board of the Court of Justice Administrative Officers consists of members as follows:
(1) The most senior Vice President of the Supreme Court as chairman
(2) The President of the Court of Appeal
(3) The Secretary General of the Civil Service Commission

(4) The Secretary General of the Court of Justice
(5) 5 members elected from the Court of Justice administrative officers at level 8
(6) 3 qualified members elected from the qualified persons in the field of organization development, personnel management, or management and administration

The Board shall have the powers to issue the regulations or notification concerning the personnel administration and other activities of the Office of the Court of Justice as follows:

(1) matter concerning the qualification, selection, positioning, probation, developing, reshuffle, promotion, vacating, salary promotion, termination, suspension, discipline, investigation, penalty, grievance and appeal for the Court of Justice officers
(2) matter concerning the substitution of the Court of Justice officers
(3) to set the uniform and dressing of the Court of Justice officers
(4) to hire the experts or specialists who shall be benefit to the work of the Court of Justice as well as setting the remuneration for such experts or specialists
(5) to establish the welfare system for the Court of Justice officers

The Court of Justice shall have 3 levels as follows:

(1) the Supreme Court
(2) the Court of Appeals, which divided into
    (i) the Court of Appeals,
    (ii) the Court of Appeals Region 1 to Region 9
(3) the Court of First Instance,
    (i) the Civil Court
    (ii) the Civil Court of Southern Bangkok
    (iii) the Thonburi Civil Court
    (iv) the Criminal Court
    (v) the Criminal Court of Southern Bangkok
    (vi) the Thonburi Criminal Court
    (vii) the Central Juvenile and Family Court
    (viii) the Central Labour Court
    (ix) the Central Tax Court
    (x) the Central Intellectual Property and International Trade Court
    (xi) the Central Bankruptcy Court
    (xii) the Provincial Court

(xiii) the Kwaeng Court

All cases shall commence at the Court of First Instance. The appeal of the judgment of the Court of First Instance shall be filed to the Court of Appeals with some restrictions. The Supreme Court is the highest court which has jurisdiction over the cases appealed from the Court of Appeals subject to the restriction provided by the Civil and the Criminal Procedure Codes.

There is a requirement under the constitution that the hearing of a case shall have a full quorum of judges. Any judge who is not sitting at the hearing of a case shall not give judgment or decision of such case, except for the case of force majeure or any other unavoidable necessity.

Basically, a judge in the Court of Justice shall be retired from the service at the age of 60. To reach at such age, one normally has already been in the service for approximately of 30 years in which making him to be a highly experience judge. Therefore, the 1997 Constitution, with the view to keep such valuable asset to the Court of Justice, provides the scheme of transferring the retired judge to be a senior judge sitting in the court of first instance. The main task of the senior judge is to try and adjudicate especially the complex cases. A senior judge shall be in the service until the age of 70, however, at the age of 65, there shall be a performance evaluation process of such senior judge. Only one that passes the performance evaluation process shall be in the service until the age of 70. A senior judge can be sitting in the court of first instance only and shall not be promoted to be chief justice of any court of first instance, or be elected as the member of the Court of Justice Judicial Commission.

4. The Administrative Court

Although the Administrative Court has been mentioned in the previous Constitutions but in reality it has never been established. Until the 1997 Constitution came into force, the time frame has been set that the Administrative Court shall be established within 2 years from the promulgation of the 1997 Constitution. Obviously, as its name suggested, the Administrative Court has exclusive jurisdiction over the administrative disputes between the private sector and the State organs concerning the issue of the abuse of power by such State organ. Accordingly, the Act for the Establishment of and Procedure for

Administrative Court B.E.2542 (1999) gives the Administrative Court the jurisdiction over the cases as follows:

(1) case of dispute between a private sector or individual and the State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government, or

(2) case of dispute between the State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government,

Both cases mentioned above shall concern with the issue of dispute as a consequence of the act or omission of the act that must be performed by such State agency, State enterprise, local government organization, or State official. Or the dispute as a consequence of the act or omission of the act of such State agency, State enterprise, local government organization, or State official which under the responsibility of the said State agency, State enterprise, local government organization, or State official in performing the duties under the law.

According to the Act for the Establishment of and the Procedure for Administrative Court B.E.2542 (1999), the Administrative Court shall have 2 levels as follows:

(1) the Supreme Administrative Court

(2) the Administrative Court of First Instance, which divided into

  (i) the Central Administrative Court

  (ii) the Regional Administrative Court

The Judicial Commission of the Administrative Court shall select the qualified persons to be judges of the Supreme Administrative Court and the Administrative Court of First Instance. Upon selection, the Judicial Commission of the Administrative Court shall submit the list of the nominees to the Prime Minister who shall then submit the list to the Senate for consideration.

5. Military Court

The 1997 Constitution gives the powers to try and adjudicate military criminal cases to the Military Court. According to the Law for the Organization of the Military Court B.E. 2498 (1955), the Military Court shall have the jurisdiction over the cases as follows:

(1) Cases which a person under the jurisdiction of the Military Court i.e. the military officer, has committed a crime against the military law or other criminal laws.
(2) Cases which a person has committed a contempt of Court as provided by the Civil Procedure Code

However, the following cases shall not be under the jurisdiction of the Military Court
(1) Cases in which a person under the jurisdiction of the Military Court and a person outside the jurisdiction of the Military Court have jointly committed crime
(2) Cases connected with the case under the jurisdiction of the civilian court
(3) Cases which must be tried at the Juvenile and Family court
(4) Cases which the Military Court is of the opinion that such cases are not fallen within its jurisdiction

All of the cases which are not under the jurisdiction of the Military Court shall be tried and adjudicated in civilian court.

The Military Court is under the administration of Ministry of Defense. The Minister of Defense shall be responsible for the administrative matter of the Military Court. However, the Military Court has the sole discretion on trial and adjudication of the cases. The Military Court is divided into 3 levels as follows:
(1) The Military Court of First Instance
(2) The Central Military Court
(3) The Supreme Military Court

6. How to solve conflict of jurisdiction among the Courts

The overlapping of the jurisdiction among the Courts could possibly occur and would not be an easy task to find the proper solution. The 1997 Constitution has established one committee, namely the "Jurisdictional Conflicts Solving Committee", specially designed to handle this issue. The Jurisdictional Conflicts Solving Committee has the responsibility to solve the issue of whether the concerned case shall fall under the jurisdiction of which courts, among the Court of Justice, the Administrative Court, the Military Court or others Court (if any). This Committee consists of members as follows:
(1) the President of the Supreme Court as chairman
(2) the President of the Supreme Administrative Court

(3) Chief of the Military Judicial Office
(4) President of the other Court (if any), and
(5) qualified persons at the maximum number of 4 persons

When the parties raised the issue of jurisdictional conflict to the court in which the case has been filed, such court shall stay the proceeding and send the said motion along with the court's opinion to the court in which the parties alleged to have jurisdiction. The procedure shall be as follows:

(1) If the sending court is of the opinion that such case shall fall under its jurisdiction and the receiving court agrees with, the receiving court shall inform the sending court of such opinion in order for the sending court to continue the proceeding.
(2) If the sending court is of the opinion that such case shall not fall under its jurisdiction and the receiving court agrees with, the receiving court shall inform the sending court of such opinion. The sending court may transfer the case to the receiving court or dismiss the case. The parties shall, then, file the case to the court which has the jurisdiction over such case.
(3) If the sending court and the receiving court have different opinion on such case, the sending shall submit the issue to the Jurisdictional Conflicts Solving Committee for consideration.

The decision of the court in the above mentioned (1) and (2) and the decision of the committee shall be final.

7. Special function of the Supreme Court under the 1997 Constitution

In order to counter corruption which is presently the growing concerned in Thailand, the 1997 Constitution has entrusted the Supreme Court as an appropriate institution in dealing with this issue by establishing the "Supreme Court's Criminal Division for Persons Holding Political Positions" within the Supreme Court. In addition to the removal from office by the Senate, the persons such as the Prime Minister, a minister, members of the House of Representative, senator or other political official shall be faced with the criminal prosecution if such person has been accused of becoming unusual wealthy, or committing malfeasance in office, or committing dishonest act in the performance of duties or corruption. Once the National Counter Corruption Commission is of the opinion that the accusation is prima facie, the Chairman of the National Counter Corruption Commission

shall send all the documents and evidences along with the opinion to the Attorney General for issuing of the prosecution order and filing the case to the Supreme Court's Criminal Division for Persons Holding Political Positions. Then the President of the Supreme Court shall call for a general meeting of the Supreme Court judges for election of 9 Supreme Court judges to be a quorum of such case by secret vote. Among the 9 judges, they shall select one to be the judge in charge of the case. Then the case shall be trial continuously on workday until the close of the trial. The judgment shall be make by majority vote. During the trial, the Division shall have the power to issue search and seize warrant and shall consider the provisional release. The President of the Supreme Court, subject to the approval of the general meeting of the Supreme Court judges, shall empowered to issue Rules of the Court on the proceeding of the case.

Chapter Three: Court of justice

Paper Outline

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1. Introduction

The constitution of Thai Kingdom, B.E.2540 (1997) has made tremendous effects on the judiciary. The establishment of the Constitution Court, and the Administrative Court were resulted from the provisions of such constitution. Inevitably, the power of the Court of Justice, as a solely organization enjoying the judiciary power in the earlier period, has separated to new independent organizations. Moreover, the administrative system of courts has drastically changed, for example, the departure of the Ministry of Justice from the Courts of Justice. This chapter will be illustrated how the Courts of Justice perform

their duties in the current times.

2. Structure

As regards the certain characteristics , the structure of courts of Justice is divided into two parts, administration and adjudication. Before August 20, 2000, the Ministry of Justice was responsible for the administration works of all courts. The main role of the Ministry of Justice was to provide supports, including personnel and office equipment, to courts in order that courts could operate theirs works efficiently. At present time, the Ministry of Justice is replaced by the Office of the Courts of Justice which an independent organization and a juristic person. Such office, consequently, obtains the duties of the Ministry of Justice. This change arose from the idea that the Ministry of Justice as a politician might interfere the judicial system. Therefore, to prevent the political intervention, the politicians should not involve in the administrative works of courts. In conclusion, the alteration of the alteration of the administrative organization is one of major parts of the judicial reform under the current constitution.

2.1 Administration

This part will show the administrative organization under both the Ministry of Justice and the Office of the Courts of Justice. The eminent change was that the works of the Probation Department, the Legal Execution Department, and the Observation and Protection Centre were brought to the new Ministry of Justice. However, the main duties, especially in transitional period, remains the same as the former system.

It should be noted that , regarding to the administration of the court, each courts has a registrar, the highest official of the office of the court, who takes responsible for administrative and secretarial works of the court, including controlling clerks and court staffs.

The organization of the Ministry of Justice prior to the current constitution

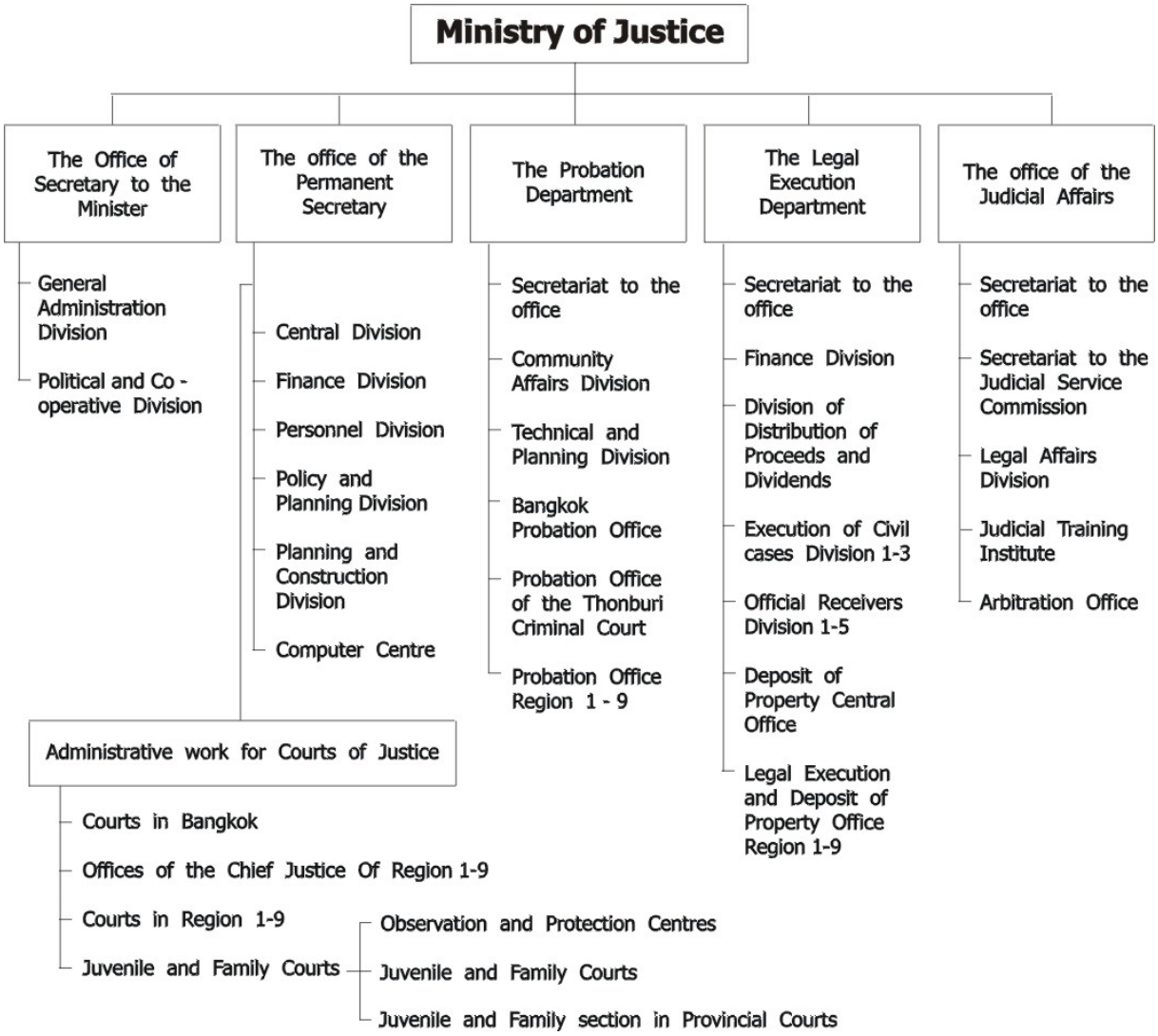


Chart No.1 *The structure of the Ministry of Justice prior to the current constitution*

The Ministry of Justice consisted of the office of the Secretary to the Ministry, the office of the Permanent Secretary, the Probation Department, the Legal Execution Department, and the office of the Judicial Affairs.

The office of the Secretary to the Ministry had duties to assist the Minister as a head of the Ministry in term of supplying information for political responsibilities. The office of the Permanent Secretary, under directed by the Permanent Secretary, played an important role in administrative works. This office dealt with personnel matters, facilities, and budget for all courts.

The Probation Department provides the investigation reports of offenders and rehabilitative programs ordered by courts. The Legal Execution Department, is responsible for the enforcement of court judgements and the court orders in civil cases and bankruptcy cases. The management of reorganization under the Bankruptcy Act amended in B.E. 2541 (1998) is the new duty of this department.

The office of the judicial affairs, headed by the secretary - general of the judicial affairs, handles all matters involving appointment, promotion, transfer, and removal of judges, which would be submitted to the Judicial Service Commission for consideration. In addition, this office both supplies legal information, texts, and periodicals of Supreme Court' decisions for judges, and provides training for judges and judge - trainees.

Apart from the Minister of Justice, the important person in the Ministry of Justice was the Permanent Secretary, the highest civil servant in this Ministry. In practice; however, he was transferred from a judge. He, as a superior of the office of the judicial affairs, also dealt with all matter of appointments, promotions, transfers, removal and disciplinary actions of judges. He was one of ex-officio members of the Judicial Service Commission.

The new structure

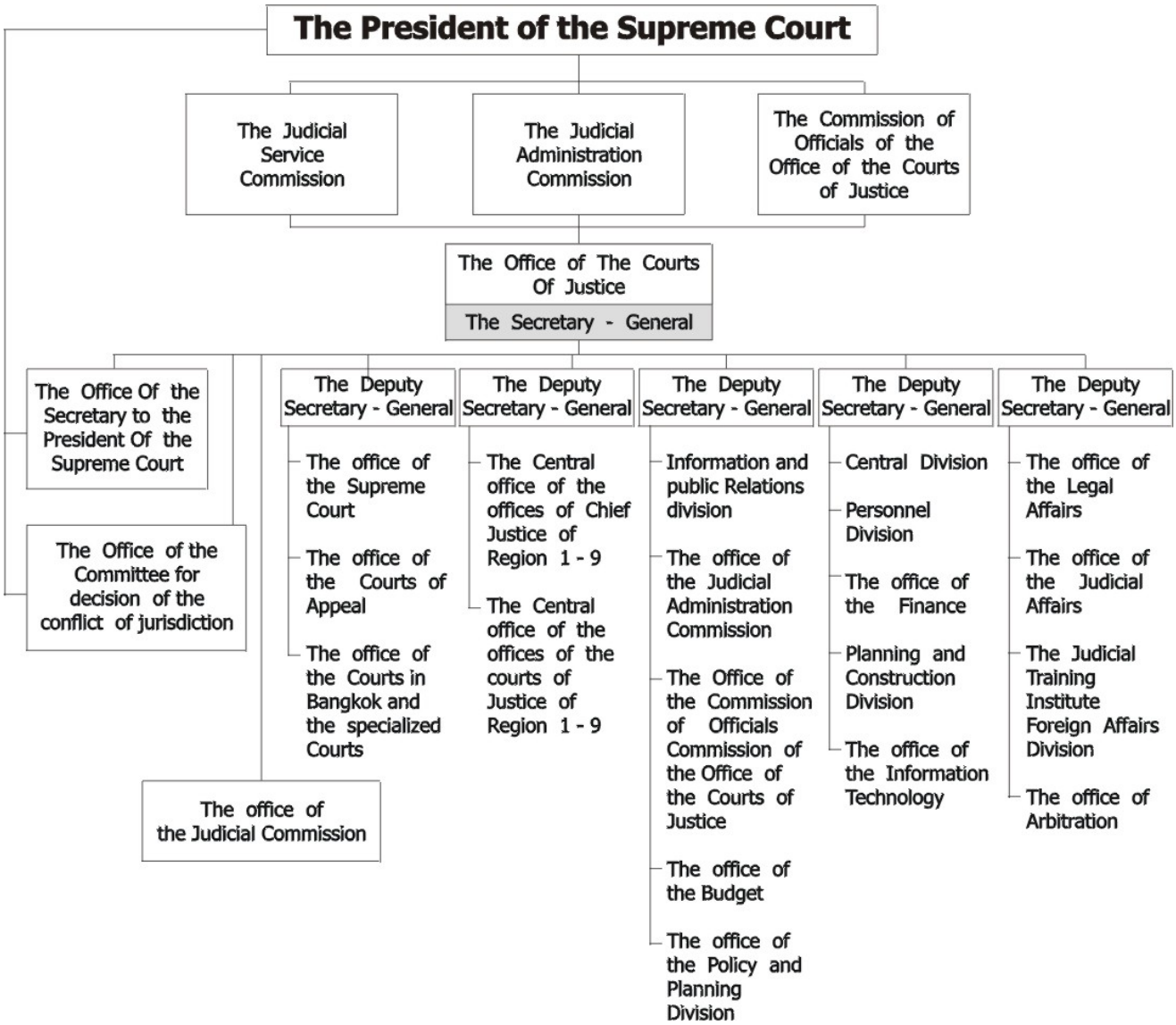


Chart No.2 *The administrative structure of the Courts of Justice proposed in the public hearing on August, 17, 2000*

The new structure of the administration of the Courts of Justice involves the three organizations, i.e., the Office of the Courts of Justice, the Judicial Administration Commission, and the Commission of Officials of the Office of the Courts of Justice.

The Office of the Courts of Justice

According to the constitution, the Courts of Justice have an independent secretariat, with the Secretary – General of the Office of the Courts of Justice as the superior responsible directly to the President of the Supreme Court. The Secretary – General has to transfer from a judicial official, or a person, in the past, has served as a judicial official. The appointment of the Secretary – General must be approved by the Judicial Service Commission.

The Office of the Courts of Justice has autonomy in personnel administration, budget, and other activities as provided by law. So far, the arrangement of the structure of the Office of the Courts of Justice has not been completed yet. However, the works of the Office of the Courts of Justice should be categorized into three groups; namely, the main line works, the auxiliary works, and directorial assistance works.

The mission of the Office of the Courts of Justice, illustrated in the document of the Office of the Courts of Justice in the public hearing on August, 17, 2000 are as follows :

1. Laying down policies concerning personnel, budget, and development plan in compliance with the principle of the Good Governance.
2. Serving as a secretary of the Judicial Service Commission, the Judicial Administration Commission, and the Commission of Officials of the Office of the Courts of Justice.
3. providing posts for judges and court officials, and developing the potential of those person systematically and continuously.
4. Promoting researches for the development of laws and system of the Courts of Justice.
5. Monitoring and evaluating the output of works, defining the effective indicators and unit cost.
6. Co – ordinating with other agencies in judiciary process for the purpose of the human right protections.

The Judicial Administration Commission

This Commission consists of persons as follows:

1. The President of the Supreme Court, as a chairman
2. Twelve judicial officials of all levels of Courts, four persons from each level, who are judges of each level of Courts and elected by judicial officials of all levels of Courts.

3. Qualified members, not less than two persons but not exceed four persons, concerning budget, organization development, or the executive and management who are not or were not judicial officials and who are selected by the chairman and member in (2).

The Secretary – General is the secretary of this commission and Deputy Secretary – General who is entrusted from the Secretary – General is an assistant secretary.

This Commission is responsible for controlling the administration of the Courts of Justice in regard to the administration and secretarial works of the Office of the Courts of Justice prescribed by laws, regulations, formalities and tradition of the judicial services and has power in respect of the following matters:

1. the issue of regulations, notifications, resolutions concerning the administrative and secretarial works of the Office of the Courts of Justice in compliance with the policies of the President of the Supreme Court, including the restraint of the administration of the Courts of Justice, or the Office of the Courts of Justice being inconsistent with such regulations, notifications, resolutions;
2. the approval of the submission of bills to the council of Ministers, concerning the administration of the Courts of Justice and the bestowal of justice to the people;
3. the approval of the budget plan for the administration of the Courts of Justice and the Office of the Courts of Justice;
4. the approval of the administration and management of budgets and procurement of the Courts of Justice and the Office of the Courts of Justice;
5. the prescription of working days, traditional public holidays, annual public holidays and leave of absence of officials and employees of the Office of the Courts of Justice;
6. the prescription of seal, emblem or sign for the administration of the Courts of Justice, including the prescription of rules and procedure of using such seal, emblem or sign;
7. the appointment of persons or groups of persons for performing any act as entrusted;
8. the supervision of the administration of the Courts of Justice prescribed by laws;
9. the performance of other acts within the powers and duties of the Judicial Administration Commission prescribed by laws.

The Commission of Officials of the Office of the Courts of Justice

This Commission consists of persons as follows:

1. The first Vice- President of the Supreme Court , as a chairman, The President of the Appeal Court, the Secretary – General of the Civil Service Commission and the Secretary – General of the Office of the Courts of Justice, as ex- officio members.
2. Three judicial officials, appointed by the Judicial Service Commission from judges of each level of Courts.
3. Five officials of the Office of the Courts of Justice, of the level not lower than level eight, elected by officials of the Office of the Courts of Justice, of the level not lower than level six.
4. Qualified members, not exceed three persons, concerning organization development, personnel management, executive and management, who are not or were not judicial officials or officials of the Office of the Courts of Justice; who possess the qualifications and are not under any of the prohibitions prescribed by the Commission of Officials of the Courts of Justice; and who are elected by members in (1) – (3).

The Commission of Officials of the Courts of Justice will appoint officials of the Office of the Courts of Justice as secretary and assistant secretaries.

This Commission has power in respect of the following matters

1. the prescription of qualifications, selection, recruitment, appointment, trial – performance of official duties, development, transfer, promotion, vacation from office, suspension of official service, instruction for temporary resignation, discipline, inquiry and imposition of disciplinary penalty, complaint and appeal against the imposition of penalty on officials of the Office of the Courts of Justice.
2. delegation of powers of officials of the Office of the Courts of Justice, be it for the purpose of acting for or acting as holders of such positions;
3. the prescription of the uniform and dresses of officials of the Office of the Courts of Justice;
4. the employment and appointment of persons as expert or specialists on specific fields beneficial to the performance of duties of the Courts of Justice and the rate of remuneration for the employment;
5. the appointment of persons or groups of persons for performing any act as entrusted;
6. the provisions of welfare or other assistance to officials of the Office of the Courts of Justice;
7. the maintenance of personnel record and the control of retirement of officials of the

Office of the Courts of Justice;

8. the prescription of procedure and conditions for the employment of employees of the Office of the Courts of Justice including the prescription of uniform and dresses, and the provision of welfare or other assistance to employees of the Office of the Courts of Justice;
9. the prescription of other acts for the benefit of personnel management.

2.2 Adjudication

The Courts of Justice have power to try and adjudicate the criminal, civil, bankruptcy, and all cases not being within the jurisdiction of other courts. Meanwhile, the Administrative Courts or the Military Courts deal with the administrative cases and the military criminal cases respectively. This part will show the jurisdiction of the Administrative Court to compare with the Courts of Justice; the Committee for decision of the conflict of jurisdiction; and the power of the Constitutional Court.

The cases falling within the jurisdiction of the Administrative Courts provided by the Act on Establishment of the Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) are as follows:

1. the case involving a dispute in relation to an unlawful act by an administrative agency or State official, whether in connection with the issuance of a by - law or order or in connection with other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;
2. the case involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay;
3. the case involving a dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law or from a by - law, administrative order or other order, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay;
4. the case involving a dispute in relation to an administrative contract;

5. the case prescribed by law to be submitted to the Court by an administrative agency or State official for mandating a person to do a particular act or refraining therefrom;
6. the case involving a dispute in relation to the matters prescribed by the law to be under the jurisdiction of Administrative Courts.

Although the power of each court distinguished by laws, the problem of the overlap of power still remains. Where there is a dispute on the competent jurisdiction among the Courts of Justice, the Administrative Court, the Military Court or any other court, it will be decided by a committee.

This committee consists of the President of the Supreme Court of Justice as a chairman, the President of the Supreme Administrative Court, the Chief of the office of the Military Court and not more than four qualified persons as members. Such qualified members are as followed;

1. a person having knowledge and experience in the trail and adjudication of the Courts of Justice, and elected by the plenary session of the Supreme Court of Justice;
2. a person having knowledge and experience in the trail and adjudication of the Administrative Court, and elected by the plenary session of the Supreme Administrative Court;
3. a person having knowledge and experience in the trail and adjudication of the Military Court, and are elected by the plenary session of the Supreme Military Court;
4. a person having knowledge and experience in laws, not being judge, and elected by the ex- officio members and the qualified members in (1)- (3)

In respect of the Constitutional Court, this court has power to decide whether the provisions of law or bill; or drafts rules of the House of Representatives or Senate or the National Assembly are contrary to or inconsistent with the constitution. It, also, has power to decide a dispute concerning the powers and duties of organs under the constitution. The decision of the Constitutional Court will bind on the National Assembly, Council of Minister, other state organ including Courts. Yet, the decision will not affect the final judgment of the Courts.

3.Judicial System

The Judicial System in this part will focus only on the Courts of Justice. The courts of Justice are classified into three levels consisting of the Courts of First Instance, the Courts of Appeal and the Supreme Court. The current system can be traced back to the court system in the reign of King Rama V. Nevertheless, the Courts of Justice have occasionally developed its efficiency in handling cases. It is found that the developments fall into three types; the increase of the number of courts, the emerge of the division and the branch of courts, and the establishment of the specialized courts.

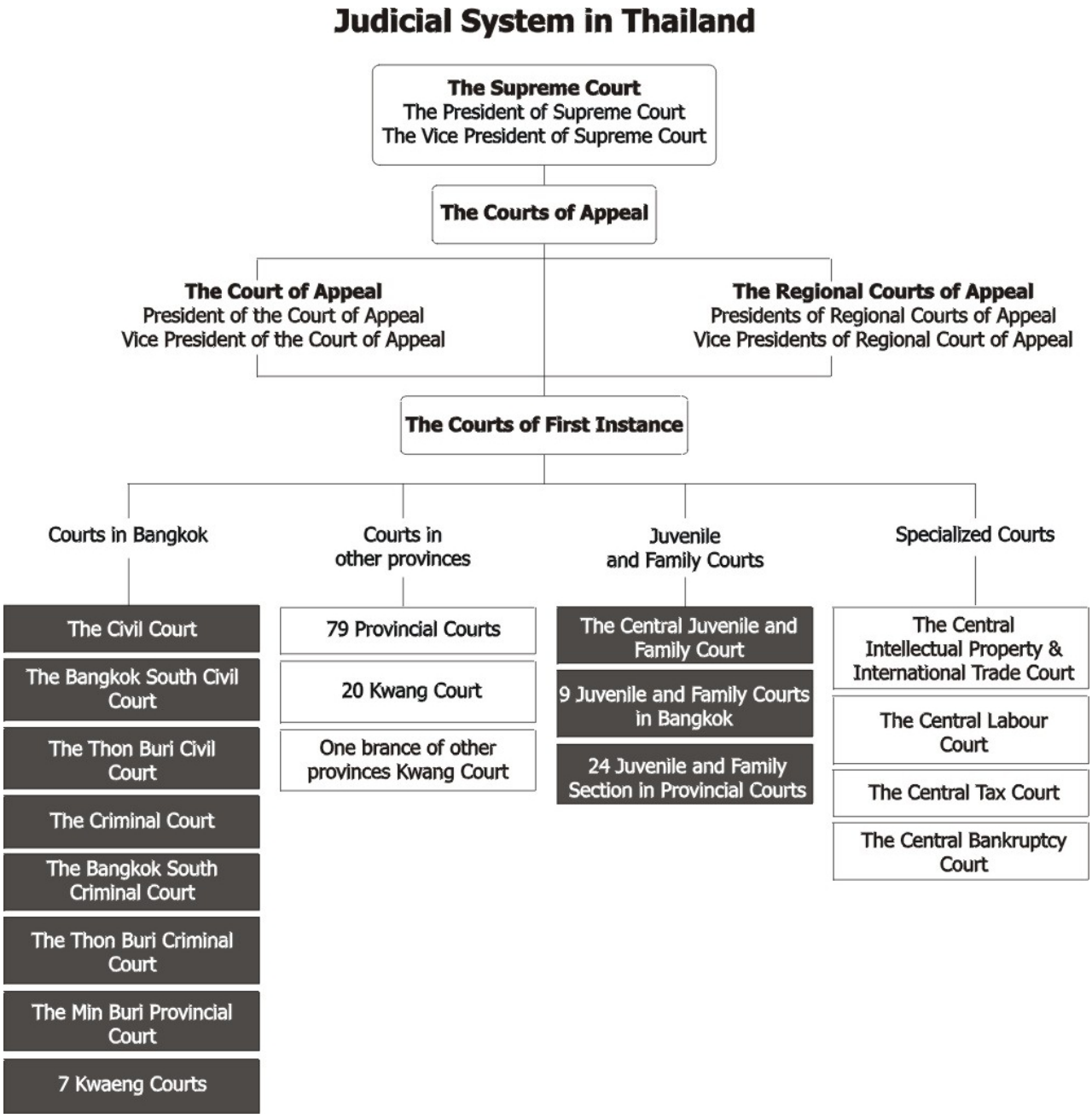


Chart No.3 The structure of the Courts of Justice

3.1 The Courts of First Instance

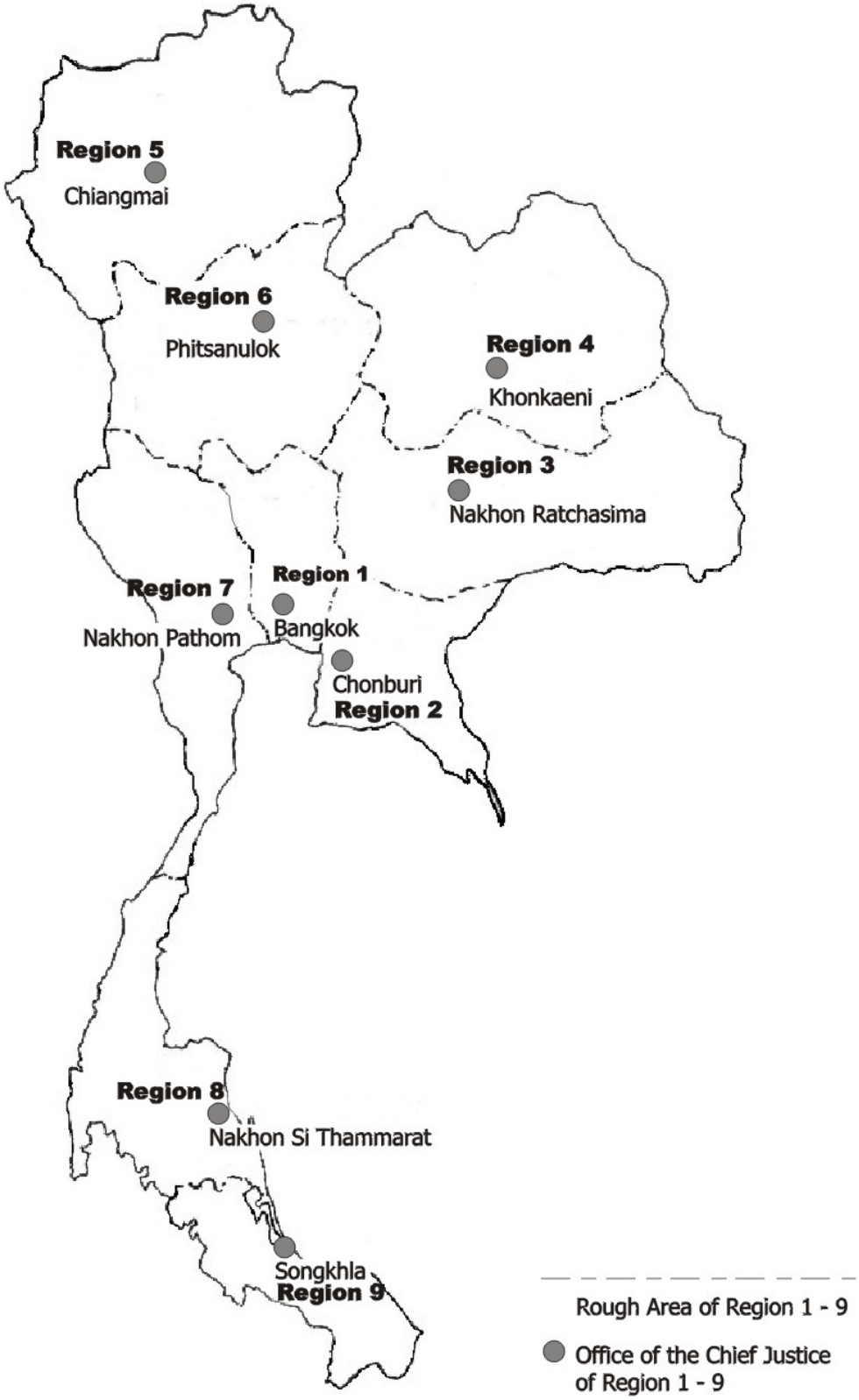
This part will cover all types of the Courts of Justice consisting general courts, juvenile and family courts and specialized courts. The general courts is an ordinary court which has duties to try and adjudicate criminal and civil cases, namely, Civil Courts, Criminal Courts, Provincial Courts and Kwang Courts. Among these courts, it should be separated between courts of First Instance in Bangkok , which has particular feature, and the other provinces.

3.1.1 General Courts

The general courts, except the Kwang Courts, at least two judges form a quorum. However, a judge attached to the court, or a judge at the first level, does not exceed one person in such quorum.

An appeal against a judgment or an order of the general courts will be delivered to the Courts of Appeal.

As regards the administration of the Provincial Courts and Kwang Courts, the office of Chief Justice of Region, presided over by the Chief Justice of the Region, is responsible for the courts in the Region in some extents.



Picture No.1 *Rough area of Region 1-9*

It should be noted that for the purpose of limiting a judge to hold an administrative position , there is no Deputy Chief Justice of the Region, which is different from the former system. In the case where the office of the Chief Justice of Region becomes vacant or in the case of his inability to perform official duties, the President of the Supreme Court will appoint a judge to perform duties of such Chief Justice.

The Chief Justice of the Region is deemed to be a judge of any court in his region and he is has power to try and adjudicate in particular cases, i.e. case regarding offence against the public security, popular case, serious criminal case, the high amount claimed case and case regarding contempt of court. In the case of necessity, the Chief Justice of the Region has power to order a judge of the court in his region to work temporarily, not more than three month, in other court with the consent of that judge, and he has to inform the President of the Supreme Court immediately.

3.1.1.1 In Bangkok

Civil Courts

In principle, the plaintiff has to bring the civil case to the court where the causes of action arise or where the defendant is domiciled. Where the immovable property involved, the plaintiff has to bring the case to the court where such property is situated, or where the defendant is domiciled. In Bangkok , Courts of First Instance dealing with civil cases are the Civil Court, the Civil Court of Southern Bangkok, the Thon Buri Civil Court and the Min Buri Provincial Court depend on the district where the causes of action arise or the defendant is domiciled. Before 1977, the Civil Court was merely court dealing with civil cases in Bangkok; yet the highly increasing of caseload of the Civil Court led to the setting up of the other civil courts in Bangkok .

The Civil Court may either has a discretion to try and adjudicate the cases brought before it, which arose outside its territorial jurisdiction , or order to transfer such case to the court owning jurisdiction. In addition, according to the Counter Money Laundering Act B.E.2542

(1999), the Civil Court has power to decide whether the property is confiscated to the state and the Civil Procedure Code applies mutatis mutandis.

Criminal Courts

As regards the criminal case, the court having power to handling the case is the court where an accused dwells, or an accused is arrested, or an inquiry official makes an inquiry. In Bangkok, Courts of First Instance dealing with criminal cases are the Criminal Court, the Criminal Court of Southern Bangkok, the Thon Buri Criminal Court and the Min Buri Provincial Court depend on the district where an accused dwells, or an accused is arrested, or an inquiry official makes an inquiry. Like the Civil court, the reason to establish other criminal courts in Bangkok was to alleviate the overloaded works of the Criminal Court.

The Criminal Court may either has a discretion to try and adjudicate the cases brought before it, which arose outside its territorial jurisdiction , or order to transfer such case to the court owning jurisdiction. Furthermore, the Criminal Court has power to deal with a criminal offence arising outside the Kingdom of Thailand.

The Min Buri Provincial Court

The Min Buri Provincial Court, the only provincial court in Bangkok, deals with the case arising in the northern part of Bangkok . The character of this court is the same as the general provincial court explained later on.

Kwang Courts

Although, its jurisdiction is limited, but it covers both criminal and civil cases. It tries the criminal offence punishable with a maximum of three years' imprisonment, or fine not exceeding 60,000 Baht or both, and the civil case where the amount of claims does not exceed 300,000

Baht. Kwang Court deals with small matters and the judge sits alone with the limited power to impose the imprisonment not exceeding six months or fine not exceeding 10,000 Baht or both. Where at least two judges constitute a quorum, Kwang Court has power to impose three years' imprisonment, or fine not exceed 60,000 Baht or both.

The proceedings of Kwang Courts is emphasized on the speedy trial, therefore, the case is tried summarily and adjudicated by oral judgment, or summarized judgment. Moreover, for the same reason, petty case with specific procedure provided by the Civil Procedure Code is dealt by Kwang Courts.

3.1.1.2 In other Provinces

Provincial Courts

The Provincial Courts, presided over by the Chief Justice, try both criminal case and civil case. For the purpose of the expanse of services of the court to the distance area, some provinces may have more than one provincial court. For example, in Nakhon Ratchasima Province, there are three Provincial Courts, i.e. Nakhon Ratchasima Provincial Court, Sekew Provincial Court and Buayai Provincial Court. Where a case within the jurisdiction of Kwang Court brought to the Provincial court, the Provincial Court has to transfer the case to the Kwang Court.

Kwang Courts

The detail of Kwang Courts in other provinces is the same as Kwang Courts in Bangkok explained above. It should be noticed that, now, there is a branch of Kwang Court, namely, the branch of the Nakhon Ratchasima Kwang Court situated in Pimay District.

3.1.2 The Juvenile and Family Courts

The Juvenile and Family Courts consist of the Central Juvenile and Family Court, the Provincial Juvenile and Family Courts, and the Division of Juvenile

and Family Court in the Provincial Courts. These courts, presided over by the Chief Justice of the Juvenile and Family Courts, deal with following cases :

1. a criminal case which a child, whose age is over 7 but does not exceed 14, or a young person, whose age is over 14 but under 18,is alleged to have committed a criminal offence;
2. a criminal case transferred from the general court;
3. a family case; the family case is a civil case concerning a minor or family which is filed, requested, required to act in court and enforced by the Civil and Commercial Code;
4. a case, which the court has to decide or order relating a child or a young person, is provided by law as power and duties of the Juvenile and Family Courts.

A child or a young person arrested for a criminal offence will be brought to the Observation and Protection Centre within 24 hours after the arrest. The detention of the child or the young person with the adult is prohibited.

One of the duties of the Observation and Protection Centre is to investigate the child or the young person accused of committing an offence with regard to the age, pass record, behavior, intelligence, education and training, health, condition of the mind, habit, occupation and status of the child or young person, the parents, the guardian, and the householder of such child or young person. These include environment of the child or the young person and the cause of the offence. Later on, the Director of the Observation and Protection Centre will make a report of fact with his opinion concerning the cause and the punishment. This report will be submitted to the court for consideration.

In addition, the welfare and the future of a child or a young person will be taken into consideration of the court in order that the training, instruction, or assistance to reform such child or young person prevail over sentencing. The characteristic, health and condition of mind of a child or a young person are taken into consideration as well. The punishment is on the individual basis, therefore, many children or young persons committed together in the one offence, each child or young person may obtain the different punishment.

In the trial of a family case, the court will attempt to settle dispute, regardless the step of proceedings is passed. The principle of the peace and unity of the family will be taken into account of such conciliation.

Two career judges and two associate judges, one of which must be a woman, constitute a quorum. An appeal against a judgment or order of the Juvenile and Family courts lies to the Courts of Appeal.

3.1.3 Specialized Courts

Nowadays, there are four types of specialized courts, namely, the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court. A judge who possess competent knowledge of the specific matters is appointed to work in the specialized courts. The specialized court, therefore, ensure that the specific or technical problems will be solved by an appropriate judge, which, of course, benefits to the litigants and the judiciary. It should be noted that the each specialized court has only the central court, except the Labour Court which now has branches situated in the other provinces.

3.1.3.1 The Central Labour Court

It is obvious that labour disputes, being different nature from ordinary criminal or civil matters, should be tried before judge whose special concern is with labour laws, and associate judges who represent employer and employee. The court will try to keep a good relation between both parties.

The Act for setting up of Labour Courts and Procedure for Labour cases B.E. 2522 (1979) provided that there shall be three kinds of Labour courts, namely, the Central Labour Court situated in Bangkok with jurisdiction covering Samut Prakan , Samut Sakhon , Nakhon Prathom , Nonthaburi and Pathumthani ; the Regional Labour Court; and the Provincial Labour Court. But so far the Regional Labour Court and the Provincial Labour Court does not exist, thus, the territorial jurisdiction of the Central Labour Court extends to the whole country. The head of the Central Labour court is the Chief Justice of the Central Labour Court .

However, for the administrative purpose, the branches of the Central Labour Court are set up. Such branches ,at present, are available in eleven provinces.

The Central Labour Court deal with matters as follows;

1. a dispute involving rights and duties under employment contract or conditions of employment;
2. a dispute involving labour laws; i.e. laws on employment protection and laws on labour relation;
3. a case provided by labour laws to proceed before the Labour Courts;
4. an appeal made against a decision of an official or a committee prescribed by labour laws;
5. a case between employer and employee on the ground of tort, as a result of labour dispute or working complied with employment contract;
6. a labour dispute submitted by the Minister of Labour and Social Welfare according to laws on labour relation.

The litigation in the Labour Courts is on free of charge basis. For example, the plaintiff brings the case without any costs, or the pleading and documents are served to the other party by the court official.

For the consideration of the court, a qualified person or an expert may be summoned for opinion, and , for the fairness between parties, the court also considers the state of working, the cost of living, the trouble of employee, the level of wages, the rights and other benefits of employee working in the same enterprise, including the status of the employer's enterprise.

A career judge, an associate judge representing employer, and associate judge represent employee form a quorum. An appeal against the judgment or order of the Labour Court is approached directly to the Supreme Court.

3.1.3.2 The Central Tax Court

The establishment of the Central Tax Court is complied with the Act for the setting up of the Tax Courts and Procedure for Tax Cases B.E. 2529 (1986). This act provides two kinds of Tax Court; the Central Tax Court, and the Provincial Tax Court. The territorial jurisdiction of the Central Tax Court covers Bangkok and five province; namely, Samut Prakan, Samut Sakhon, Nakhon Prathom, Nonthaburi and Pathumthani. Yet, so far the Provincial Tax Court does not set up, the jurisdiction of the Central Tax Court, hence, covers throughout the kingdom.

The Central Tax Court, presided over by the Chief Justice of the Central Tax Court, deals with the civil cases in relation to tax disputes as follows:

1. an appeal made against a decision of an official or a committee prescribed by tax laws;
2. a dispute involving a claim of state on tax debt;
3. a dispute involving tax refund;
4. a dispute involving rights and duties under an obligation provided for the benefit of tax collection;
5. a dispute concerning the matters prescribed by the law to be under the jurisdiction of the Tax Court.

In practice, judges of the Central Tax Court are selected from those who specialize in tax laws. Besides, a qualified person or an expert may be summoned by the court for opinion.

In the Central Tax Court, there are at least two judges forming a quorum for trial and adjudication. An appeal against the judgment and order of the court lies directly to the Supreme Court.

3.1.3.3 The Central Intellectual Property and International Trade Court

The territorial jurisdiction of the Central Intellectual Property and International Trade Court covers Bangkok , Samut Prakan, Nakhon Pathom, Nonthaburi, and Pathum Thani Provinces. At present, the Regional Intellectual Property and International Trade Court has not

been established, consequently, the territorial jurisdiction of the Central Intellectual Property and International Trade Court extends throughout the Kingdom.

The court has power to adjudicate both civil and criminal cases regarding intellectual property and civil cases regarding international trade which are as follows:

1. Offences against trademark, copyright, and patent infringement under the Trademark, the Copyright, the Patent Acts
2. Offences relating to trade provided in Section 271-275 of the Criminal Code
3. Civil cases regarding trademark, copyright and patent , and regarding technology transfer or licensing agreements
4. Civil cases arising from the offences provided in Section 271-275 of the Criminal Code
5. Civil cases regarding international sale, exchange of goods or financial instruments, international services, international carriage, insurance and other related transactions.
6. Civil cases regarding letter of credit, trust receipt
7. Civil cases regarding arrest of ships
8. Civil cases regarding dumping and subsidization of goods or services from abroad
9. Civil and Criminal cases regarding disputes over layout-designs of integrated-circuits, scientific discoveries, trade names, geographical indications, trade secrets, and plant varieties protection
10. Any other matters, if subsequent legislation prescribe to be under the jurisdiction of the Central Intellectual Property and International Trade Court
11. Civil cases regarding arbitration to settle dispute stated above.

However, cases falling under the jurisdiction of juvenile and family courts shall not be under the jurisdiction of intellectual property and international trade courts.

Where there is a dispute as to jurisdiction, whether the dispute arises in the Central Intellectual Property and International Trade Court or in any

other courts, the dispute must be submitted to the President of the Supreme Court for his ruling.

The proceedings in the Central Intellectual Property and International Trade Court must be continuous without adjournment until the hearing is over.

The Chief Justice of the Central Intellectual Property and International Trade Court , with the approval of the president of the Supreme Court, is empowered to issue Rules of the Court on matters concerning proceedings and hearing evidence, provided that such provisions must not impair the right of defence of an an accused in a criminal case. The Rules of the Court contain special procedure such as interim injunction, the Anton Piller Order type of procedure, pre-trial conference, submission of written statements in the hearing of witnesses, hearing by means of video conference and admission of computer record.

Quorum of the Bench consists of at least two career judges and one associate judge. Judgment or order of the court is by a majority vote. An appeal against any judgement or order of the Central Intellectual Property and International Trade Court lies directly with the Supreme Court.

3.1.3.4 The Central Bankruptcy Court

The Central Bankruptcy Court, headed by the Chief Justice of the Central Bankruptcy Court, was established by the Act for setting up of the Bankruptcy Court and Procedure for Bankruptcy Cases B.E.2542 (1999). Once this court was inaugurated, other courts of First Instance cannot accept a case falling into the jurisdiction of the Bankruptcy Court.

As regards the Act, there are two kinds of the Bankruptcy Court, the Central Bankruptcy Court, whose the territorial jurisdiction covers Bangkok, and the Regional Bankruptcy Court. The former is the only court so far, therefore, the jurisdiction of the Central Bankruptcy Court

extends throughout the country.

The bankruptcy case is a civil case under the Bankruptcy Law and civil case related to such case. The Bankruptcy Court also deal with the reorganization case . The qualified person or an expert may be called to give opinion for the consideration of the court.

Like the Central Intellectual Property and International Trade Court, the Chief Justice of the Central Bankruptcy Court has power, subject to the approval of the President of the Supreme Court, to issue rules of the court on proceedings and hearing of evidence.

It should be mentioned that the issuing of such rules is the method to improve the proceedings to be more convenient and more flexible, instead of amending of the Civil Procedure Code which is complicated and a time - consuming process.

Judges of the Central Bankruptcy Court are appointed from those who has competent knowledge of the matter relating the Bankruptcy Law and at least two of them constitutes a quorum. An appeal against any judgment or order of the Bankruptcy Court in regarding to a reorganization case, including a civil case related to such case will submitted to the Supreme Court. Apart from that, an appeal is subject to the Bankruptcy Law.

3.2 The Courts of Appeal

The Courts of Appeal are headed by the Presidents of the Courts of Appeal, whom called the Chief Justices in the early times. The Court of Appeal handle an appeal against the judgment or order of the Civil Courts and the Criminal Courts. Meanwhile, the Regional Courts of Appeal handle an appeal against the judgment or order of the other Courts of First Instance. The divide of cases among the Regional Courts of Appeal is consistent with the jurisdictions of the courts of First Instance Region 1-9.

The Court of Appeal and the Courts of Appeal Region 1-9, except the Court of Appeal Region 2 which has just been moved to Rayong Province in September,

2000, are situated in Bangkok . It is likely that the other Regional Courts of Appeal will be moved out of Bangkok to facilitate the communication between the Courts of First Instance and the Regional Courts of Appeal.

The Courts of Appeal has not only power to try and adjudicate an appeal against the judgment or order of the Courts of First Instance, but also the following powers:

1. to affirm, correct, reverse or dismiss the judgment, imposing the death penalty or life imprisonment, of the Courts of the First Instance which is submitted to the Courts of Appeal prescribed by the Criminal Procedure Code;
2. to decide a motion or a request submitted to the Courts of Appeal according to the laws;
3. to decide a case which the Courts of Appeal have power prescribed by other laws.

The quorum of the Courts of Appeal consists of at least three justices.

3.3 The Supreme Court

The Supreme Court is the final court to try and adjudicate an appeal against a judgment or a order against the Courts of Appeal or ,in the particular case, the Courts of First Instance. The President of the Supreme Court is the head of the Supreme Court and Courts of Justice. In the new system of the Courts of Justice, the President of the Supreme Court plays a great role in judicial and administrative works.

At least three justices of the Supreme Court form a quorum. Moreover, the plenary session of the Supreme Court justices will be held, normally, where there is inconsistent with any issue of laws.

The Supreme Court is divided into divisions for handle the specific case. Furthermore, there is, as a result of the constitution, a Criminal Division for Persons Holding Political Positions in the Supreme Court.

Where the Prime Minister, a minister, member of the House of Representatives, senator or other political official is accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Criminal Code or a dishonest

act in the performance of duties, or corruption according to other laws, this division has the jurisdiction to try and adjudicate the case.

In trial, the member of the House of Representatives or senator is unable to claim the immunity provided in the constitution. However, the Criminal Division for Persons Holding Political Positions in the Supreme Court has to rely on the file of the National Counter Corruption Commission and may investigate to receive additional facts and evidence as it think fit.

The quorum consists of nine justices of the Supreme Court who hold position of not lower than justice of the Supreme Court, and are elected by a plenary session of the Supreme Court justices on a case by case basis. The judgment will be made by a majority of votes; provided that each justice constituting the quorum will prepare the written opinion and make oral statements to the meeting before making decision. Orders and decisions of the Criminal Division for Persons Holding Political Positions in the Supreme Court will be disclosed and final.

Chapter Four: Personnel in the Machinery of Justice

Paper Outline

1. **Judge**
   1.1Types of Judge
      1.1.1 Career Judge
      1.1.2 Senior Judge
      1.1.3 Associate Judge
      1.1.4 Datoh Justice
   1.2 The performance of duties and securities
   1.3 The Judicial Service Commission

2. **Public Prosecutor**
   2.1 Organization
   2.2 The performance of duties

3. **Attorney**
   3.1 Organization
   3.2 Works

1. Judge

In this part, the types of judges will be illustrated in details and followed by the performance of duties , securities of judge and the Judicial Service Commission.

1.1 Types of Judge

There are four types of judge in the current system, namely, a career judge, senior judge, associate judge , and Datoh Justice.

1.1.1 Career Judge

The general qualifications of persons eligible for Judge – trainee are as follows:

1. being of Thai nationality;
2. being not lower than twenty five years of age;
3. upholding the democratic regime according to the constitution with good

faith;

4. being the ordinary member of Thai Bar Association;
5. not having ignominious or immoral conduct;
6. not being insolvent;
7. not being in the period of suspension of official service or temporary resignation;
8. not having been expelled, dismissed or removed from the official service, state agency or state enterprise;
9. not being imprisoned by a final judgement except for an offence committed through negligence or a petty offence;
10. not being incompetent or quasi- incompetent person or a person of unsound mind or mental disorder or having body or mental which is inappropriate to be a judge or having disease prescribed by the regulation of the Judicial Service Commission;
11. passing the physical and mental examination by the committee of doctor , consisting not less than three doctors, and the report of such committee approved by the Judicial Service Commission.

There are three methods to choose a judge – trainee. Each method requires the different qualifications of candidate.

The first method is an open examination, and the candidate will have the following qualifications:

1. having LL.B., or having law degree or certificate from foreign country , not lower than Bachelor's degree;
2. passing the examination of the institute of Thai Bar Association;
3. having not less than two years experience in legal professions, namely, registrar, deputy registrar, official receiver, executing officer, probation officer, public prosecutor, officer of the Judge Advocate General Department, attorney.

The second method is called a knowledge test, the candidate will have the following qualifications:

1. passing the examination of the institute of Thai Bar Association;
2. having one of following qualifications:

2.1 having law degree or certificate from foreign country , with a curriculum being not less than three years, not lower than Bachelor's degree, or having Ph.D. in the field of laws from Thai university;

2.2 having law degree or certificate from foreign country , with a curriculum being not less than two years or combined curricula being not less than two years, not lower than Bachelor's degree, and having not less than one year experience in legal professions;

2.3 having LL.M. from Thai university and having not less than one year experience in legal professions;

2.4 having LL.B. with honors and being a lecturer in law in the public university for not less than five years;

2.5 having LL.B., being the official of the office of the Courts of Justice in the field of laws not less than six years and having a good conduct approved by the Secretary – General of the Office of the Courts of Justice;

2.6 having master degree or Ph.D. in the field prescribed by the Judicial Service Commission, having LL.B., and having not less than three years experience in legal professions or professions prescribed by the Judicial Service Commission;

2.7 having bachelor degree or its equivalent in the field prescribed by the Judicial Service Commission, having not less than ten year experience until being expert in such professions prescribed by the Judicial Service Commission, and having LL.B.

The third method is a newly special selection , the candidate will have the following qualifications

1. having one of following qualifications

1.1 being or having, in the past, been Professor or Deputy Professor in the public university;

1.2 being or having, in the past, been a lecturer in law in the public university for not less than five years;

1.3 being or having, in the past, been government official not lower than director or its equivalent;

1.4 being or having, in the past, been attorney for not less than ten years.

2. passing the examination of the institute of Thai Bar Association;
3. having excellent knowledge and experience in the field of law prescribed by the Judicial Service Commission;
4. being honest, and having appropriate personality, conduct and opinion for performing duties as the judicial official.

Once the candidates are recruited, they have to be trained as judge – trainees at least one year. After completion of training, and results of training are satisfied, the judge – trainees will be to be approved by the Judicial Service Commission and tendered to the King for royal appointment to be a judge attach to the court. Furthermore, the trial and adjudication of cases are performances in the name of the King; thus, before taking office as a judge, they have to make a solemn declaration before the King.

In the current system, there are five levels of position of justice, excluding judge – trainee, it is ranged from the judge attached to the court, the first level, to the President of the Supreme Court, the fifth level. The promotion to upper position is provided by law and under the consideration of the Judicial Service Commission.

In regarding to a removal of Judge, the following matters make a judge vacated from the office:

1.death;
2.resignation;
3.vacation from the office under the law on government pension fund;
4.transfer to serve in a position of government official, not judicial position;
5.resignation for being in military service;
6.being instructed to resign
7.being expelled, dismissed, or removed from the office;
8.the Senate passing a resolution for the removal from office.

The last is resulted from the constitution which provides that member of the House of Representatives of not less than one - fourth of the total member of the existing members of the House, or voter of not less than fifty - thousand in number has right to request the senate to pass a resolution removing judge

from office. The ground of removing is that judge is under the circumstance of unusual wealthiness or under circumstance indicative of the commission of corruption, malfeasance in judicial office or an intentional exercise of power contrary to the provision of the constitution or law.

1.1.2 Senior Judge

According to the Rules of appointing and holding senior judge position Act, B.E. 2542 (1999), where judges are of sixty years of age, they remain in office to perform duties, but merely, in the Courts of First Instance , provided that they are approved by the Judicial Service Commission and they are tendered to the King for royal appointment. When they become sixty five years old, and pass the assessment of performance fitness, they are able to be senior judges until they will be seventy years of age.

A senior Judge cannot be appointed to hold an administrative position; namely, a Chief Justice, or even to perform duties in place of such person. Furthermore, the senior judge is prohibited not only from being elected to be a member of the Judicial Service Commission, but also to vote for a member of such commission.

1.1.3 Associate Judge

Associate Judges are layman and selected by the Judicial Service Commission to perform in the Juvenile and Family Courts, the Central Labour Court and the Central Intellectual Property and International Trade Court. However, the aim of having associate judges in each court depends upon the works of the court.

In the case of the Juvenile and Family Courts, the associate Judges are experienced person in family or in the welfare of children and young person. The qualification of the associate judge of the Juvenile and Family Courts are as follows:

1. not being under 30 years of age;
2. has or, having had, in the past, child, or having worked relating to the assistance or the guidance to the children or young person at least two years;

3. having appropriate disposition and behavior to try a juvenile and family case.

In the case of the Labor Courts, it is involved , for the purpose of fairness and the balance of power, tri – parties ; i.e. the court, the employer and the employee. The associate judge are elected, prescribed by law, by the employer association and the trade union.

In the case of the Intellectual Property and International Trade Court, the associate judges are experts in intellectual property or international trade matters and assist career judges to decide the case.

1.1.4 Datoh Justice

According to the Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Province, B.E. 2489, the Islamic Law on Family and Succession except the provisions on prescription in respect of succession shall apply in place of the Civil and Commercial Code in giving decision in civil cases concerning family and succession of Islamites. Where cases have arisen in the area of those four provinces, and both plaintiff and defendant, or the person filing request in non-contentious case are Islamites, there are Career Judges with Datoh Justice who is expert in Islam try and decide the case in order to comply with the principle of Islam. Datoh Justice has to be not less than thirty years of age, know Thai language at the prescribed level , and has knowledge in Islam in order to be able to decide the Islam laws relating to family and succession.

1.2 The performance of duties and securities

Because of the shortage of judges, in practice, a case is tried by a judge alone. Nevertheless, such practice will be ceased in 2002 by the result of the provision of the constitution. The constitution provides that the hearing of a case requires a full quorum of judges. Any judge not sitting at the hearing of a case will not give judgment or decision of such case.

The other duty, involving human right protection, is added by the constitution is

issuance of a warrant of arrest of a person who committed a criminal offence. The principle is that no arrest will be made without such warrant. The court, in 2002, will have to consider a reasonable evidence before a warrant of arrest is issued.

To comply with the above provisions, the increasing numbers of judge is an urgent task for the Courts of Justice.

As regards the securities, the following securities ensure the independence of judge.

(1) Salary

An appropriate salary is a part of securities of judges. Initially, the system of salary – scale of judges is connected to the system of civil servants; hence, it is difficult to increase salaries of judge without any effect to the civil servants. The constitution provides that the system of salary – scale or emoluments applicable to the civil servants is not applied which means that the increment of salaries of judges to the suitable rates will be made easier than earlier time.

(2) The supervision

Although the position of the Chief Justice of courts is higher than judges, the Chief Justice is unable to interfere the works of judges. The constitution provides that the trial and adjudication are not subject to hierarchical supervision, and the distribution of case files to judge will be in accordance with the rules prescribed by law , not depending upon the discretion of the Chief Justice. In addition, the recall or transfer of case files is not permitted in the case where the justice in trial and adjudication of the case is otherwise affected.

(3) The transfer

Apart from that the Judicial Service Commission ensures the protection for judge carrying out his or her duties, the constitution provides that the transfer of a judge without his or her prior consent is not permitted, except in the case of transfer in term as provided by law, promotion to a higher position, being under a disciplinary action or becoming a defendant in a criminal case.

1.3 The Judicial Service Commission

The former Judicial Service Commission is composed of twelve members: Four are ex-officio members, namely, the President of the Supreme Court, the Chief Justice of the Court of Appeal, the First Vice President of the Supreme Court, the Permanent Secretary of the Ministry of Justice; four qualified members are elected from among

other Vice President of Supreme Court, the other Chief Justice of the Courts of Appeal, senior justices of the Supreme Court, Deputies Chief Justice of the Courts of Appeal, Chief Justices of the courts of First Instance; and other four are elected from retired judges.

The loss of the retired judges in the composition and the combination of the persons elected by the senate, for the purpose of the connection between the judiciary and people, in a new composition are resulted from the constitution.

The Judicial Service Commission consists of the following persons:

1. the President of the Supreme Court, as chairman;
2. twelve qualified members of all levels of Courts, four persons from each level, who are judicial officials of each level of Courts and elected by judicial officials of all levels of Courts;
3. two qualified members who are not or were not judicial officials and who are elected by the Senate.

The appointment, and the removal from office of judges must be approved by the Judicial Service Commission before tendering to the King. In addition, the promotion, the increase of salaries, and the punishment of judges must also be approved by the commission, and this commission will appoint a sub – committee in each level of Courts for preparing and presenting its opinion on such matter for consideration. The sub – committee consists of the seven judicial officials of each level of Courts.

2. Public Prosecutor

A Public Prosecutor is an official under the Office of the Attorney – General. The main work is to prosecute criminal cases. The head of this office is the Attorney – General.

2.1 Organization

Formerly the office of the Attorney – General is called the Public Prosecutor Department , presided over by the Director, and such department is a part of the Ministry of Interior. In 1991, this office was separated from the Ministry of Interior, and became a state agency under the direct supervision of the Prime Minister.

The appointment, the promotion, the increase of salaries, the transfer, the removal and punishment of a public prosecutor must be approved by the Public Prosecutor Commission. This commission consists of the following persons:

1. a president selected from a retired official, who has, in the past, served in a position not lower than Deputy Attorney – General, or Attorney – General, or a qualified person in a field of laws, who is a retired official and has served, in the past, in a position not lower than Director or its equivalent. Those have not been either a member or an official of a political party in the past 10 years, or political official, a member of the House of Representative, a senate, or an attorney;
2. the Attorney – General, as a Vice – President;
3. a Deputy Attorney – General, a Special Prosecutor in advisory division, a Special Prosecutor in litigious division, a Special Prosecutor in legal affairs division, as ex – officio member;
4. six qualified members elected by the public prosecutor being the official at the second level or more.

Three qualified members are from the Public Prosecutor at the fourth level who are not the ex – officio member. The other three qualified members are from the retired public prosecution who are not a political official, a member of the House of Representative, a senate, a director of a political party, an official of a political party, or an attorney.

It should be noted that in the current system of the public prosecutor, there are eight levels of position, ranging from a public prosecutor- trainee to the Attorney – General.

The qualifications of persons eligible for a public prosecutor – trainee are as follows:

1. having LL.B., or having law degree or certificate from foreign country , not lower than Bachelor's degree;
2. passing the examination of the institute of Thai Bar Association;
3. having not less than two years experience in legal professions, namely, judicial official, registrar, deputy registrar, official receiver, executing officer, probation officer, officer of the Judge Advocate General Department, attorney or other legal profession prescribed by the Public Prosecutor Commission;
4. being of Thai nationality;

5. being not lower than twenty five years of age;
6. upholding the democratic regime according to the constitution in good faith;
7. being the ordinary member of Thai Bar Association;
8. not having ignominious or immoral conduct;
9. not being insolvent;
10. not being in the period of suspension of official service or temporary resignation;
11. not having been expelled, dismissed or removed from the official service, state agency or state enterprise;
12. not being imprisoned by a final judgement except for an offence committed through negligence or a petty offence;
13. not being incompetent or quasi- incompetent person or a person of unsound mind or mental disorder or having body or mental which is inappropriate to be a judge or having disease prescribed by the regulation of the Public Prosecutor Commission;
14. passing the physical and mental examination by the committee of doctor , consisting not less than three doctors, and the report of such committee approved by the Public Prosecutor Commission.

A public prosecutor will be vacated from the office on the ground of the following matters:

1. death;
2. vacation from the office under the law on government pension fund;
3. resignation;
4. transfer to serve in a position of government official;
5. resignation for being in military service;
6. being instructed to resign;
7. being expelled, dismissed, or removed from the office;
8. the Senate passing a resolution for the removal from office.

The last is resulted from the constitution which provides that member of the House of Representatives of not less than one - fourth of the total member of the existing members of the House, or voter of not less than fifty - thousand in number has right to request the senate to pass a resolution removing a public prosecutor from office. The ground of removing is that public prosecutor is under the circumstance of unusual wealthiness or under circumstance indicative of the commission of

corruption, malfeasance in judicial office or an intentional exercise of power contrary to the provision of the constitution or law.

As shown above, The system of the public prosecutor; for example, the Public Prosecutor Commission, the appointment of public prosecutor – trainee and the removal from the office is close to the system of the Courts of Justice.

2.2 The performance of duties

The duties of the public prosecutor are divided into 4 parts; duties in criminal matters, duties in civil matters, legal aids, and other duties.

1. Duties in Criminal matters

Where the police decide, after detection and investigation, that the offender should be prosecuted, the case is handed over to the public prosecutor. The public prosecutor is able to make the decision to continue or drop the case, and the public prosecutor may order the police for additional investigation before making decision. A public prosecutor takes a responsibility to bring the criminal case to the court and continue the criminal proceedings.

Moreover, in the case that a criminal action is brought against the government official who perform his or her duties, the public prosecutor will be an advocate for such official.

The Office of the Attorney – General has made an attempt to be a central organization for international cooperation in criminal matters.

2. Duties in civil matters

The Office of the Attorney – General is able to provide the government agencies, state enterprise, provincial authorities, or municipalities the legal advice. It , also, provides a counsel for the government in the civil case. In addition, it is able to review a draft of contract between a private entity and a government agency or state enterprise.

3. Legal Aid

The Office of the Attorney – General provides legal aid for persons of very limited

means. The assistance covers various kinds, i.e. advice, legal aid for court proceedings, or conciliation process.

4. Other duties

The other duties of the public prosecutor are prescribe by laws, such as where the Attorney – General institutes prosecution in the Criminal Division for Persons Holding Political Positions in the Supreme Court after receiving the report from the National Counter Corruption Commission.

3. Attorney

To perform as an attorney; for instance, drafting a file or an appeal, or proceeding before a court, a person is required to register and receive a license from the Law Society, The example of the qualifications of the person eligible for applicant are as follows:

1. being of Thai nationality;
2. being not less than 20 years of age on the day of applying for registration and receiving the license;
3. having graduated with LL.B., or sub – bachelor' s degree, or certificate in the field of law, or its equivalent, and being a member of Thai Bar;
4. not being official or local official who has salary and permanent position, except political official

The applicant must attend in the training course set up by the Law Society, except he has been a attorney, a judge, public prosecutor, legal professions in military court, or has been practiced in the law office at least 1 year.

3.1 Organization

The attorney have their own assembly called the Law Society of Thailand, which is set up by the Attorney Act B.E. 2528 (1985). The objectives of this society are as follows:

1. promotion of the education and the attorney as a profession;
2. control of the etiquette of attorney;
3. promotion of the unity and dignity of the member;
4. promotion and provision of welfare of the member;
5. promotion, assistance, advice, dissemination and provision of education

concerning laws to the people.

The main duties of the society is to perform a registration and issue the license to the applicant. This society, also, has a committee dealing with the etiquette matters of the attorney. In addition, the legal aid is the service of the society for persons of very limited means.

The society is administered by the committee of the society, which consists of a representative of the Ministry of Justice, a representative of the Thai Bar, the President of the society and other members not more than 23 person elected by the member of the society, at least 9 member must have the offices attached to the Regional 1 – 9.

3.2 Works

The attorney in Thailand do not divided to barrister and solicitor, the works of attorney, therefore, include advising a client on legal, financial, or tax matters, drafting an agreement, giving an opinion on legal problems, and proceeding in court. In the performance of duties, the attorney need to comply with the etiquette of the attorney. Such etiquette , ruled by the committee of the Law Society, covers the following matters:

1. an etiquette to the court, and the practice in court.;
2. an etiquette to the client;
3. an etiquette to other attorney;
4. an etiquette of general litigants;
5. the dress of the attorney;
6. the compliance with the order of the etiquette committee, the committee of the Law Society.

It should be noted that the attorney from foreign countries do not be permitted to work in Thailand. However, it is likely that such law will be effected by the free trade market policy. Therefore, the improvement of standard of attorney in Thailand to cope with the international standard is interesting topic from now.

Chapter Five: Legal Education and Training of Legal Profession

Paper Outline

1. **Legal Education in Thailand: Historical Background**
   1.1 Before Legal and Judiciary System Reform
   1.2 After Legal and Judiciary System Reform
2. **Legal Education in Thailand: Current and Future Trend**
3. **Legal Profession Training and Development**
   3.1 Judiciary
   3.2 Public Prosecutor
   3.3 Lawyer

1. Legal Education in Thailand: Historical Background

1.1 Before Legal and Judiciary System Reform *[before B.E. 2411 (A.D. 1868)]*

Back in the year of B.E. 1781 (A.D. 1238), the Kingdom of Thailand was in the period of Sukhothai Reign. King Pau Khun Sri-Intratit of the first monarchy, which was called "the Fountain of Justice", had provided way of solving the disputes among his citizens by exercising his power himself. His judgment was a sign that the king impliedly imposed rules or regulations which were meant to be the law of the kingdom. In B.E. 1862 (A.D. 1319), the invention of Thai Alphabetical words were established by King Ramkhamhaeng Maharaj. It was then the new era of education in all range of knowledge including opportunity to record all events and historical stories of the kingdom. Nonetheless, many legal nobles believed that the law was recorded even before that invention. Some said that the law was written in the Khmer script or Sanskrit script, the language which was originated in India and widely used in those periods and the law had some root from Code of Manu, the ancient Hindu Jurisprudence. However, when Thais had their own alphabet, they recorded the law in the so-called "Sila-Jaruk" or Royal Stone Inscription, under supervision of King Ramkhamhaeng Maharaj. According to the Sila-Jaruk, the record showed that there was the implication of some rules that had criminal penalty and some rules in civil matters. At that period, there was evidence that people had

started studying many fields of knowledge such as medical science, literature, mechanical subject and so on. But legal education was dimly shown its existence because the society then was simple and static. Way of life among that period was plain. And more importantly, people had great respect to the King who presided upon the dispute and delivered judgment; everyone honor the King decision without any question. There was no need for complication of the rules imposed by the King to regulate his people. In this period, people were more interested in working for living than in legal matter which, somehow, was not acquainted with their daily lives. Therefore, the legal education back then was not likely established in systematic function even thought the law itself had been starting to surround the community. The way of dispatch legal knowledge was done by telling and someway teaching between relatives and friend among persons who needed to exercise their legal rights.

In B.E. 1893 (A.D. 1350), the so-called “Sri Ayudhaya Period”, Krung Sri Ayudhaya was promoted as the capital city of Thailand till B.E. 2310 (A.D. 1767). The society of this period became more subtle because of the improvement of people’s life and increasing of population. The King had no longer overseen and delivered his royal decisions to all dispute put before him. The King instead delegated his power of judiciary to his royal noble officials or the so called “Purohita” ,the Chief Chaplain to the King, who had general knowledge in legal matter. However, the King’s power of judiciary was still absolute in his hands. When the King delivered judgment by himself, it was the model and royal precedent for others to follow. Consequently, it became law. In the same time, the King also exercised his power on legislation to order his royal officials drafting the law and be reviewed and declared by him. During this period, King U-Thong gave his order to have all legal matters assembled and put in written forms for the first time. Even though it was evident that the law was getting more and more evolved but the group of people who gained legal knowledge was confined to the royal officials who were entitled on the legislation and judiciary matters in the royal palace. The Legal education, therefore, started literally from the royal institution among those royal officials.

In the beginning of Rattanakosin period, B.E. 2325 (A.D. 1782), after the end of Sri Ayudhaya Period where Thailand had lost to Burma (Myanmar) during the war, some collections of the law which had been recorded during Sri Ayudhaya Period were

partly destroyed from the Burma invasion. The first monarch of Chakri Dynasty in this period, King Rama I, exercised the law partly inherited from Sri Ayudhaya period and in the same time he engaged the power of judiciary and created the precedent of the law to fulfill the missing. He also established new rules of law, which conformed to way of life during his period of the reign. And according to his concern in the law, he ordered to have all laws and regulations assembled, revised and rectified. After 11 months, the rectification was finished and the law was written into three copies and was called "the Three Emblems of State Law or the Law of the three Great Seals". This Law was considered as the original formality of the Law of the Land and was used as the Basic Law of judiciary. This Law had been used for 103 years. In the meantime, there were some minor laws enacted to solve some urgent problems. Legal study during this period, however, had not been changed much since Sri Ayudhaya Period because the way of life and culture maintained its pattern including legal system and judiciary.

In B.E. 2369 (A.D. 1827), while Thailand had been developing trade relation with western countries for some period of time, England, under resenting perspective in trading with Thailand because of the monopoly of Thai bureaucrats, threatened to use force to amend the Thai regulations and rules of law on trading. However, King Rama IV, who just ascend the throne, proposed the agreement with England and other colonial hunting countries on trade and relationship. Those countries, therefore, became soften their resent. However, Thailand was inevitable under pressure to conclude the Royal Relation Treaty to England called "Bowring Treaty" which in fact brought about unequal right to economy, law and judiciary of Thailand. According to the treaty, English had no obligation to Thai law and judiciary. Other western countries followed suit, claiming that their people should not be put under Thai law and judiciary as well because of the lag behind and unsystematic of Thai Law and Courts. They preferred to have their people respond only to their laws and special tribunal of judiciary established by them. This situation created special right of judiciary over sovereignty of Thailand for foreigners; it was consequently harmful to Thai legal Society. King Rama IV, therefore, was trying to improve Thai law and judiciary acceptable to other countries. The Thai law was then written and promoted to foreigners and Thai people to understand and act according to the law. Also in this period, technique of printing was invented. Therefore, many law books were available to all people who were interested. Legal study during this period, having

the effect from legal knowledge in the law books, moved forward dramatically even though there was no law school, law curriculum or technique of teaching law in systematic pattern.

1.2 After Legal and Judiciary System Reform *[after B.E. 2411 (A.D. 1868)]*

At the time when King Rama V was reigning the kingdom in B.E. 2411 (A.D. 1868), England and France both conquered and colonized Thailand neighboring countries. Therefore, it was the time for Thailand to get ready to challenge the threat of colonization. Improving and developing the country in the way of westernization was the plan to challenge or slow down the threat from those countries. The King ordered the moves to revolution of the administration foundation toward modernization. In the area of State Administration, the King appointed the Privy Council and the Council of State to deliver advice of state administration and policy in the same style as English system. In the area of public utility, the King built water supply, electricity and post offices. In the area of public health, the King established hospitals and medical school. And one of the significant royal responsibilities created by the King was the declaration of abolishment slavery system in Thailand. The Kingdom in this period was in the so-called “Absolute Revolution”. When the community was prospering, communication and trade relation among people was expanded. There were a lot of foreigners coming to Thailand and the numbers had been increasing drastically. However, the factor that made Thailand felt troublesome to cope with foreigners was exception of judicial power above them. When the aggressive western countries were trying to interpret the treaty to expand its special rights not to be obligated to Thai Law and Judiciary for those Asian people in their colonized nations, It was led the incredible way for those to evade the law and justice. Consequently, the law was not seen as the enforceable tool for administering and protecting peace in the community. The only way to confront with these undue practices was to improve Thai legal system and judiciary at the maximum to the acceptance of western countries and brought back the sovereignty right of the judiciary above the people of the western nations living in Thailand.

In B.E. 2434 (A.D.1891) the royal Thai government announced the establishment of the Ministry of Justice which was the organization mainly responsible to reform and

improve Thai judiciary. The moving of Thai legal system followed modernization of the European countries. Common Law and Civil Law system were among the system that Thai looked forward to adaptation as Thai model law. In the first place, there was an idea to bring Common Law system as the principal law for Thai legal adaptation because most of Thai lawyers and judiciaries graduating with law degree from England were familiar with this system. However, after taking serious consideration, all concluded that Common Law system was more suitable to English people than others because it was the system that the Law was based mainly on traditional practices and judgments of the Court. The Law was not organized well enough for studying and using as the model. On the other hand, Civil Law system of the continental has been well-organized into section of code which was suitable to learn and adopt. Moreover, many western countries except only England exercises Civil Law system. If those countries accepted Thai legal system and judiciary as moving toward the modernization of the Civil Law system, it would be more possible that multilateral negotiation to terminate undue advantages on the Thai law and judiciary would be agreed upon. Finally, the royal Thai government took Civil Law system to be the model of Thai legal adaptation. In the process of reforming Thai legal system, there was the consideration of the real need of the people, custom practice, tradition, culture and way of life; not just made the copy of the law. The very first law reform was the Criminal Code on the Chakri Dynasty Era of 127 (B.E. 2451). This Criminal Code was drafted with very thorough consideration and discreet. Firstly, the draft was done in English by Mr. George Padoux, the Chief of drafting committee which included some of legal foreigner experts and the draft, then, was translated into Thai. This Criminal Code was considered as the very modern law at the time because the popular principles of criminal law of the western countries were included while some rules were changed to suit with Thai community. In the following, in B.E. 2438 (A.D. 1895) there were 2 other drafting laws, the draft of Civil Procedure and Constitution of the Court of Justice. And in the later year, many laws were drafted and utilized. In B.E. 2478 (A.D. 1935) Thailand had the set of code laws which included Criminal Code, Civil Code, Criminal Procedure Code, Civil Procedure Code and Constitution of the Court of Justice. That was the period of the fulfillment of the legal system and judiciary reform to challenge with western countries and to claim back independence of the Thai judiciary. Finally, in B.E. 2481 (A.D. 1938) Thailand gained back entirely its independence of the Law and judiciary from all western countries. It is important to note that even though Thailand had

reformed Thai legal system and judiciary, it was also exhausted with diplomatic persuasion with powerful countries and trading off some of its territories to bring about this result. Upon this reform of the legal system and judiciary, the legal study had been expanding from simple learning in the house or premise of the royal official to teaching law in the royal institute among new officials and in the same time sending some of scions of the royal house and outstanding officials to study law overseas. For example, the King sent his brother, HRH Prince Sawasdi-Sophon, to study at Balliol College of Oxford University, England and sent Khun Luang Phraya Krai Sri, a Thai judge, to study Barrister-at-Law in the English Bar institution. Later on the King's son, HRH Prince Rapee-Pattanasak or Prince Rajburidirekrit, was sent to study law at the Christ Church College, Oxford University in England. This Prince was the one who later founded the first law school in Thailand and he was acclaimed as "the Founder of Thai Modern Law". And many officials and judges were sent to study and graduated with Bachelor degree of laws from Cambridge and Oxford University and Barrister-at-Law from many institutes such as Gray's Inn or Middle Temple.

In the period of establishment of the Ministry of Justice, workload of cases was one of the problems the department had to solve. However, in the beginning, the solution focused on court procedural efficiency rather than inputting manpowers. But when the laws were being reformed and there was a need to have personnel with adequate knowledge to the reformed law, the government, temporally, hired legal experts from foreign countries which had no conflict of interest to Thailand to solve the lack of personnel. For example, the government hired Mr. Rolin Jacquemyns and Mr. R. J. Kirkpatrick, legal advisers from Belgium. Mr. Tokichi Masao from Japan and Mr. William Alfred Tilleke from Sri Lanka were invited to work with Thai judges. However, the Thai government had to hire some legal advisers from England and France due to the commitment of the treaty between Thailand and those countries. These legal experts even though working in Thailand for years, however, still had the perception that interest of their countries should come first. Therefore, Thai government was trying to keep the number of foreign legal advisers to the limit. And the King was trying to send more Thai officials to study overseas meanwhile trying to educated officials with better knowledge in law by providing legal education. In B.E. 2440 (A.D. 1897), under the responsibility of HRH Prince Rapee-Pattanasak, who was promoted as the Head Official of the Ministry of Justice at the

time, the school of law was established with determination of producing new generation of legal officials to handle judicial tasks under the reformed legal system. In the beginning, the school had around 100 students participating in classes. Chief Justices of the civil and criminal courts and some other judges came to help as the lecturers of the law school. The style of teaching in the school was like English legal teaching because most of the lecturers graduated from England. Moreover, English culture had played important role in the society at the time. The curriculum and law books used in the school were adapted mostly from England. However, when the time went by, many lecturers wrote more law texts in different areas of law such as land law, law on evidence, civil damages, corporate law, contract law etc. The curriculum of the law school was one-year term and final examination was provided at the end of term before graduating with Barrister-at-Law degree. In November 22, B.E. 2440 (A.D. 1897), the Ministry of Justice announced the schedule of the first examination during December 2-7, B.E. 2440. The subjects of the examination included criminal, contract, succession, tort, family law, procedural law and international law. Each day, there would be 10 questions to be answered and 4-hour period (9.00 – 13.00) was allowed to complete the examination. For the first examination there were 9 out of 100 students passed this test and qualified as Barrister-at-Law. In B.E. 2441, the school proposed the plan to have a committee taking care and running the school. Therefore, the committee so-called “the Thai Bar Association” was established. The conference of the Bar would be entitled to vote for the members of this Bar Association. All regulations of the school was enacted such as school regulation on committee election, committee process of conference, conduct investigation of Barrister, process of admitting judge who graduated from overseas to be Thai Barrister-at-Law, process of applying to be students in the school, process of practicing litigation in Court, robe of Barrister, etc. The school, under unofficial supervision of the Ministry of Justice, had duty to teach and conduct professional training in the meantime, which was more like Inns of Courts of England. The Bar Association was also acting as same as one of the profession association. In B.E. 2454 (A.D. 1911), during the period of King Rama VI, the school of law was royally declared to be the royal college under the Ministry of Justice by reason of the government would take full responsibility to run this school like other professional schools. The Head of the Ministry would be responsible to all activities in the school. Therefore, the Bar Association ended its role from this law school. The law school under supervision of the Ministry of Justice was categorized as the

level of college. The student must finish high school before entering as the law student.

In B.E. 2456 (A.D.1913), when civil law was completed its drafting, there was the change of the curriculum in teaching to be suitable for civil law system. There were two ways of changing Thai legal study according to the new coming of civil law system. The first way was that some of Thai students were sent to study law in France and Germany or the United Stated of America to gain broadly legal knowledge instead of only knowledge of Common Law system from England like in the past. The second way was to reorganize and develop curriculum and teaching. In B.E. 2462 (A.D.1919), there was the change of the legal curriculum to extend time frame to 2 years within 2 terms. In the first term, the subjects included jurisprudence, private international law, criminal law, criminal procedure law, contract, torts and land law. The second term included agency law, corporate law, bankruptcy law, Bill of exchange law, buy and sale, succession law, family law, law of evidence, civil procedure and public international law. This development of the school moved toward the system of substantial legal study more than professional learning as in the past, which more liked the style of the school in the continental. Between the period of B.E. 2457 (A.D.1914) to B.E. 2466 (A.D.1923), the curriculum and teaching style had been changing in the way conforming to the changing and improving of the civil code which maintained legal rules and legal methods in the system of the continental law. Therefore, the King gave the order to announce the improvement and development of the curriculum by way of establishing the so-called “Legal Council” to take care of the changing of the curriculum according to current legal system and making up to the international standard like foreign school of law. In B.E. 2467 (A.D. 1924), the curriculum of the law school was changed into 3 terms within 3 years. First term included jurisprudence, legal history, criminal law, civil law on chapter 1 and 2, marital law, will and property law. Second term included civil law chapter 3, bankruptcy law, evidence law, civil procedure, criminal procedure and private international law. And third term included special law (to be announced), public international law, economic study, administrative law and financial law. A student who passed the first 2 terms would graduate with the degree of Barrister-at-Law and a student who passed the third term would graduate with the Bachelor Degree. In B.E. 2473 (A.D. 1930), the Legal Council announced the new curriculum by increasing the term for Barrister-at-Law curriculum from 2 years to 3 years which

was the same curriculum of Barrister-at-Law of other countries such as United Stated of America, Japan, France, etc. In the meantime, the curriculum would include English or French Law for a student to choose. This was very beneficial to students to make comparison both Thai and foreign law. However, in case of a student who graduated with Bachelor Degree or Barrister-at-Law from abroad, that student would not have to take this foreign law and had the opportunity to take the examination in many subjects after enrolling to study one year. This new curriculum which extended into 3 terms within 3-year-period combined with the first term; jurisprudence, legal history, administrative law, constitution of the Court of Justice, criminal law, criminal procedure, English or French law, the second term: commercial and civil code on juristic act and obligation, insurance with person and property (which meant suretyship, mortgage, pledge, lien, buy and sell of goods, exchange of property, gift, leasing, hire of property, hire-purchase, carriage of goods, loan, deposit, warehousing, compromise, gambling, corporate and association, civil procedure, law on evidence, bankruptcy law, English or French law and the third term; international law (state and individual section), commercial and civil law on property, family and will, agency, current account, insurance, bill , management of affairs without mandate, English or French law. The Legal council set up the subjects including English and French law as follows:

First term

English law: Constitution of the Court of Justice, Criminal Law, Civil Procedure and Criminal procedure.

French law: Constitution of the Court of Justice, Criminal Law, Civil Procedure and Criminal procedure.

Second term

English law: Common Law and Equity.

French law: Civil Law.

Third term

English and French law: Commercial Law

According to the Bachelor of Laws curriculum, the Legal Council set the higher subjects of learning by allowing a student learn how to accomplish legal research not

more than 2 years. It was meant that after a student graduated with Barrister-at-Law Degree, he or she would have to spend 2 years doing research and came back to take written and oral tests on the topics of general law including English and French law (except the student who graduated from oversea). Moreover, the student would have to fulfill a thesis in a topic that the examination committee assigned. The reason that the Legal Council had to put English and French Law in the curriculum was Thailand had been put to sign the agreement with England and France to hire English law teachers to teach the English Civil and Commercial Law where England demanded Thailand to apply as that law which Thai law did not interpret in its Civil and Commercial Law. And the agreement with France demanded Thailand to establish legal Department and drafted the new curriculum and regulation of the law school while the director of the school would be French. Moreover, Thailand had to hire French legal advisers attaching to the Ministry of Justice. Therefore, by force of the State Agreements, Thailand had to appoint Mr. L Duplart, a French lawyer with other 2 French law teachers to participate in the law school. Meanwhile, the school also hired English law teachers to teach Common Law as well.

This establishment of the law school, in the time of King Rama VI through the period of King Rama VII, which was declared as the royal school under supervision of the Ministry of Justice, was the foundation to Thai legal education until now.

2. Legal Education in Thailand: Current and Future Trend.

In B.E. 2476 (A.D. 1933), King Rama VII considered that the law school of the Ministry of Justice had been being prosperous and reached at the level of the standard college like most others in the western countries. The King, therefore, declared the royal decree to merge the curriculum and regulation of the law school and established another one of the faculty in the university; it was announced as the Faculty of Law and Political science. At that time, this faculty was in Chulalongkorn University and later on it was transferred to be one of the faculties in Thammasat and Political Subject University in B.E. 2477 (A.D. 1934). During B.E. 2477 (A.D. 1934) through B.E. 2491 (A.D. 1948), there was only one legal study institution in Thailand, the faculty of law in Thammasat and Political Subject University. In B.E. 2494 (A.D. 1951), Chulalongkorn University reestablished a department of law in the faculty of Political Science and within a few years, the university developed this department to be the faculty of law. These two universities rendered legal

study service for students in their institutions for many years. After B.E. 2500 (A.D. 1957), more universities provide legal study in their institutes. In this year of B.E. 2543 (A.D. 2000), there are total of 21 law faculties in various universities in Thailand. Five out of twenty one universities are State Universities: Chulalongkorn University, Chiengmai University, Thammasat University, Ramkhamhaeng University and Sukhothai Thammathirat University. The first three universities require applicants to take the entrance examination before admitted to study while Ramkhamhaeng University and Sukhothai Thammathirat University are the Open University which need no entrance exam to apply for studying. These open state universities try to provide legal education to those who are interested but have no opportunity or time to enter the others. Therefore, distance legal learning for students who stay in other provinces is provided by these universities. And apart from those universities, another important legal institution which has to be mentioned here is the Institute of Legal Education of Thai Bar Association which provides higher level of legal study and offers Barrister-at-Law degree to a candidate who passes its examination.

2.1 Current Legal Education in the University of Thailand

Undergraduate level

The current legal study of undergraduate level in most faculties of law of present universities combines with 4-year standard terms in which students will normally have 4 years of studying. The credits of graduation with Bachelor of Laws accumulate with around 135 to 145 credits. The main qualification of a candidate who will be admitted to study in the university is to have high school knowledge or any degree on the same level. To enter some state universities, a candidate must take the so-called “entrance examination” and gain appropriate scores to be admitted. Most faculties of law in various universities provide relatively the same subjects of legal studying. However, there are some differences among those schools on methods of teaching and patterns of enrollment, which lead to identify expertise or major area of studying of students.

This paper will pick up the update curriculum of one of the faculties of law of the State University and enter to some details of the subject matters of legal study. This will provide some prospective idea of how legal education in Thailand on graduate level is like.

Bachelor of Laws program of Chulalongkorn University

Title of Degree: Bachelor of Laws or LL.B.

Philosophy and objective of the curriculum

- build the social concern among students
- establish legal professionalism from students
- magnify internationalization through students

Qualification of candidates

The one who graduates with the high school degree or the same level according to the rules and regulations of admission to study in the level of graduate degree.

System of studying

One term combines with 2 semesters: first semester and second semester and sometime includes summer session after each conventional term. Each semester will be the studying period of not less than 15 weeks. Summer session will be around 6 studying weeks.

Period of studying

Throughout 4 curriculum years (8 studying semesters) whereas minimal period of study not less than 7 semesters and maximal period not more than 16 semesters.

Enrollment

In each semester, a student will be allowed to enroll not more than 22 credits, not less than 9 credits and 7 credits in summer session.

Evaluation and fulfillment

A student must obtain grade A, B+, B, C+, C, D+ or D to pass an exam. F is considered as failing a test. If a student fails a compulsory subject, he or she must enroll that subject again. If the subject is not compulsory, the student can choose any other subject instead. A student must pass examinations and obtain at least 135 credits to reach the fulfillment of the curriculum whereas he or she must consume studying time not less than 7 semesters.

Curriculum

- Accumulated credits throughout the curriculum are 135 credits.
- Structure of the curriculum.
  - Section of general subjects 30 credits
  - Section of specific subjects
    - *Group of basic legal subjects (compulsory)* 71 credits
    - *Group of area subjects (compulsory to choose)* 18 credits
  - Section of noncompulsory subjects 16 credits

1. Section of general subjects (30 credits)

1.1 subjects of general study (18 credits)

- group of social science 3 credits
- group of humanity science 3 credits
- group of science and mathematics 3 credits
- group of general science 3 credits
- group of foreign language 6 credits

1.2 Compulsory subjects according to other faculties (12 credits)

- choose one of Legal Logic or History of Law 2 credits
- Law and Society 2 credits
- Choose one of Accounting for Lawyer or Economics for Lawyer 2 credits
- Choose one of EAP I or French language in legal studying III 3 credits
- Choose one of EAP II or French language in legal studying IV 3 credits

2. Section of specific subjects

2.1 Group of basic legal subjects (compulsory) (71 credits)

Sources of Obligations I	3 credits
Property Law	3 credits
Persons and Family Law	3 credits
Fundamental Legal Principles	3 credits
Effect of Obligations	3 credits
Succession Law	2 credits
Loan and Security Transactions	2 credits
Specific Contracts I	3 credits
Specific Contracts II	2 credits
Sources of Obligations II	3 credits
Law on Business Organization	3 credits

Negotiable Instruments	3 credits
Taxation	3 credits
Criminal Law: General Principals	3 credits
Criminal Law: Specific Offences	3 credits
Judiciary Process and Thai Court System	3 credits
Civil Procedure	3 credits
Criminal Procedure	3 credits
Evidence	2 credits
General Principles of Public Law	2 credits
Constitutional Law and Political Institutions	3 credits
Administrative Law	3 credits
Legal Philosophy	2 credits
Labor Law	2 credits
Public International Law	3 credits
Private International Law	3 credits
Total of	26 subjects

2.2 Group of area subjects (compulsory to choose) (18 credits)

A student must choose to study a set of subject area as follows and must enroll up to 18 credits

- Area of Civil and Criminal Law
- Area of Business Law
- Area of International Law
- Area of Public Law

Area of Civil and Criminal Law

Civil and Criminal Law in English	2 credits
Seminar on Civil Law	2 credits
Insurance Law	2 credits
Seminar on Criminal Law	2 credits
Business Crime	2 credits
Juvenile Offences	2 credits
Civil Procedure: Execution of Judgements or Orders	2 credits
Bankruptcy Law	2 credits
Seminar on Civil Procedure	2 credits
Seminar on Criminal Procedure	2 credits
Introduction to Comparative Law	2 credits
Total of	11 subjects

Area of Business Law

Accounting for Lawyers		2 credits
Business Law in English		2 credits
Intellectual Property Law		2 credits
Anti-trust Law		2 credits
Seminar on Business Law		2 credits
Securities Regulations		2 credits
Contract Negotiation and Drafting		2 credits
Banking Law		2 credits
Consumer Protection Law		2 credits
International Trade Law		2 credits
International Contract		2 credits
International Business Transaction Law		2 credits
	Total of	12 subjects

Area of International Law

International Law on Sea		2 credits
International Criminal Law		2 credits
International Law in English		2 credits
International Environmental Law		2 credits
International Organization Law		2 credits
European Union Law		2 credits
Seminar on International Law		2 credits
International Humanitarian Law		2 credits
Human Rights Law		2 credits
International Economic Law I		2 credits
International Economic Law II		2 credits
International Law and Development		2 credits
	Total of	12 subjects

Area of Public Law

Public Law in Foreign Language		2 credits
Organic Law I		2 credits
Administrative Court and Administrative Procedure		2 credits
Public Finance Law		2 credits
Administrative Procedure Law		2 credits
State Contracts		2 credits
Seminar on Law and Social Problems		2 credits
Environmental Law		2 credits

Introduction to Public Economic Law	2 credits
Seminar on Legal Drafting and Legislative Process	2 credits
Seminar on Administrative Law	2 credits
Seminar on Constitutional Law	2 credits
Total of	12 subjects

3. Section of noncompulsory subjects (16 credits)

3.1 Subjects in the faculty of Law

Law on Derivatives	2 credits
Law on Structuring and Financing Foreign Direct Investment	2 credits
Criminology	2 credits
Litigation and Moot Court	2 credits
Forensic Medicine	2 credits
Non-Judiciary Dispute Settlement	2 credits
Criminal Investigation and Inquiry	2 credits
Law on Land Management	2 credits
Seminar on Taxation	2 credits
Customs Law	2 credits
Law on Marking	2 credits
Mineral Resource and Petroleum Law	2 credits
Consumption Tax	2 credits
Seminar on Law and Computer	2 credits
Law on Public Service and State Enterprise	2 credits
Seminar on Labor Law and Social Security	2 credits
Industrial Law	2 credits
Law on Personal Management in Public Section	2 credits
Law on Public Information Access and Rights of Privacy	2 credits
Organic Law II	2 credits
Maritime Law	2 credits
International Commercial Arbitration	2 credits
International Taxation	2 credits
International Law on Natural Resource Management	2 credits
International Law on Air and Space	2 credits
Total of	25 subjects

3.2 Group of noncompulsory subjects out of the Faculty of Law

1. Field of Business Administration in Faculty of Commerce and Accountancy.
2. Field of Economic in Faculty of Economics.
3. Field of International Relation in Faculty of Political Science.

4. Field of Public Administration in Faculty of Political Science.
5. Field of Foreign Language in Faculty of Arts.
6. Field of other faculties.

Postgraduate Level

Due to the development of the global economic and trade, there is a need to have personnel who are qualified to work in the area of this development. As well as in the area of Public Law, Thailand had recently enacted the new Constitution which is regarded as the most democratic one. The Constitution provides many significant fundamental rights to the people. The Society, therefore, is turning to focus on fulfilling and maintaining citizen rights under their new Constitution. According to the Constitution, there are new institutions established, namely the Constitutional Court and the Administrative Court. Public Law, which is mainly used by those institutions then, comes to its important role to accomplish the expectation of the Constitution. Those areas of law are important to the lawyers in the community to have the opportunity to acquire more intensive knowledge. Many universities in Thailand provide postgraduate programs for students to further their knowledge in specific area. The faculties of law in various universities, as well, have developed postgraduate program to produce qualified candidate to serve the need of the legal community. Moreover, some universities have created international programs in legal study by cooperating with outstanding universities overseas such as Japan, United States of America, England, etc. and have been producing students who qualify to serve regional and international legal communities. It is appropriated to choose one of the Master of Laws curriculum from Ramkhamhaeng University to be the example of postgraduate studying of law.

Master of Laws program of Ramkhamhaeng University

Name of the degree: Master of Laws (LL.M.)

Method of teaching: Period of teaching will be held out of an official working hour.

Number of students: not more than 120 students

Qualification of a candidate: Obtain Bachelor degree of Laws from any institute approved by the Department of University with average score not less than 75 percent or not less than 2.75 GPA and a candidate must have an experience in legal field not less than 1 year.

Curriculum

Total credits not less than 49 credits and the curriculum is divided into 4 separate fields as follows:

1. Business Law
2. Public Law
3. International Law
4. Law for Development

In each field combines with these subject Sections:

Section of supplementing on basic legal subjects	none credit
Section of basic of law	9 credits
Section of compulsory subjects	18 credits
Section of noncompulsory subjects	10 credits
Thesis	12 credits
Total of	49 credits

And a student must pass English for Legal Study subject to the level or above of **S** (Satisfactory).

<u>Subjects of studying</u>

1. **Subjects in the Section of supplementing basic of law and Section of basic of law. Must be taken not less than 5 subjects**
   - None credit subjects
     - English for Lawyer
     - Legal Research
   - Credit subjects
     - Legal Philosophy 3 credits
     - Rules of Civil and Commercial Law 3 credits
     - Philosophy and Rules of Public Law 3 credits

2. **Compulsory subjects total of 18 credits**

   2.1 Section of compulsory subjects in the field of Business Law
   - Advanced problems in Business Law 3 credits
   - Graduate Seminar in Business Law 3 credits

   And a student must choose group of subjects 4 out of 6 from these following subjects:
   - Law concerning Financial Institution 3 credits
   - Law concerning Industrial and Investment 3 credits
   - Advanced Tax Law 3 credits
   - Advanced Labor Law 3 credits

- Intellectual Property Law 3 credits
- International Commercial and Investment Law 3 credits

2.2 Section of compulsory subjects in the field of Public Law

- Advanced Constitutional Law and Political Institution 1 3 credits
- Advanced Constitutional Law and Political Institution 2 3 credits
- Advanced Administrative Law 1 3 credits
- Advanced Administrative Law 2 3 credits

And a student must choose one out of these two following subjects:

- Advanced Monetary Law 3 credits
- Public Economic Law 3 credits

2.3 Section of compulsory subjects in the field of International Law

- Advanced International Law 3 credits
- International Law Concerning Treaty 3 credits
- Graduate Seminar on International Law 3 credits

And a student must choose 3 out of 5 subjects as follows:

- Advanced Law on International Organization 3 credits
- International Law of the Sea 3 credits
- International Economic Law 3 credits
- International Trade and Investment Law 3 credits
- Law on International Organization in level of Region 3 credits

2.4 Section of Compulsory Subjects in the field of Law for Development

- Law for Social Development 3 credits
- Law Concerning Development Planning of City and Province 3 credits
- Graduate Seminar on Law for Development 3 credits

And a student must choose 3 out of 7 subjects as follows:

- Environmental Law 3 credits
- Anti-Trust and Unfair Competition Law 3 credits
- Consumer Protection Law 3 credits
- Intensive Problems in Welfare and Social Security Law 3 credits
- Law on Specific Territory Development 3 credits
- Law on Agriculture and Agriculture Institution 3 credits
- Law on Land Control 3 credits

3. Section of noncompulsory subjects not less that 10 credits

3.1 Section in the field of Business Law

- Law on Commerce and Accounting 2 credits

- Maritime Law 2 credits
- Law on Business Organization 2 credits
- Economic Law 2 credits
- Advanced Insurance Law 2 credits
- Seminar on International Business Law 2 credits
- Law on Business Planning 2 credits
- Economic Crimes 2 credits
- Comparative Commercial Law 2 credits

3.2 Section in the field of Public Law

- Advanced Law on Election and Parliament 2 credits
- Law on State Official 2 credits
- Law on Public Service Management 2 credits
- French Administrative Law 2 credits
- German Administrative Law 2 credits
- Administrative Law of Anglo-Saxon 2 credits
- Principle of Law on Constitutional Case 2 credits
- Law on Public Freedom 2 credits
- Law on Public Administration 2 credits
- Law on Social Science 2 credits

3.3 Section in the field of International Law

- Private International Law 2 credits
- International Criminal Law 2 credits
- International Law in Field Trip version 2 credits
- International Law on Diplomacy and Counsel 2 credits
- International Law on Human Rights 2 credits
- Law of Space 2 credits
- International Labor Law 2 credits
- Law on Land and Air Transportation 2 credits
- International Tax Law 2 credits
- International Agreement 2 credits
- International Commercial Arbitration Law 2 credits
- European Community Law 2 credits

3.4 Section in the field of Law for Development

- Law and Economics 2 credits
- International Environmental Law 2 credits
- Human Rights in Developing Countries 2 credits

- Law on Monetary Loan Agreement of Developing Countries 2 credits
- Economic Crimes 2 credits
- Public Economic Law 2 credits
- Law on Social Science 2 credits

Besides noncompulsory subjects in those 4 Sections, a student may choose compulsory subjects in each Field or these noncompulsory subjects as follows:

- Criminal Justice Administration 2 credits
- Advanced Criminal Procedure 2 credits
- Comparative Criminal Procedure 2 credits
- Advanced Civil Procedure 2 credits
- Comparative Evidence Law 2 credits
- Advanced Criminology and Penology 2 credits
- Advanced Criminal Law 2 credits
- Seminar on intensive Problems of Criminal Law 2 credits
- Advanced Contract and tort Law 2 credits
- Comparative Bankruptcy Law 2 credits
- Seminar on Contemporary Legal Problems 2 credits

Besides Master of Laws, there are 2 universities which provide Doctor of Laws Degree; Chulalongkorn University and Thammasat University. Doctor of Laws programs of these two universities were recently revised. The program of Thammasat University were revised in B.E. 2539 (A.D. 1996) and now there are three students studing. However, there has been no successful student applying to study in Doctor of Laws in the faculty of law of Chulalongkorn University.

University and Institute Statistics

Table 1. Number of all universities/institutes by types of types of institution, 1999

Type of Institution	Number
Grand Total	**70**
1.Public Institute	**24 (21 with law faculty)**
1.1 Limited Admission University	18 (3 with law faculty)
1.2 Open University	2
1.3 Autonomous University	4 (no law faculty)
2. Private Institute	**46**
2.1 University	20 (12 with law faculty)
2.2 College	25 (4 with law faculty)
2.3 Institute	1 (no law faculty)

Table 2. Number of new and total enrollments of all students (all faculties) in 1999 and graduates in 1998 by types of institution

Type of Institution	New Enrollment	Total Enrollment	Graduate
(Grand Total)	328,182	1,012,285	109,648
1.Public Institute	276,691	844,186	78,206
1.1 Limited Admission University	77,807	263,567	52,278
1.2 Open University	193,928	565,032	23,590
1.3 Autonomous University	4,956	15,587	2,338
2. Private Institute	51,491	168,099	31,442
3. Public: Private	84:16	83:17	71:29

Number of Students in Faculty of law of State Universities

Table 3. Student Numbers in Chulalongkorn University in 1999

	Bachelor	Master	Total
Faculty of Law	704	472	1176
Law	704	362	1066
Economic Law		87	87
Business Law		23	23

Table 4. Student Numbers in Thammasat University in 1999

	Bachelor	Diploma	Master	Ph.D.	Total
Faculty of Law	3279	122	389	3	3793
Non-Select Area of Law	2026	122	389	3	2540
Law (Special Class)	1253				1253

Table 5. Student Numbers in Chiengmai University in 1999

Faculty of Social Science	Undergraduate
Law	269

Table 6. Student Numbers in Ramkhamhaeng University in 1999

Faculty of Law	Bachelor	Diploma	Master	Total
Law	60447	48	674	61169

Table 7. Student Numbers in Sukhothai Thammathirat University in 1999

	Undergraduate	Bachelor	Total
Faculty of Law			49077
Land and Property Law	805		805
Law		48273	48273

The Institute of Legal Education of Thai Bar Association

At the time of B.E. 2476 (A.D. 1933), when there was the royal decree to terminate the Legal Study Council who had responsibility to organize the curriculum of the law school in the Ministry of Justice, the Bar Association, therefore, did not play any role in legal education. Until B.E. 2490 (A.D. 1947), the Bar Association Committee, with advice of the Judicial Committee, considered to establish the legal training course focusing mainly on legal professional practices to produce personnel serving the judiciary in the Ministry of Justice. The committee, therefore, founded the department of legal study in the Bar Association. And in B.E. 2491 (A.C 1948), the Legal Education Institute of Thai Bar Association was established with the duty of educating and promoting knowledge of legal practicing for law practitioners. There was a special committee which was enacted to direct legal study in particular. At the time, the President of the Supreme Court was nominated to be the president of the institute. The objective of establishment of the Legal Education Institute of Thai Bar Association was accorded to the agreement of the International Bar Association in which Thailand was a member. The consensus of the International Bar Association which was held in Hague, Netherlands in B.E. 2491 (A.D. 1948) stated that there should be enough practical training for legal personnel before performing his or her duty in the legal professions. At the beginning, the curriculum of the institute included Civil Procedure Law, Criminal Procedure Law, Evidence Law and the Constitution of the Court of Justice, Criminal Law, Civil Law and others. In present, the qualification of a candidate who can apply to study in the institution must be a person who graduates with Bachelor of Laws from Thammasat University, Chulalongkorn University and Ramkhamhaeng University or has studied in the faculty of law in other universities in Thailand or overseas and passes an examination up to the standard stipulated by the Legal Study Committee of the Bar. The curriculum of studying is as follows:

The curriculum of studying is as follows:

- Civil Law
- Criminal Law
- Administrative Law
- Intellectual Property Law

- International Trade Law
- Civil Procedure Law
- Criminal Procedure Law
- Evidence Law
- Constitution of the Court of Justice
- Others

The period of study is separated into two terms. The first term begins on June to September and the second term starts on December to March of the consecutive year. Time of teaching is provided in both normal class (8.00 to 16.30) and evening class (17.00 to 20.00 including Saturday 8.00 to 17.00). The subjects which are taught in the first term are: Criminal Law, Labor Law and Proceeding in Labor Court, Administrative Law, Civil Law on Property, Juristic Act, Obligation, Torts, Sales, Exchange, Gift, Hire of Property, Hire-Purchase, Hire of Labor, Hire of Services, Loan, Deposit, Suretyship, Mortgage, Pledge, Agency, Broker, Bill, Current Account, Partnership and Company, Family, Succession, Tax Law, Land Law, Intellectual Property Law and International Law. Second term includes: Civil Procedure Law, Bankruptcy Law, Constitution of the Court of Justice, Criminal Procedure in Small Claim Court, Trial Procedure in Juvenile and Family Court, Criminal Procedure, Evidence Law and Litigation and Witness Examining Practices. An examination will be held at the end of each term. The examination combines with written and oral tests. A student who passes the Bar exam will be entitled to Barrister-at-Law degree and qualifies to be a candidate applying to judiciary or public prosecutor recruitment.

From B.E. 2440 (A.D.1897) to B.E. 2476 (A.D.1933), where the school of law was running by the Ministry of Justice, there were 1,073 students who graduated with Barrister-at-Law. Since B.E. 2491 (A.D.1948) the Institution of Legal Education of Thai Bar Association was established and the institution has been producing many lawyers as stated on the table below.

Table 8. Numbers of Barrister-at-Law each year.

Session	Year	Graduated
1	B.E. 2419 (A.D. 1948)	6
2	B.E. 2492 (A.D. 1949)	None
3	B.E. 2493 (A.D. 1950)	3

4	B.E. 2494 (A.D. 1951)	13
5	B.E. 2495 (A.D. 1952)	24
6	B.E. 2496 (A.D. 1953)	34
7	B.E. 2497 (A.D. 1954)	38
8	B.E. 2498 (A.D. 1955)	32
9	B.E. 2499 (A.D. 1956)	15
10	B.E. 2500 (A.D. 1957)	11
11	B.E. 2501 (A.D. 1958)	19
12	B.E. 2502 (A.D. 1959)	20
13	B.E. 2503 (A.D. 1960)	58
14	B.E. 2504 (A.D. 1961)	19
15	B.E. 2505 (A.D. 1962)	69
16	B.E. 2506 (A.D. 1963)	44
17	B.E. 2507 (A.D. 1964)	115
18	B.E. 2508 (A.D. 1965)	51
19	B.E. 2509 (A.D. 1966)	130
20	B.E. 2510 (A.D. 1967)	63
21	B.E. 2511 (A.D. 1968)	137
22	B.E. 2512 (A.D. 1969)	304
23	B.E. 2513 (A.D. 1970)	351
24	B.E. 2514 (A.D. 1971)	124
25	B.E. 2515 (A.D. 1972)	125
26	B.E. 2516 (A.D. 1973)	72
27	B.E. 2517 (A.D. 1974)	132
28	B.E. 2518 (A.D. 1975)	328
29	B.E. 2519 (A.D. 1976)	255
30	B.E. 2520 (A.D. 1977)	171
31	B.E. 2521 (A.D. 1978)	361
32	B.E. 2522 (A.D. 1979)	490
33	B.E. 2523 (A.D. 1980)	548
34	B.E. 2524 (A.D. 1981)	517
35	B.E. 2525 (A.D. 1982)	646
36	B.E. 2526 (A.D. 1983)	906

37	B.E. 2527 (A.D. 1984)	443
38	B.E. 2528 (A.D. 1985)	678
39	B.E. 2529 (A.D. 1986)	530
40	B.E. 2530 (A.D. 1987)	530
41	B.E. 2531 (A.D. 1988)	466
42	B.E. 2532 (A.D. 1989)	250
43	B.E. 2533 (A.D. 1990)	260
44	B.E. 2534 (A.D. 1991)	436
45	B.E. 2535 (A.D. 1992)	259
46	B.E. 2536 (A.D. 1993)	338
47	B.E. 2537 (A.D. 1994)	282
48	B.E. 2538 (A.D. 1995)	395
49	B.E. 2539 (A.D. 1996)	491
50	B.E. 2540 (A.D. 1997)	405
51	B.E. 2541 (A.D. 1998)	839
52	B.E. 2542 (A.D. 1999)	438
Total		13,271

2.2 Future Trend of Legal Education in Thailand

In the future, many legal education institutes are looking forward to accelerating their legal education improvement of producing appropriate personnel to serve the society. Many universities annually improve their curriculums to muster up students who will have their areas of expertise in the period the first or second year of studying. The curriculum will be more intense in each area and more legal subjects are provided for students to choose. This effect comes from the changing of society. The more areas of study occur, the more in-depth of knowledge is in need. The area of laws is inevitably effected. At present, it is the age of information technology where phenomenon has been bringing the world to no boundary. It is the era of international exchanging of information, which brings about many implications. International matters play the important roles in the world communities in many areas, especially in business activities. When the market of international business transaction is in need of personnel, most of educational institutes are moving toward those needs. With no exception to the legal education institutes, they are trying to serve this personnel shortage, which, however, has long been lacking. Even thought the

long plan to produce international practicing lawyers from undergraduate and postgraduate students has been being on the way as mentioned earlier, there is also urgent need to provide some knowledge on international legal forum to current practitioners both lawyers and non lawyers in the community. Some of the outstanding education institutes, then, are managing to provide significant education in this area of international legal matters. They are coming with short course and medium course where students will obtain the diploma after going through the course. Some institutes provide Master Degree to a successful student who implements their long term course. One of the programs which is interesting and should be mentioned here is the Master of Arts in Economic Law 2000 provided by Chulalongkorn University. This program is designed under the consideration of the drastic trend of global economy, monetary transaction and international investment under the scope of the World Trade Organization (WTO) and the scope of regional groups such as European Union, NAFTA, AFTA, APEC, etc. In the section of economy and business of the country, the relation between law and financial & investment market has been increasing in every moment. The new creation of cooperation between private institution in investment, establishment of business organization, business negotiation, utility of new financial instruments needs to be approached with competent particular business concept together with legal perception as well. Due to the limited numbers of experts in this area, the program is, therefore, designed to prepare and produce both lawyers and businessmen who have conception and knowledge in global and regional economic law for the global business community. This program eliminates obligation, which the legal curriculum structure is always created significantly toward legal technical profession whereby a law student neglects the concept of other areas outside legal scope. This program, therefore, combines relation between law and economics in the sense of correspondence, which will create a candidate who gains vision and integrated concept and can serve the community in the mist of the changing of the global economic phenomenon. Qualification of a candidate who will be admitted to study is: graduated with law, economics, business administration or accounting degree and having working experience in those fields not less than 3 years or if graduated with other degree than those three, a candidate must have no less than 4 years experience or if a candidate has postgraduate degree, experience is not needed. However, a student who has less legal basic must take special courses on particular fundamental legal subjects approved by the Board of Postgraduate Study. The time of fulfillment is not more than 4 years and not less than 2 years. A student must accumulate at least 39 credits to graduate with the master degree. The curriculum subjects are as

follows:

Compulsory subjects with total of 27credits

Economic Analysis of Law	3 credits
Relationship between Law and Business	3 credits
Contract Negotiation and Drafting	3 credits
Law relating to Business Organization and Management	3 credits
Tax and Business	3 credits
Laws relating to International Business	3 credits
Settlement of Disputes in Business	3 credits
Criminal Law and Economic Crimes	3 credits
International Economic Regulations	3 credits

Noncompulsory subjects with total of 9 credits

Law of International Commercial Transactions	3 credits
Tax and International Business	3 credits
Business Tax Planning	3 credits
Laws relating to Business Finance	3 credits
Law on Marketing Planning	3 credits
Law relating to Industry and Labor	3 credits
Law relating to Commercial Credits	3 credits
Law on Securities	3 credits
Law on Derivatives and Derivative Market	3 credits
Law on Business Planning	3 credits
Important Business Contracts	3 credits
Law and Contract for Real Estate Development	3 credits
Intellectual Property Law	3 credits
Natural Resources, Environment and Law	3 credits

Thesis with total of 12 credits

Individual Study with total of 3 credits

Individual Study on Economic Law and Business Law	3 credits

In the meantime, the Bar Association has also been working on transcending its curriculum to meet new legal environment. The Bar, upon legal experts brainstorming, concluded the future legal trends and created norms toward those tendencies to produce more productive lawyers to the community. Upon the conclusion, the appropriate lawyer is

compared with social architect or engineer. He or she should have very keen legal knowledge in particular area. Economic, social, and politic matters will be important for all lawyers to understand those situations and its implications. Lawyers, therefore, will be able to manage to establish justice in the society, which is the step toward elevating quality and integrity of Thai community. Lawyers should be able to protect state interest and sovereignty. Toward the qualified lawyer, there must be concrete strategies to improve and establish legal knowledge and merit of all lawyers to serve the country. With those strategies, the Bar has concluded as follows:

1. There should be enough special curriculums in specific area of law for specialized lawyers such as in the area of Intellectual Property Law, International Trade Law, Administrative Law or Private International Law.
2. The way of learning and testing the students in Legal Education of the Bar must be differentiated from those in the universities. The curriculum must provide the opportunities of learning the law, understanding and applying them appropriately. The way of utilizing the law must be focused on its merit besides earning of interest.
3. The curriculum must also be concentrate on morality, ethical conduct and social responsibility. The improvement in this matter must be intense for the foreseen professional practices.
4. Legal Education of the Bar must expand its objective to cover all law practitioners. Not like in the past that the institute only provided legal personnel for the community of judicial, public prosecutor and litigation lawyer, the institute must presently serve the community out of the court as well by producing appropriate lawyers such as legal consultants to the field of business transaction.

From those educational moves of the Bar, we can foresee good pictures of legal profession of Thai Community in the future. If the Bar fulfills its expectation including the supplementation from legal educational markets in many learning Institutes, standard of Thai lawyer will be even better and levitate the society up to the anticipation.

3. Legal Profession Training and Development

3.1 Judiciary

Thai judiciary within the Ministry of Justice has long been providing legal training in its institution. Because judiciary is crowded with legal nobles and in the past there were not many numbers of judiciary, they, therefore, trained new comers individually. The way of

training was more like on-the-job training where a candidate who was approved to work in the judiciary would be posted as Judge-Trainee and would be trained by a senior judge who had experience more than 20 years of judicial work. A senior judge would train a Judge-Trainee word for word by the reason of efficient training. The senior judge would have responsibility to contribute job operation knowledge in all areas from adjudicating through delivering a judgment. And more importantly, a senior judge would emphasize also on judicial ethic along the way besides professional training. Lectures and seminars were provided by high ranking and prominent justices from time to time. However, when there were the increasing numbers of new comers into the institute, the Ministry of Justice, therefore, established its Training and Seminar Division under supervision of the Office of the Judicial Affairs. This Training and Seminar Division had the main duty to organize training for Judge-Trainees before sending them to be trained with senior judges. In 1987, the Ministry of Justice realized that it was necessary to enhance judge and court personnel's knowledge and capability by means of pre-service training and continuing education programs in order to assist them in discharging their duties more efficiently and effectively. And due to the fact that the Training and Seminar Division had a very limited capability of manpower and place not enough to implement all training programs intended by the Ministry, therefore, under distinguished idea of Honorable Justice Sophon Ratanakorn, Permanent Secretary of the Ministry of Justice at that time, the Ministry of Justice eventually proposed and got approval from the government the project to expand and develop the Training and Seminar Division to be the Judicial Training Institute. Judicial Training Institute, nowadays, has its own twenty-storied building including more than 5 seminar rooms and 70 air-conditioning bedrooms for participants throughout the country to attend long term training. The Judicial Training Institute is annually running various kinds of both legal and related knowledge training and seminar for all level of judicial personnel not only a Judge-Trainee training. Normally, more than 40 courses of training and seminar are conducted for judges in each year. These courses are combined with short term (3 to 10 days) and long term (4 months) courses. Here are some interesting courses, which should be mentioned.

The Training of Judge-Trainee

Under the Judicial Service Act B.E. 2543 (A.D. 2000) the general planning for the training of judge-trainee is entrusted to the Office of the Judicial Affairs. In order to ensure high standard of training, there is a official body called the Committee of Judicial Training presided over by the Secretary of the Court of Justice to supervise the training curriculum.

The present one-year training course aims at a balance education of the individual and insists upon both knowledge and wisdom. The training devotes much attention to the practical skills being on a bench. A good deal of time is also allotted to discussions and classes in allied subject. The academic training course is divided into three parts

1. Judicial knowledge comprises 6 sections:
   - **Court works** (30 subjects within 106.5 hours): Civil trial, Criminal trial and special trial. This section is designed to train judge-trainees both theoretical and practical skill in civil and criminal court proceedings.
   - **Knowledge related to the work of the court** (13 subject within 45 hours): Probation and Rehabilitation, Theory of laying down punishment tariff and sentencing, Justice system on woman and child protection, Medical science and Justice, Criminology, Forensic, Rule of interrogation and investigation, Trial related to international cooperation in both civil and criminal and extradition, Legal writing and Judgment, Legal interpretation, Justice system under the Constitution, Testimony recording, Strategy toward Court system improvement.
   - **Special Subjects** (18 subjects within 61.5 hours): the Constitutional Law, Administrative Law, Intellectual Property Law, International Trade Law, Rights to Information Law, Law of Protection and Suppression Money Laundering, Anti-trust Law, Law on Electronic Commerce, Law on Cross Border Crime and International Criminal Case, Law on Financial Institution, Law on Monetary and Finance, Law on Security and Stock Exchange Market, Merger and Acquisition, Rehabilitation under Bankruptcy Law, Unfair Contract Terms Act, Arbitration, Mediation and Higher Thai Language Utilization.
   - **Institution under the Constitution** (4 subjects within 12 hours): Constitutional Court, Criminal Trial of Politicians, Election Committee and Administrative Court.
   - **General Knowledge** (8 subjects within 45 hours): Legislative Process, State and Royal Ceremony, Human Rights, Narcotic Problems, Psychology in Court Trial, Computer, Period of the Office of Judicial Affairs and Academic Seminars.
   - **Professional Ethic and Judicial Character** (16 subjects within 57 hours): Judicial Discipline and Ethic, Judicial Wisdom, Professional Way of Life of Judiciary, Ethical Practice in Court Trial, Ethical Practice in Administrative Works, Ethical Practice in Other Matters, Ethical Practice of individual and family, Religious way of living, Way of Live of Renowned Justices, Justice in Common Sense and Justice to the

Law, Social Status of Character, Physical Character, Verbal Character, Mind Development, Image of a Judge under Expectation of Public and Conventional Social Manner.

2. Practical Training comprises 2 sections: In this training, judge-trainees will be assigned to write court decisions, court memorandums, orders of court and all proceedings carried out by the court from the copies of the real files under supervision of 7 senior advisers who were distinguished senior judges and had already retired from the office.
   - Court Practical Training (39 hours)
   - Moot Court Practice (57 hours)

3. Observation Study (15 days): Courts and other related offices in the region and other governmental agencies such as Scientific Crime Detection Division, the office of Narcotic Protection and Suppression Committee, etc.

All subjects of training will be produced not only by learned judges in special field but also by the well-known professors and experts from state agencies and private institutions. This judge-trainee course is a campus type of training. All participants must stay during weekday in the dormitory of the Judicial Training Institute. During the course, participants are urged to choose additional activities such as sports, computer or languages after class.

After the completion of the four-month academic training, the judge-trainees will be sent to the Civil Court and Criminal Court for 8 months to learn the skills and techniques of adjudication of cases and administration of all case proceedings under supervision of senior judges in those courts. The trainees will be able to actually acquainting with all court works via this on-the-job training after learning important aspects of working from the Judicial Training Institute. After all these trainings, all judge-trainees will be finally evaluated by the special committee before being appointed to enter the position of judge to the Court of First Instance.

Chief Judge Training

When a judge has worked for more than 10 years, he or she will be promoted to the higher post and entitled to have administrative responsibility when he or she is elected to be the chief judge in a provincial court. The duty of the chief judge is not only taking care of case

management in the court but also responsing to court management including manpower, money and material. Therefore, the chief judge must have managing concept as tools to manage the court up to the standard. The Judicial Training Institute, therefore, provides court management knowledge for those chief judges before they discharge their duties. This course comprises 4 parts lasting within 8 days. All 4 parts are as follows:

1. **Court Administering** (8 topics within 19.5 hours): Planning for Court Development Techniques, Court and Public Service, Public Relations of the Court, Personnel Management, Court Administration Management, Monetary, Financial and Accounting Management, Inventory Management and Court Rule and Regulation Memorandum and Correspondent.
2. **Court-related Works** (6 topics within 13.5 hours): Court Policy for Development, Chief Judge and Royal Ceremony, Chief Judge and Social Meeting, Technique of Office Cooperation, Computer and the Court and TQM of the Court.
3. **Case Management** (6 topics within 13.5 hours): Principles and Techniques of case advice, Mediation Technique, Court Bail Procedure, Special Procedure of Juvenile Case, Petty Case and Special Trial for Non-Answering of the Defendant in Civil Case.
4. **Others** (3 topics within 3.5 hours): Special Lecture of the President of the Supreme Court, Leadership of the Chief Judge and Organization Management Experience in comparison between Public and Private.

Besides these 2 interesting trainings, the Judicial Training Institute provides “in-service” training which is intended to be the continuing education for judges in order to keep them well informed for the latest legal developments. In-service training in the form of seminars and conferences is also given to the judges of the Court of Appeal and the Supreme Court as well. The topics of the seminar include Law of International Trade, Intellectual Property Law, Taxation Law, Administrative Law and others in the field relating to legal knowledge.

Table 9. Number of Judge-Trainees each year.

Session	Year	Number
27	B.E. 2528 (A.D. 1985)	57
28	B.E. 2529 (A.D. 1986)	109
29	B.E. 2530 (A.D. 1987)	70
30	B.E. 2531 (A.D. 1988)	95
31	B.E. 2532 (A.D. 1989)	118
32	B.E. 2533 (A.D. 1990)	138
33	B.E. 2534 (A.D. 1991)	239

34	B.E. 2535 (A.D. 1992)	142
35	B.E. 2536 (A.D. 1993)	135
36	B.E. 2537 (A.D. 1994)	150
37	B.E. 2538 (A.D. 1995)	133
38	B.E. 2539 (A.D. 1996)	70
39	B.E. 2540 (A.D. 1997)	143
40	B.E. 2541 (A.D. 1998)	81
41	B.E. 2542 (A.D. 1999)	140
42	B.E. 2543 (A.D. 2000)	166
Total		1986

3.2 Public Prosecutor
Office of the Attorney-General

Attorney-General Office has been conducting its human resource development for many years. One of its important courses is the training of its new comers or public prosecutor trainees to the office from the annual recruitment. Those candidates who have passed the examination will be called to participate the training and be evaluated before appointed as Assistant District Public Prosecutor. This training is called "Assistant District Public Prosecutor Course". The training is organized according to the Public Prosecutor Act B.E. 2521 Section 26. It is the requirement to have every public prosecutor Trainee to be trained by the office not less than one year and each of them will be evaluated by the Public Prosecutor Committee whether they all gain appropriate knowledge, ability and conduct to be appointed as Assistant District Public Prosecutor. This special training provides basic concept of the infrastructure of the Attorney-General Office and its chain of management. Duties and responsibilities of the Public Prosecutor are included in the curriculum. Moreover, morality and profession conducts are other important matters the participants should learn. This training is composed of 2 parts: Academic Training and Practical Training.

The Academic Training will last 45 official days whereas the Practical Training will be held within the period which the Public Prosecutor Committee stipulates. The Academic Training comprises 7 sections as follows:

1. **Professional Ethic (24 hours)**
    - Morality and Professional Conduct of Public Prosecutor
    - Lawyer Spirit

- Life and Nature
- Works and Life valuation
- Buddhism and Etiquette Problems
- Human, Logic and Eethic
- Wisdom and Human Learning
- Life equilibrium

2. Problems of Thai Society (12 hours)

- Child Problems
- Problems of Prostitute in Thai Society
- Illegal Economy Activities
- Economic and Financial Crisis in Thailand

3. General Knowledge (29 hours)

- Personality and Manner Improvement for Thai Society
- Thai Civilization
- Ethical Valuation in Thai Literature
- Thai Folklore Intuition
- Indigenous Intellect
- Ways of Community Life
- Law and Social Development
- Economic and Social Development Planning
- Appropriate Conduct of the State Official following His Majesty the King's Paths

4. Works of the Public Prosecutor (42 hours)

- Roles and Responsibilities of the Public Prosecutor
- Infrastructure and Policy of Attorney-General Office
- Intellectual Property Litigation
- Litigation in the Small Claim Court
- Litigation in Juvenile and Family Court
- Tax Litigation
- Labor Litigation
- Works in the International Relation Office
- Narcotic Litigation
- Principle of Case Investigation
- Forensic Medicine
- Principle of Court Procedure
- Criminal Proceeding Regulations and Case Administration
- Suggestion of Case Proceeding of the Public Prosecutor
- Criminology and Criminal Justice Administration

5. Case Proceeding (84 hours)

- Criminal Proceeding (Criminal case approving and ordering, Criminal case drafting and

Criminal case advocating)

- Civil Proceeding (Evidence collecting, file ordering, offense and defense case drafting and advocating)

6. Buddhism Practicing and Field Trip Observation (10 days)

- Visiting Royal Projects and the Grand Palace
- Visiting the Central Prison
- Lecture on Buddhism, teamwork practicing and acquainting to Chonburi Province
- World Heritage Park in Sukhothai

7. Miscellaneous (20 hours)

Beside this Assistant District Prosecutor Training, the Public Prosecutor also has other important training and seminar all year round to fulfill its objective of human resource development in Attorney-General Office.

Table 11 . Number of Participants in Assistant District Prosecutor 3 years back.

Year	Number
1999	261
1998	148
1997	67

3.3 Lawyer

According to the Advocate Act B.E. 2528 section 33, the law prohibits any person who does not register and obtain the license to practice law representing other persons in the Court. The person who will qualify to register and obtain a license must have law degree from a university which the Law Society of Thailand has approved and that person must be a member of the Thai Bar Association. According to section 38, the applicant, who is not used to be a lawyer, judge, judge advocate in the army, public prosecutor, public prosecutor advocate in the army or lawyer according to the Constitution of the Court of Martial, must pass the training in the area of Attorney Ethic, Basic Practice in Litigation and Lawyer Professional Practices (except the applicant who has practiced in any law firm for more than one year). The Law Society assigns the responsibility of training applicants to the Advocate Training Institute of the Law Society. The institute, therefore, stipulated its announcement of training in B.E. 2539 where the training combines with the academic training and the practical training. The academic training will last 25 days. Afterward, the applicant must pass the examination of the institute. For the practical training, the applicant who has passed the examination will be sent to practice law in law firms not less

than 6 months. The applicant who passes both academic training and practical training will be entitled to obtain the diploma from the institute and will be proposed to obtain the license to practice law.

The academic training comprises these major subjects: Arts of Lawyer Profession, Basic Legal Consultant, Basic legal Notice and Power of Attorney Drafting, Fact Finding, Social Manner, Basic Legal Advisory to foreigners, the Advocate Act B.E. 2528, the Constitution of the Court of Justice and the Court Jurisdiction, Intellectual Property Law and its Litigation Preparation, Land and Building Law and its Transaction, Corporate Registration, Basic of Civil Plead and Answer Drafting, Civil Litigation, Criminal Proceeding under the Investigator, Process of Search, Arrest, Detention and Release on Bail, Basic of Criminal Plead and Answer Drafting, Criminal Litigation, Principle of Contract Drafting, Principle of Basic Accounting for Lawyer, International Trade and Investment Law, Lawyer Ethic, Legislature Procedure, Tax Litigation, Labor Litigation, Alien Business Act, Communication Law, Financial Institution and Banking Law, Customs Law, Notary Public and International Document Certification, Security Regulation Act and Security Market, Arbitration Law, Mediation, Lawyer Personality Improvement, Litigation in Juvenile and Family Court, Small Claim Court Litigation, Arts of Advocating, Psychology and Human Relation, Probation Process, Bankruptcy Litigation, Forensic Science, Lawyer Discipline Process, Correction Department Works, Court Administration Works, The Carriage of Goods by Sea Act and Arrest of Sea Going Ship Act, Environmental Law, Law for Public Safety, Economic Crime, Constitution and Administrative Law Concerning to Legal Profession, Administrative Law Litigation and Rights of Public on State Information, Art of Speaking for Lawyer and Moot Court.

Table 12. Number of participants of the Advocate Training Course each year

Year	Number of Applicants	Number of Graduate
B.E. 2539(A.D. 1996)	2564	1432
B.E. 2540(A.D. 1997)	2987	1793
B.E. 2541(A.D. 1998)	3270	2140
B.E. 2542(A.D. 1999)	2615	1473
B.E. 2543(A.D. 2000)	2709	

The training of advocating for the candidate who applies to obtain law practicing license is the important course for the Advocating Training Institute. However, the institute also provides other special trainings and seminars in the area of interesting laws and also

contemporary problems for lawyers.

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Chapter Six: Novelty in Thai Procedural Law

1. Procedure in the Intellectual Property and International Trade Court

The most significant event in the reform of Thai Civil Procedural Law is perhaps the establishment of the Central Intellectual Property and International Trade Court and followed by the establishment of the Central Bankruptcy Court. The movement for judicial reform in the civil justice system is echoed around the world.

In England, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* created a big impact. In July 1996, The Right Honourable the Lord Woolf, Master of the Rolls published the Final Report to the Lord Chancellor on the Civil Justice System in England and Wales. In the Report, Lord Woolf identified the present English civil justice system as too expensive in that the cost often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is fragmented in the way it is organized since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

How true it is for Thailand and its civil justice system as for England and the rest of the world!

Rethinking Intellectual Property Rights (IPR) in the Light of Trade-Related Aspects of Intellectual Property Rights (*TRIPS)* and Specialized Intellectual and International Trade Court

1.1 Rethinking the Philosophy of IPR Enforcement in the light of TRIPS and the Concept of Private Rights

TRIPS in its preamble recognises that intellectual property rights are private rights. In Anglo-American jurisdiction, most claimants in the IPR enforcement

make use of civil process, partly because its technique and atmosphere are appropriate to the assertion of private property rights amongst businessmen, and partly because the types of remedy --in particular the injunction (interlocutory and permanent) and damages – are more useful than punishment in the name of the state.[2] Technically, there are two further factors in common law jurisdiction which weight in favour of civil proceedings:

(1) There is no possibility in criminal procedure of securing an interim order to desist from conduct pending the trial.[3]

(2) There is a high burden of proof on the prosecution in criminal proceedings: the defendant must be shown to be guilty beyond reasonable doubt, and not merely on a balance of probabilities. This quantum of proof may be specially hard to demonstrate if the type of offence requires proof of *mens rea* in the defendant, for example that he knew, or had reason to believe, that he was committing an infringing act or other offence.[4]

Conventional wisdom in the enforcement of IPR in Thailand has always been conducting police raids and treats IPR as 'public rights'. 'Trade-based sanctions' from its more influential trading partners always establish the political will to 'beef up' enforcement generally. Suppose one may pause here and reconsider the philosophy of enforcement. Suppose one may examine the common law technique and the TRIPS mechanism of enforcement of IPR. The question may be that in the market economy, if the industries were to loose, say some 227.9 million US dollars per annum, due to loss in copyright piracy, would the industries care to, and is it not fair to, spend a fraction from that amount in private criminal prosecutions or civil actions for injunctions and damages of what are basically their private rights in property. In the long run it is suggested that if the procedure for enforcement of IPR as private rights are adequate and effective, the legal profession efficient and knowledgeable; the enforcement of IPR by civil proceedings may be a good or even better alternative to criminal proceedings. This article is an attempt in the author's own private capacity to explore and perhaps persuade fellow legal practitioners towards that direction.

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[2] W.R. Cornish, *Intellectual Property*, (3rd ed., 1996), Sweet & Maxwell, p 49.

[3] On the contrary, Rule 42 of the Rules for Intellectual Property and International Trade Cases authorizes the use of provisional measures of protection prior to instituting an action and the application for taking of evidence in advance (a sort of Thai *Anton Piller* Order) to criminal proceedings in IP cases brought in the Thai Intellectual Property and International Trade Court.

[4] W.R. Cornish at p 50.

1.2 The Establishment in Thailand of an Intellectual Property and International Trade Court

To cite a celebrated Chinese saying, "*we are living in an interesting time",* is perhaps appropriate. In 1997 Thailand witnessed the transition of its economy from phenomenal success and double-digit or near double-digit growth of the past few years to the one near collapse verging on the state of bankruptcy in many important finance and real estate sectors. Lawyers, like any other profession, bear the burden of bringing Thailand out of this predicament. This is a time for re-thinking, re-planning and re-structuring our legal infra-structure to create the legal environment friendly to international trade and investment. The legal environment whereby legal rights, local and foreign, shall be equally protected and enforced under Thai law and the Thai judicial system. The legal environment of good faith and trust worthiness. The legal environment which will lead us to the glory of international trade and investment and the recovery of Thai economy as a whole. In the field of administration of justice, the establishment of the *Central Intellectual Property and International Trade Court (The IP&IT Court)* is a single most important factor to this end.

The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court 1996 was passed by the National Assembly and promulgated in the Government Gazette on the 25th October 1996. Under the Act, a Royal Decree was later passed to inaugurate the *Central Intellectual Property and International Trade Court* on the 1st December 1997. The IP&IT Court Act was the culmination of a joint effort between the Ministry of Justice and the Ministry of Commerce in the wake of negotiations between Thailand and the United States as well as the European countries on trade related aspects of intellectual property rights.

In fact Thailand has exceeded its obligation under Article 41(5) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by establishing the IP & IT court. Article 41(5) states:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that

for the enforcement of law in general... Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

However, the IP & IT Court is established to create a 'user-friendly' forum with specialized expertise to serve commerce and industry. International trade is added to the jurisdiction of the court for the reason that in a country like Thailand specialized Bench and Bar in intellectual property and international trade should be grouped together for easy access and administration. Not least for want of sufficient workload to warrant a separate court system.

1.3 Some Salient Features of the IP&IT Court System

The followings are some of the prominent features in the new court system:

- Liberal use of *Rules of the Court* to facilitate the efficiency of the forum.[5] Perhaps this could be seen as a unique 'common law' approach to solve a 'civil law' problem.
- Exclusive jurisdiction both in civil and criminal matters on the enforcement of intellectual property rights throughout the country.[6]
- Exclusive jurisdiction on matters concerning international trade e.g. international sale, carriage, payment, insurance and related juristic acts.[7]
- Exclusive jurisdiction on the arrest of ship (a sort of *Mareva* injunction).[8]
- Exclusive jurisdiction on anti-dumping and subsidies.[9]
- Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.[10]
- Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in IP or IT matters. The third member of the panel is an associate judge who is a lay person with expertise in IP or IT. A double guarantee of specialization.[11]
- Availability, for the first time in Thai procedural law, of the '*Anton Piller Order*' type of procedure. An English innovation incorporated in the TRIPS Agreement.[12]

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[5] The IP&IT Court Act, s 30.
[6] The IP&IT Court Act, s 7 (1) - (4)(9).
[7] The IP&IT Court Act, s 7 (5) (6).
[8] The IP&IT Court Act, s 7 (7).
[9] The IP&IT Court Act, s 7(8).
[10] The IP&IT Court Act, s 7(11).
[11] The IP&IT Court Act, s 19.
[12] The IP&IT Court Act, s 29 and Rules 20 - 22 of the Rules for IP&IT Cases.

- Use of pre-trial conference to facilitate a speedy, efficient and fair trial.[13]
- Use of video conferencing for the examination of witnesses outside the court, including overseas, can be requested.[14]
- Full day and continuous hearing as against piecemeal.[15]
- Use of deposition and affidavit in conjunction with oral evidence.[16]
- Speedy inquiry and orders for preliminary injunctions.[17]
- Possibility of the appointment of expert witness as *amicus curiae.* A friend of the court.[18]
- Leap-frog procedure where appeals lie directly to the IP & IT Division of the Supreme Court.[19] An attempt to redress delay.
- With parties' consensus, documentary evidence in English not at the main issues in dispute may not have to be translated into Thai.[20]
- Possibility of *in camera* proceedings in appropriate cases for the protection of IPR or damage to international trade of the parties.[21]
- Possibility of extending the jurisdiction of the court to other matters by further amending legislation.[22] There has been question concerning the wisdom of dividing the jurisdiction between domestic and international trade. Some critics suggest that it would have made more sense if the 'international trade division' of the court could be transformed into commercial court entertaining both domestic and international commerce; hence the name "Commercial and Intellectual Property Court" instead of "Intellectual Property and International Trade Court".
- However, the protection of juvenile justice takes precedence over the protection of IP rights. Hence, a juvenile shall be charged in the Juvenile and Family Court and not in the IP&IT Court even if in IP infringement cases.[23]

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[13] Rule 27 of the Rules for IP&IT Cases.
[14] Rule 32 of the Rules for IP&IT Cases. Video Conferencing has been used for the first time in a private prosecution of copyright infringement case involving the right owner in Japan. The witness for the prosecution testified in Japan through the service of the Thai Telecommunication Authority in Bangkok where the court sat for the purpose. The expenses, in accordance with Rule 32, were borne by the party who adduced the witness. Rule 32 para. 2 specifies that the taking of evidence via video conferencing shall be deemed as if it was conducted in the court room. The reason is to overcome the claim of right of confrontation by the accused and the possibility of holding the party at the other end of the conference in contempt of court, if such an offence did occur.
[15] The IP&IT Court Act, s 27.
[16] Rules 29 -31 of the Rules for IP&IT Cases.
[17] Rules 12 - 19 of the Rules for IP&IT Cases.
[18] The IP&IT Court Act, s 31.
[19] The IP&IT Court Act, s 38.
[20] Rule 23 of the Rules for IP&IT Cases.
[21] Rule 24 of the Rules for IP&IT Cases.
[22] The IP&IT Court Act, s 7(10).
[23] The IP&IT Court Act, s 7 para. 2.

However, it is suggested that while establishing a new court is not an easy task, the successful promotion of it to international commerce and industry is most difficult of all. One will have to create the right 'legal environments' to attract international commercial litigation. Reputation, integrity, expertise, convenience, accessibility, expenses, respect and the effective enforcement of order or judgment are but some of the more important criteria.

1.4 Rules of the Court under the IP&IT Regime

It is hoped that, as special expertise develops in this specialized court, more just and effective measures in IP rights enforcement can be further incorporated in the *'Rules of the Court'*. Rules of the Court is a common law technique in creating court procedure. Traditionally, in Thailand which is basically a civil law country, the amendment to the procedural law is invariably by way of an amendment Act to the Procedural Code. Under section 30 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court 1996, a new procedure has been devised, it reads:

For the purpose to ensure convenience, expediency and fairness of the proceedings, the Chief Justice of the Central Intellectual Property and International Trade Court shall be empowered to, subject to the approval of the President of the Supreme Court, issue Rules of the Court on proceedings and hearing of evidence in intellectual property and international trade cases, provided that such provisions shall not impair the rights of defence of the accused in a criminal case.

By this means, changes in the procedure of the court will be achieved much more speedier than in the traditional means of an Act of Parliament. Rules of the Court may take a couple of months to be finalized whereas an Act of Parliament will invariably takes years. The question for concern is how much of a 'blank-cheque' would the legislature be willing to give to the judiciary of this legislative role. An analogy might be made with the power vested in the Executive to issue Royal Decrees and Ministerial Regulations. In other words, what is the scope of the 'Rules of the Court' in relation to principles of procedural law of the 'public order' *(l' ordre public)* type ? Can this be interpreted as an

encroachment on the legislative functions by the judiciary ? A caveat has been entered under section 30 itself that *"such provisions shall not impair the rights of the accused in a criminal case".* However, the fear expressed above has somewhat been disarrayed by the fact that even in the new Constitution of Thailand, the Constitution Court is entitled to draft its own procedure by the unanimous consent of the justices of the court.[24] Perhaps a very common law tradition of 'Rules of the Court' has found its way in the Thai legal tradition which has always been classified as civil law with common law influence.

1.5 Novelty in Intellectual Property Rights Enforcement : *Injunction V. Police Raid*

In Thailand, the conventional method of policing intellectual property rights against infringers has always been conducting a police raid. However, the provisions of *TRIPS* Agreement, in particular Article 50, equip the judicial authority with the power to order prompt and effective provisional measures to:

(a) Prevent an infringement of any IP right from occurring and entering into the channels of commerce. (Preventive Injunction)

(b) Preserve relevant evidence in regard to the alleged infringement. (*Anton Piller Order*)

Preventive injunction under Article 50 (1) (a) has been implemented for the first time in Thailand in section 116 of the Trademark Act 1991, section 77 *bis* of the Patent Act (second amendment) 1992 and section 65 of the Copyright Act 1994. This is seen as a novelty in Thai procedural law because contrary to the provisions on provisional measures prior to judgment under the Civil Procedural Code, preventive injunction under the IP legislation can be requested prior to the filing of a statement of claim or the prosecution.

However, if one examines carefully into the three relevant sections which give rise to preventive injunction in intellectual property matters, some flaws can be detected. On the whole the provisions prescribe:

[24] Art. 269 of the Constitution of Thailand. In defending the draft constitution, the Drafting Committee even cited the specialized court of justice, in particular the Intellectual Property and International Trade Court, as having the authority to draft its own *'Rules'* (a sort of why can't the Constitution Court?). This is seen as an interesting move towards the common law technique.

'In case where there is clear evidence that a person commits or is committing or is about to commit an act of infringement of intellectual property rights, the right owner may petition a court to make an order restraining such person from committing the infringement.'

The earliest version is that of the Trademark Act 1991. The literal interpretation of section 116 is 'a person commits *or is committing'* but the Patent Act 1992 and the Copyright Act 1994 prescribe 'a person commits or *is about to commit'*. A notion closer to preventive injunction (a *quia timet* injunction).

On procedural points, the legislation fails to provide the petitioner and the court with sufficient 'back up' mechanism for the effective application of the preliminary injunction. Some of the examples are :

- No provisions as to which court to apply.
- No provisions as to the applicability of an *ex-parte* hearing.
- No provisions as to the speed in which the court is to conduct the case e.g. in urgent cases.
- No provisions as to security for compensation of damages should the petitioner's claim fail.
- No provisions for review requested by the defendant.
- No provisions for lapse or revocation of the order after a certain period.

All the defects described above are detected and taken care of by the implementation of the Rules of the Intellectual Property and International Trade Court.[25]

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[25] See Rules 12 - 19, Rules for IP&IT Cases. For the sake of convenience, the text of the relevant Rules are provided in full as follows:

Provisional Measures of Protection Prior to Instituting an Action

Rule 12. *An application for the Court order under section 65 of the Copyright Act B.E. 2537 (1994), section 77 bis of the Patent Act B.E. 2522 (1979), section 116 of the Trademark Act B.E. 2534 (1991) or other intellectual property legislation, shall state the facts giving rise to the cause of action in the case and the reasons sufficient for the Court to believe that it is appropriate to grant such order. The application shall also include a statement confirming the facts giving rise to the application, of a person who witnessed the cause of action, in order to substantiate the cause of action.*

Rule 13. *In considering the application under Rule 12, the Court shall grant the application if it satisfies that:*

(1) There is reasonable ground for the application and the filing of the application, as well as sufficient reasons for the Court to grant such application, and

(2) The nature of the damage incurred by the person filing the application is such that the damage cannot be restituted by monetary measures or any other form of indemnity, or the prospective defendant is not in a position to compensate the applicant for his damage, or it might be difficult to enforce the judgment against the prospective defendant afterwards.

In considering the application, the Court shall take into account the balance of the extent of damage that might be incurred by both parties.

An English example on interlocutory injunction might be useful as to how it is applied in common law jurisdiction. Perhaps the most celebrated case on the subject matter is the House of Lords case of *American Cyanamid V. Ethicon.*[26] According to Lord Diplock, the correct approach is as follows: The court must first be satisfied that there is a "serious question to be tried". Thereafter, it should not try to assess relative merit by looking for a *prima facie* case on the affidavit evidence; it should instead turn at once to the balance of convenience. If it appears that damages awarded at the trial will adequately compensate the plaintiff, and that the defendant is likely to be able to pay them, interlocutory relief should not normally be granted. If damages will not be adequate to compensate the plaintiff, it becomes necessary to consider whether, on the other hand, the defendant would be adequately compensated by damages upon the plaintiff's cross-undertaking, should the plaintiff not make good his claim at trial; if these

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If the Court issues an order dismissing the application, such order shall be final.

Rule 14. *In case where the Court grants the application under Rule 13, the Court shall notify the prospective defendant of the order without delay.*

The order under paragraph one shall immediately bind the prospective defendant even though the prospective defendant has not been notified of the order.

Rule 15. *In case where the Court grants the application under Rule 13, taking into account any damage that the prospective defendant might incur, the Court shall order the person filing the application to provide security for such damage in the amount, within the period and under the conditions, the Court deems appropriate.*

Rule 16. *In case where the Court grants the application under Rule 13, the prospective defendant may file an application requesting the Court to repeal or modify the provisional measures of protection. The order of the Court repealing or modifying the measures shall be final.*

In the case specified in paragraph one, the prospective defendant may make a request in the application to repeal or modify the provisional measures, or file with the Court, within thirty days from the date on which the Court issues an order repealing or modifying the measures, a request for the Court order directing the person requesting for such measures to compensate him for his damage. If the Court finds, after making an enquiry, that the order granting provisional measures of protection which has been repealed or modified was granted due to the Court's misunderstanding that there is ground for taking an action against the prospective defendant or sufficient reason to grant such provisional measures and the misunderstanding is caused by the fault or negligence of the person requesting for the measures, the Court may order him to compensate the prospective defendant in the amount the Court deems appropriate. If the person requesting for the measures fails to comply with such Court order, the Court may enforce such order as if he is a judgment debtor.

Rule 17. *In case where the Court grants the application under Rule 13 but the person requesting for the provisional measures fails to institute an action relating to the application within fifteen days from the date on which the application was granted or within the period prescribed by the Court, the provisional measures shall lapse at the expiration of the aforesaid period.*

In the case specified in paragraph one, the prospective defendant may file with the Court, within thirty days from the date on which the provisional measures is deemed to lapse, a request for the Court order directing the person requesting for such measures to compensate him for his damage. The Court may order the compensation be paid in the amount it deems appropriate. If the person requesting for the measures fails to comply with such order, the Court may enforce such order as if he is a judgment debtor.

Rule 18. *In case where the Court grants the application under Rule 13 and an action is instituted in relation to the application within fifteen days from the date on which the application was granted or within the period prescribed by the Court, the provisional measures so granted or modified under Rule 16 paragraph one shall continue to be in force, unless the Court issues an order repealing or modifying the measures according to a request of the defendant. In this case, sections 260, 261 and 263 of the Civil Procedure Code shall apply mutatis mutandis.*

Rule 19. *The provisions on in camera proceedings and prohibition of publication under Rule 24 and hearing conducted via video conferencing facility under Rule 32 shall apply to the proceedings under Rules 13 and 15 to 18 mutatis mutandis.*

damages would be adequate, the injunction will be granted. Where there is doubt about the adequacy of damages to one or both, any factor which may affect the balance of convenience is brought into account --in particular, whether the defendant has not yet started on his allegedly infringing course of action (it being "a counsel of prudence … to preserve the status quo"). If the balance remains substantially even, some account can ultimately be taken of the relative strength of each party's case as revealed by the affidavit evidence. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

Another consideration is that most IP infringement cases in Thailand are brought by criminal prosecution. Attempts should also be made for the improvement of police raids as an alternative to injunction. This predicament may also be true for most jurisdictions in Asia where most infringement cases are blatant and obvious.

1.6 *Anton Piller Order* under Art. 50 (1) (b) of TRIPS Agreement

Anton Piller Order derives from the celebrated English case of *Anton Piller KG* V. *Manufacturing Process Ltd.* [1976] Ch. 55. It derives from the rule that the court has an inherent jurisdiction to prevent the defendant frustrating the process of justice by destroying the subject-matter of an action or documents or other relevant evidence.

This jurisdiction may be invoked on an *ex parte* application by the plaintiff. The application is usually made after the plaintiff has issued his writ but before he has served it on the defendant. When the application is heard the court sits in *camera.* The plaintiff must satisfy the court that he has an extremely strong *prima facie* case on the merits of his claim, that he is likely to suffer very serious actual or potential damage from the defendant's actions, that there is clear evidence that the defendant has incriminating documents or things in his possession and that there is grave danger that the defendant will smuggle away or destroy the material before an application *inter partes* can be made. If the plaintiff can satisfy these conditions the court will grant appropriate relief in the form of injunction directed to the defendant, breach of which will put the defendant in contempt of

[26] [1975] A.C. 396, [1975] R.P.C. 513. The passage that followed is quoted from W.R. Cornish at p 57.

court.

In addition, the order may include a direction to the defendant that he permit the plaintiff to enter the defendant's premises, to search for goods or documents belonging to the plaintiff or which are relevant to his claim, and to remove, inspect, photograph or make copies of such material according to the circumstances of the case.

The defendant may be ordered to disclose to the plaintiff the names and addresses of his suppliers or customers.

In Thailand, prior to the IP&IT Court regime, there were no provisions which came close to an *Anton Piller Order.* Under section 254(3) of the Civil Procedural Code, the plaintiff might move a court to grant an order arresting and detaining a defendant who wilfully evades a writ or an order of the court or hides any documents which may be incriminating to him in the proceedings. The measure is hardly used and its effectiveness for preserving evidence is doubtful in the light of a more draconian method of an *Anton Piller Order.*

The language of Article 50 (1) (b) of TRIPS is not clear and certainly one would doubt, even in the most optimistic mind, that the Article requires a member State to create something akin to an *Anton Piller Order* in the English sense. Perhaps somewhere along the line of an *Anton Piller Order* with some restrictions on the part of the successful plaintiff might be a prototype for the Thai IP & IT Court. These considerations include :

- An undertaking by the plaintiff to compensate the defendant in damages for any loss caused, should the plaintiff's claim fail.
- An undertaking not to use the material or information gained for any purpose other than the action in which the order is given.
- An officer of the court must be present in enforcing the order.
- The plaintiff is not entitled to use force.

It is a pleasure to report that under section 29 of the IP&IT Court Act and its ensuing Rules of the Court (Rules 20 - 22)[27], a somewhat 'reformed' *anton piller*

[27] ***Section 29.*** *In case of an emergency, when an application is filed under Section 28, the applicant may simultaneously file a motion to the effect that the court may issue an order or a warrant without delay. Where*

order along the line discussed above is preferred by the Drafting Committee of the Rules of the Court.

However, falling short of an *Anton Piller Order*, the right owner can always consider the relative effectiveness of a search warrant under the Criminal Procedural Code. It is believed, among IP law specialists, that the officers of the Department of Intellectual Property Ministry of Commerce, who are designated as law enforcement officers under the Copyright Act, are entitled to file a motion with the IP&IT Court for a search warrant in copyright infringement cases. An exclusive right so far given to police officers. This diversified right to request a search warrant will lead to less breach of secrecy in conducting raids. However, one is still waiting for the first request of a search warrant from a DIP officer.

1.7 Rights of Information

Article 47 of the TRIPS Agreement provides that:

> *'Members may provide that judicial authorities shall have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution'.*

Two observations may be made here:

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necessary, the applicant may also request the court to seize or attach the documents or materials that will be adduced as evidence upon any conditions as the Court may think fit.

The provisions of sections 261 to 263 and sections 267 to 269 of the Civil Procedural Code shall apply mutatis mutandis to the cases referred to in paragraph one.

Application for Taking of Evidence in Advance

Rule 20. *A petition or motion for a court order directing the evidence to be taken at once under section 28 of the Act for the Establishment of and Procedure for the Intellectual Property and International Trade Court B.E. 2539 (1996) shall state the facts showing the necessity for taking of evidence at once. If an action has not yet been instituted, the facts showing grounds on which the petitioner may take an action or an action may be taken against the petitioner shall also be stated.*

In case of emergency under section 29 of the Act, the motion shall state the facts showing the emergency situation which, if the other party or the third party involved is to be notified beforehand, such evidence will be damaged, lost, destroyed or, due to some other reasons, difficult to be adduced at a later stage.

Rule 21. *In case where the Court grants an order for attachment or seizure of documents or materials to be adduced as evidence in emergency situation under Rule 20 paragraph two, the Court may order the petitioner to provide security for any damage that might be incurred, in the amount, within the period and under any condition the Court deems appropriate.*

Rule 22. *The provisions on in camera proceedings and prohibition of publication under Rule 24 and hearing conducted via video conference under Rule 32 shall apply to the proceedings under Rules 20 and 21 mutatis mutandis.*

(1) The word 'may' in Article 47 indicates a choice rather than an obligation on the part of member State for its implementation.
(2) The right of information enunciated in Article 47, if applies in a criminal case, will infringe the rule of privilege against self-incrimination. A rule acknowledged by Article 243 of the constitution of Thailand.

In the House of Lords case of *Rank Film Distributors* V. *Video Information Centre*[28], the defendants to an action for breach of copyright successfully sought the discharge of an *Anton Piller Order* which ordered them to disclose the names and addresses of their suppliers and customers for illicit copies of the Plaintiffs' films, on the ground that this would tend to expose them to proceedings for a criminal offence. The House of Lords held that the privilege against self-incrimination is capable of being invoked in such a case.

Rank Film was a 1981 House of Lords decision. In the same year, the Parliament in England enacted the Supreme Court Act 1981 and in section 72 the Act reverses the effect of *Rank Film* and restores the full effectiveness of *Anton Piller Order* by taking away the privilege against self-incrimination in intellectual property and passing off cases.[29]

A fine example of how powerful and effective the lobbyists on the part of the IP rights owners in the UK are.

1.8 Damages

Under section 64 of the Copyright Act 1994, in cases of copyright or performer's right infringement, the court may order appropriate damages for the right owner by taking into consideration the gravity of the damage including loss of benefit and necessary expenses in enforcing his right.

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[28] [1982] A.C. 380; [1981] 2 All E.R. 76.
[29] *Supreme Court Act 1981, s.72: Withdrawal of privilege against incrimination of self or spouse in certain proceedings*
S.72(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty—
(a) from answering any question put to that person in the first-mentioned proceedings; or
(b) from complying with any order made in those proceedings.
(2) Subsection (1) applies to the following civil proceedings in the High Court, namely—
(a) proceedings for infringement of rights pertaining to any intellectual property or for passing off;
(b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and

This is an improved version from the former Copyright Act of 1978 which simply stated that a fine shall not preclude the right of the right owner from seeking civil compensation for the amount in excess of the fine which is received by the right owner.

Some comments may be levied on the new section 64 :

- Section 64 satisfies the test under Article 45(1) but not 45(2) of the TRIPS Agreement.[30]
- Under section 64 of the Copyright Act 1994, it is suggested that the test for damages in a civil action is one of 'foresee or could have foreseen' the consequences of the damage. Thus, it is more akin to the wordings of 'knowingly or with reasonable grounds to know' under Article 45(1) than the negative element under Article 45(2).
- Article 45(2) may be of a higher standard than Article 45(1), but the word 'may' in Article 45(2) denotes a choice for the member State rather than an obligation.
- Article 45(2) also demands the payment by the infringer of expenses including appropriate attorney's fees. Section 64 speaks of' 'necessary' expenses in enforcing the right. Attorney's fees may be necessary for the enforcement of the right but only appropriate attorney's fees not excessive attorney's fees. One would have to use the objective standard in the country of the forum to determine what the appropriate attorney fees' are.
- The court is bound by Schedule 6 of the Schedule annexed to the Civil Procedural Code concerning the award of attorney's fees. At the moment the court cannot grant more than 5% of the damages claimed for attorney's fees. The Schedule requires the court to grant appropriate attorney's fees between the minimum (600 baht equivalent to 15 US $) and the maximum (5% of the

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(c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.

[30] *TRIPS Agreement, Art, 45: Damages*

(1) The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property rights by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

(2) The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

amount claimed) taking into consideration difficulties of the case, the amount of time and work put into the case. Although the court has the tendency of awarding a higher fee than in the past, in reality it rarely reflects the actual fees claimed or paid by the parties.

- The wordings of section 64 *"necessary expenses in enforcing the right*", may give the plaintiff a wider scope of claim than for purely attorney's fees. It may include investigation efforts, private detective works etc.
- The wordings of section 64 *"loss of benefits"* refer to loss of benefits to the plaintiff. Concerning the base for assessment, the following quotation from Cornish's *Intellectual Property* [31] may be of assistance: A starting point in assessing damages is to ask whether the plaintiff and defendant are in actual competition. Where this is so, the next question is whether the defendant might have had the plaintiff's licence if only he had sought it. Then the measure of damages will likely be what the plaintiff would have charged for a licence. However, the plaintiff is not normally under any compulsion to grant licences. If he would not have done so, the court will look to his losses through the defendant's competition. When it comes to non-competitive infringements, the courts have held that a reasonable royalty for non-competing use will be awarded upon a principle 'of price or of hire'. Under the Thai law, although the burden of proof is on the plaintiff, the court can grant compensation in accordance with the circumstances and gravity of the wrong (s. 438 of the Civil and Commercial Code). This is normally discretional. If the plaintiff can assist the court with systematic and economic analysis of damages, it will lead to a more realistic quantum of damages than by leaving it to judicial discretion.
- Although damages under s. 64 *includes* loss of benefits and expenses, section 64 does not deal with account of profits. Accounting is a traditional equitable remedy available to recover profits unfairly gained from another's property. A common law court might order the defendant to account to the plaintiff for profits made from wrong-doing such as infringement of an intellectual property right. This in not a notional computation as with damages, but an investigation of actual account, which may incidentally afford the plaintiff a sight of customers' names and other information about the defendant. Nonetheless it is a laborious and expensive procedure and is

[31] W.R. Cornish at p 61.

infrequently resorted to.[32] It is difficult to claim account of profits under the present Thai law.

1.9 Improvements in the Thai Intellectual Property Law and Practice to Protect IPR as 'Public Rights'

In addition to the new philosophy of enforcement of IPR by civil proceedings as private rights in accordance with *TRIPS* mentioned above, there have also been improvements in the Thai intellectual property law and practice to protect IPR as "public rights":

- Presumption of copyright subsistence and the right vested in the plaintiff.[33]
- Harsher penalty for infringement of IPR. The maximum penalty for infringement of copyright for commercial purpose could reach four years' imprisonment or 800,000 baht (20,000 $US, prior to the baht flotation this was equivalent to 32,000 $US) fine or both.[34]
- Compare the maximum penalty for theft *simpliciter* which carries the maximum penalty of three years' imprisonment and 6,000 baht fine.[35]
- Double the penalty, should the accused be found to have re-commited the offence within 5 years after the completion of the previous sentence.[36]
- A half of the fine will go to the right owner.[37]
- Right to claim damages in addition to fine.[38]
- Infringing goods seized in copyright cases which are owned by the offender shall be vested in the copyright owner. Materials and machines used in the production of those goods shall be confiscated.[39]

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[32] W.R. Cornish at p 63.

[33] S 62 Copyright Act B.E. 2537 (1994). Under the cited provision, the presumption applies both in civil and criminal cases which leads to some absurdity in case of a public prosecution. In a criminal case, the presumption is rebutted the very moment the accused pleads not guilty. Likewise in a civil case, the presumption is rebutted when the defendant contests the copyright of the plaintiff. The presumption does help in the committal stage in a private prosecution whereby the accused cannot be questioned at that stage. It results in a quicker and more *prima facie* findings in committal hearings of copyright cases brought by right owners.

[34] S 69 para.2 Copyright Act B.E. 2537 (1994).

[35] Criminal Code s 334.

[36] S 73 Copyright Act B.E. 2537 (1994) and s 113 Trademark Act B.E. 2534 (1991). The wordings "5 years after the completion of the previous sentence" give rise to difficulties in doubling the penalty in case of suspended imprisonment and the accused re-commits the offence while in the period of suspension because the previous sentence has not quite been completed.

[37] S 76 Copyright Act B.E. 2537 (1994).

[38] S 76 Copyright Act B.E. 2537 (1994).

[39] S 75 Copyright Act B.E. 2537 (1994).

- Where the offender is a legal entity, it shall be presumed that all the members and managing directors of the board are accomplices to the offence unless proof of innocence or disapproval of the offence is furnished.[40]
- Divergence of law enforcement. Recently, it is agreed that in addition to the police officer, the officer of the Department of Intellectual Property can apply for a search warrant in order to conduct a raid. This will somewhat alleviate the breach of secrecy in the raid.
- Right owner can apply for a preliminary injunction and Anton-Piller order before bringing a civil action or most uniquely before instituting a private prosecution in a criminal case.[41]

1.10 Conclusion

It is refreshing that TRIPS recognizes intellectual property rights as private rights. I would like to suggest, if I may, that attempts should be made to explore alternatives or perhaps more options, in the light of TRIPS and recent economic crisis in Asia, for more effective means of enforcement of intellectual property rights other than by public fund. Treating IPR as private rights and encouraging right owners to institute private prosecutions or civil actions for injunction and damages might be an answer. In the long run, it is suggested that, if the procedure for enforcement of IPR as private rights are adequate and effective; the legal profession efficient and knowledgeable. The enforcement of IPR by civil proceedings may be a good or even better, alternative to criminal proceedings. This symposium is a good forum to explore that possibility. We are most fortunate that in this symposium we are able to attract some of the finest lawyers from different aspects of the enforcement mechanism to share their views and experience. The establishment of the Central IP&IT Court inaugurated since December 1, 1997 is to provide effective mechanism for IPR enforcement. The court has its own rules including interim injunction and the Anton Piller type order specially devised to ensure convenience, expediency, effectiveness and fairness of the IP proceedings. It is our attempt to go beyond our obligations under TRIPS by providing a legal infrastructure under which the atmosphere of fairness and trust can be maintained and assurances that IPR shall be effectively and expeditiously enforced.

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[40] S 74 Copyright Act B.E. 2537 (1994).

2. Procedure in the Bankruptcy Court

Formal Insolvency Mechanisms

2.1 Overview and Procedure

Formal insolvency mechanisms are currently governed by the Thai Bankruptcy Act 1940. This legislation went through four amendments, i.e. Bankruptcy Act (No.2) 1968, Bankruptcy Act (No.3) 1983, Bankruptcy Act (No.4) 1998 and Bankruptcy Act (No.5) 1999. Basically, there are two mechanisms provided by the current law. The first one is the liquidation or bankruptcy procedure and the second is the reorganization or rehabilitation procedure.

The law was comprehensively amended in 1998 and 1999 due to the need of a reform in the bankruptcy law. The reorganization procedure and some other changes are the result of the effort by the government to modernize the system. To strengthen the changes made to the law, the Thai parliament also approved the establishment of a specialized bankruptcy court.

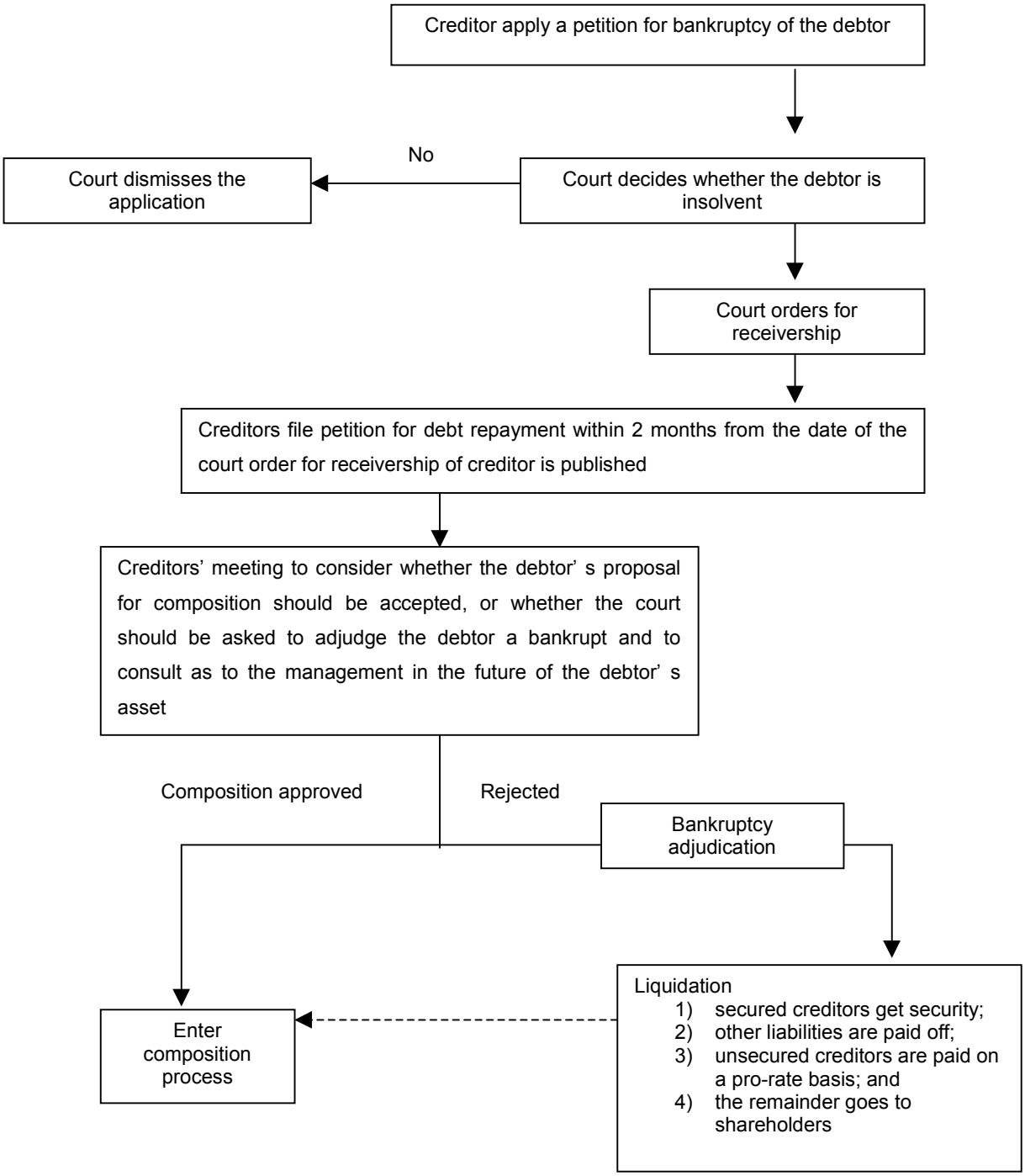
The details of each procedure are shown below.

2.1.1 Bankruptcy Cases

In general, the bankruptcy of individuals, partnerships and companies is concerned with the realization of the assets subject to the bankruptcy charge?, and with the distribution among all administration? for the benefit of these creditors under the bankruptcy law. The law in this area is solely governed by the Bankruptcy Act (BA) B.E. 2483 (1940 AD). The term "execution" itself is never mentioned in the Act, but instead it is called "administration of the bankrupt's property". The officer in charge of the said process is called an official receiver who, by law, must be a qualified lawyer and recruited by the Ministry of Justice.

[41] Rule 42 of the Rules for IP&IT Cases enables the application of provisional measures in civil cases (under Rules 12 -19) to criminal cases.

Liquidation



2.1.1.1 Receiving Order

The administration does not commence until a receiving order is made against a debtor. To obtain such order, a creditor will have to file a bankruptcy petition against the debtor and satisfy the court of the required grounds under BA ss. 9, 10. The trial for the issue will be set and the outcome will depend upon the evidence. (BA s. 14). Once the receiving order is made against a debtor, he will, by the effect of the order, cease the control of his assets which, by law, is vested in the official receiver.

It should be noted that at this time the debtor is not yet bankrupted by law, albeit not far from it. It is the obligation of the official receiver to proceed further, that is to forthwith advertise the order, call for the first creditors' meeting and make a public examination of the debtor in court. (BA ss. 28, 31, 42, 43)

2.1.1.2 Meetings of Creditors

The first creditors' meeting is crucial for the debtor since the matter is for the creditors to decide whether the debtor should be adjudicated bankrupt. (BA s. 31) The debtor may submit a proposal in the meeting of creditors to settle the issue which, in order to succeed, will need a special resolution in favor of it, i.e. a resolution by a majority of creditors whose claims equal three quarters of the total claims of creditors who present at the meeting personally or by representation and have voted on such resolution. (BA s.6). The proposal is forbidden if it is against the principle of pari passu, i.e. proportionate distribution. Unless the proposal is successful, the case will be redirected to the court and a bankruptcy order will then be made.

Other creditors meeting may be called by the official receiver at such time as may be proper, compulsory by law, court order or demanded by the required numbers of creditors. (BA s. 32)

2.1.1.3 Composition and Realization of Assets

The debtor may propose a composition to the creditors' meeting during this time, but it requires a special resolution at the creditors' meeting.[42] If the debtor fails to secure a composition, the court will adjudicate the debtor a bankrupt.

It is the responsibility of the official receiver, with assistance from the creditors, to undertake the gathering of all assets which are distributable under bankruptcy law. The power of the official receiver in this respect is far wider than that of the executing officers. The process may involve seizure of property in a similar manner to the enforcement of judgment in civil cases. However, property belonging to third parties may also be seized if it is in the possession or disposition of the debtor in the course of trade or business of the debtor by consent of the owner under the circumstances which create the view that the debtor is the owner when the petition in bankruptcy is filed against the debtor. (BA s. 109 (3)).

Further, the official receiver is entitled, under BA ss. 118 and 119, to claim payment of money or demand the delivery of property from the bankrupt's debtors. The aforementioned claim or demand will have to be in the form of a written notice informing such person what he will be deemed to be indebted as such unless he submits his denial in writing with reasons to the official receiver within 14 days from the date the notice takes effect.

When the denial is submitted, an investigation will be carried out by the official receiver to determine whether or not the bankrupt's debtor is actually indebted to the bankrupt. If the official receiver believes so, a second notice will then be served upon the bankrupt's debtor and he, if objecting to it, must apply to the court for a hearing on such issue within 14 days.

In the case where there is no objection from the bankrupt's debtor or the court has made an order against him, if the demand or court order is not complied with accordingly, the official receiver is empowered to apply for a writ of execution against such a person and enforce it in the same manner as in civil cases.

The work of the official receiver does also include the process of recovery of the assets disposed by the bankrupt to third parties. The official receiver may apply by motion to the court to nullify the transfer of property on the following grounds:

A) Fraudulent transaction under BA s. 113.
B) Transaction made within 3 months preceding the petition with the intention to prefer some creditors under BA s. 115. (The qualified time for transaction made with insiders is a year.)

The property may be sold by the official receiver in any manner which shall be convenient and most beneficial to the creditors. However, a sale other than by auction will require the approval of the creditors' committee except it is permitted by law. (BA s. 19, 123)

2.1.1.4 Distribution

To be entitled to dividends of the assets of the bankrupt, every unsecured creditor is required to submit a formal claim, known as a proof of debt, to the official receiver within a period of 2 months from the date of publication of the receiving order. (BA s. 91). The claim has to show that the debt in question is provable under BA ss. 92-94. Secured creditors can submit a formal claim only if he has complied with one of the conditions under BA s. 96.

The official receiver will, without delay, examine all the claims and subsequently report his opinions to the court which will finally decide whether each claim should be dismissed or allowed in full or in part. (BA s. 104-107)

Preferential debts and expenses of the official receiver have priority over other claims and will be paid out in order stated in section 130. Ordinary debts rank equally among themselves and will be paid out on *pari passu* basis, i.e. ratable proportionate. Payments must be made at all times not exceeding 6 months from the date of the bankruptcy order unless the court permits an extension of time. (BA s. 124)

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[42] Special resolution requires the supporting of at least three-quarters of the value of debts and the majority in

2.1.1.5 Termination of the Administration

The debtor can be released from bankruptcy in three major ways, a composition after bankruptcy, a discretionary discharge and an automatic discharge. The first two actually came with the 1940 Act whereas the third was newly included into the Act by the Bankruptcy Act (No.5) 1999. In short, a bankrupt if wants to be released before the period of three years from the date of adjudication may try to reach a compromise with creditors through a composition process after bankruptcy or may apply to the court for a discretionary discharge order. In any case, a bankrupt will be automatically released from bankruptcy after the period three years expire. It is to be noted that claims based on debtor's fraudulent conduct and tax claims cannot be discharged.

2.1.2 Reorganization or Rehabilitation

The process of business reorganization under the new law is more like a hybrid of US Chapter 11 type and the Judicial Management of the Singaporean law. In short, this reorganization could be described as the court supervised formal attempts to restructure the finances of a financially distressed enterprise. The new provisions contain very detailed provisions on reorganization procedure. The law is intended to prevent business from being driven into unnecessary bankruptcy because of temporary liquidity problems. In order to solve the problems, the law subjects indebted enterprises to a reorganization proceeding if a creditor or the debtor files a petition with the court and if the debtor owes at least 10 million baht to one or more creditors. Reorganization is provided for companies both private and public, and for other enterprises as may be provided by ministerial regulations. None of the regulation is yet in existence.

Upon filing the petition, the moratorium or automatic stay under section 90/12 will come into effect and will prevent secured and unsecured creditors from pursuing their debts, enforcing their civil judgment or filing a bankruptcy petition against the debtor but to participate in the reorganization proceeding. A court trial will be set to decide if the reorganization order is to be issued. It is stated very clearly in the law that the trial must be conducted in the speedy manner in order to prevent any delays. If the court is satisfied that the debtor is insolvent and has the

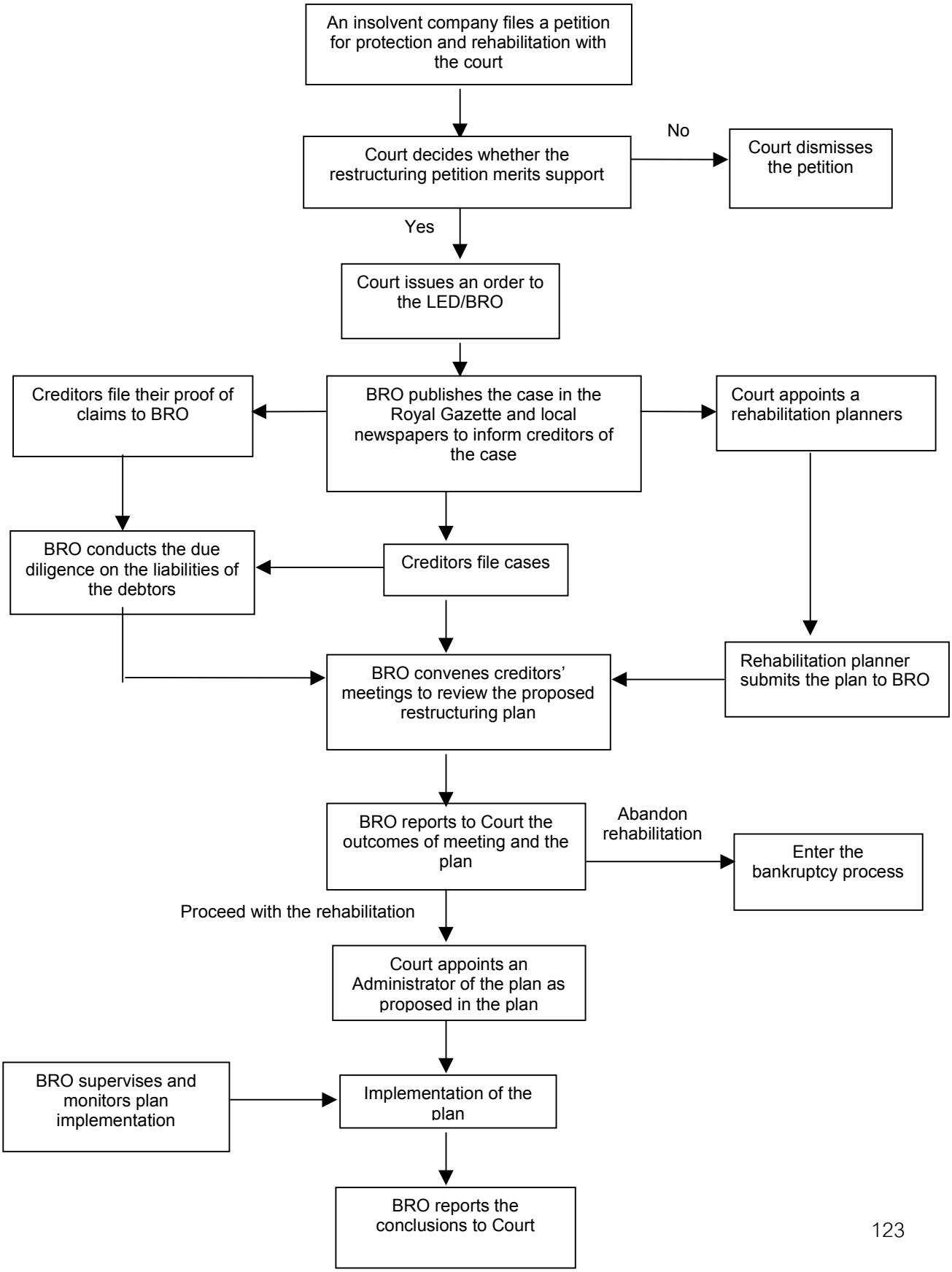
the number of creditors attending and voting.

possible potential of achieving the success of the business restructure, the court will issue the reorganization order. Once the reorganization order is issued, the court will have to appoint a planner to form a reorganization plan. The planner will also have the power to run the business during the reorganization under the supervision of official receiver and the court.

The proposed plan must be put to a vote by creditors within 3 months after the appointment order and must be approved by a special resolution of creditors with certain qualified majority. Only the creditors who have filed their proofs of claim with the official receiver of the business reorganization within one month from the date of the publication of the appointment of the planner order have the right to vote. If the plan receives the approval from creditors, it will then be submitted to court for a confirmation. Motions against the confirmation may be filed with the court on the basis that there is an unfair treatment of creditors.

The details of each plan could vary depending upon the problems and status of business. A composition can be provided for the plan, as well as a capital reduction or increase. The time period limitation for the plan is five years but may be extended by the court. If the process fails to help the business, the court could declare the enterprise bankrupt and the liquidation under the bankruptcy law will follow.

Rehabilitation



2.1.2.1 Automatic Stay

Moratorium or automatic stay is the major element of the reorganization law in every jurisdiction. The question is to understand the scope of the automatic stay in each country since it varies very much from one to another

Thai automatic stay has a very wide scope and will come into effect at the very beginning. Section 90/12 provides that upon the acceptance of the reorganization petition by the court, the so-called "automatic stay" will be effective. This does not depend on whether or not it is the petition from the debtor or creditors like in the US jurisdiction.

The stay will have the effect to both secured and unsecured creditors. The stay will freeze all the civil suits and bankruptcy actions against the company. Secured creditors will not be able to enforce payment of debt against the asset, which is security, unless allowed by the court. This approach is in line with the concept of adequate protection in many jurisdictions. The court can allow the enforcement against security if it can be shown that there is no sufficient protection of the rights of secured creditors.

During the stay but before the reorganization order is issued, the existing management can still have control over the company subject to the limitation that it can only conduct the ordinary course of business. To do something further than the ordinary course of business, the management will need a leave of the court.

The stay will be effective until, (a) the expiration of period of time for implementation of the plan, (b) the date on which the plan is accomplished successfully, or (c) the date on which the court dismisses the petition, disposes of the case, repeals the order for a business reorganization, cancels the business reorganization, or issues a receiving order.

2.1.2.2 Management

With the concept of appointing someone as a planner, the law has to balance the interest of the shareholders and creditors reasonably. The concept under the US Chapter 11, i.e. giving priority to the debtor to form a

plan, and both the concept under the English Administration, i.e. appointing an independent licensed practitioner to take control over the company, influenced the Thai legislation.

Although section 90/16 provides that the Minister of Justice may prescribe ministerial regulations relating to the registration and qualifications of the planner, until now there is still no such regulations. The debtor may have the edge over creditors if it proposes someone as the planner. The law provides that if there is more than one person proposed as the planner, the one proposed by the debtor should be the planner, except at the creditors' meeting, there is a vote amounting to two-thirds of the debt value of the creditors attending and voting deciding otherwise. Therefore, to this extent, it is correct to say that management may or may not change hands during the forming plan period.

Once the plan is completed and submitted to the creditors' meeting, there might be another possible change of the management. The one who will have the power to run the business in accordance with the plan is called a plan administrator. The plan must state who the plan administrator is. It is accepted that the planner and the plan administrator may not be the same person.

The plan administrator must prepare a report of the plan implementation and submit it to the official receiver every three months. The removal of the plan administrator for wrongdoing or fraud can be done by a court order. Creditors may change the plan administrator through the amendment of the plan. In any case, the plan administrator will cease the control of the company once the court orders that the rehabilitation comes to an end. Who will take over depends upon the outcome of the rehabilitation. If the outcome is a successful one, current holder will recontrol the company. On the other hand, if the plan fails, official receiver will come to have the control.

2.1.2.3 The Plan

The new law does give the plan formed within its scope some more advantages than the one done for the purpose of an informal workout. First, the interest of equity holders seems to be very much limited. All the powers

relating to the decision-making on the future of the company is now shifted to creditors. This includes the powers to decide to reduce and increase the capital. Conversion of debts into equity is also allowed.

The credit given to the company under the plan does enjoy a priority right over existing unsecured debts. It is very unfortunate that the superpriority is not adopted by this legislation.

For cases filed with the court prior to 22nd April 1999, the plan is deemed to be accepted by the creditors if it receives a special resolution, i.e. a resolution by a majority of creditors whose claims equal three quarters of the total claims of creditors present at the creditors' meeting in person or by proxy and voting on such resolution. For cases filed after the said date, the procedure for voting is very different since creditors will be classified into groups and some groups may be crammed down to accept the plan.

2.1.2.4 Classification of Creditors and Cram Down

A special resolution was the required resolution for the rehabilitation under the Bankruptcy Act (No.4) 1998. It has proved to bear great difficulty since a major creditor or a group of small creditors may vote down the plan for their own personal interest. The Bankruptcy Act (No.5) 1999 amends the vote by adopting a new approach, classification of creditors. Under the new law, creditors will have to be classified into groups by law. The groups stated by the law are as follows.

1. Major secured creditors.
2. Minor secured creditors.
3. Unsecured creditors.
4. Subordinated creditors.

Major secured creditors refer to secured creditors whose secured debts reach at least 15% of the total debts. Each of these major secured creditors will be classified a group. All other secured creditors will then form another group, the minor secured creditors.

Unsecured creditors are obliged by the law to have at least a group. However, if the planner thinks fit, he or she may divide the unsecured

creditors into different groups on the condition that every unsecured creditor in the group must have the same nature of the claims.

A subordinated creditor is the creditor who will receive any dividends after their senior creditors under some agreement will be paid in full, and therefore has very little interest under insolvency law.

A plan is considered to be approved by creditors if

a) all the affected groups approve the plan with a special resolution of each group, or
b) There is a special resolution from one affected group and their are more than 50% of the total debts approving the plan.

The law not only lowers down the required resolution to approve the plan as we can see in (b), but also changes the rule for confirmation of the plan. Judges will have to observe three objective principles shown below if there is a motion from any creditor objecting the plan.

1. Non discrimination treatment within a group.
2. Absolute Priority rules if the plan is not passed by type (a) resolution.
3. Best Interest Rule.

2.2 Insolvency Test

For bankruptcy or liquidation, the petitioner must prove the insolvency of the debtor. The term insolvency has no definition provided by the law but the petitioner may rely upon certain presumption to trigger the mechanism. Normal grounds for the presumption are the failure to pay debts after a statutory demand[43] set by a creditor or the fact that the debtor cannot satisfy debts after an enforcement of a civil court order. Debtors may not be adjudicated bankrupt if he or she can prove that his or her assets exceed liabilities.

In the Rehabilitation procedure, insolvency although is required as a threshold for filing, presumption can work in the same manner as a trigger of mechanism. Further, the law allows the consensual case to proceed without any hearing and therefore without any prove of insolvency. The court now in the rehabilitation case tends to

[43] Written demands must be served on the debtor twice before a bankruptcy filing and there must be at least 30 days in between each.

allow rehabilitation and have accepted the valuation of the assets as the measure for considering contested case. In one case the court allowed a company to be reorganized even its balance sheet is positive after it has been shown that the company if stops operating will lose its property value tremendously.[44]

2.3 Deliberation Procedure

2.3.1 Claims

In both liquidation and rehabilitation, all creditors will have to file proof of claims with official receiver. The difference between the two procedures is the time frame, i.e. in respect of a bankruptcy, creditors must file their proof of claims within 2 month from the date of the receiving order, whereas in respect of a rehabilitation creditors must file proof of claims within 1 month from the date of the reorganization order.

Debtors, creditors and planner have the right to object the claims and if there is an objection, official receiver will have to inquire upon the matter and rule accordingly. A late filing can only be allowed by a court order and the ground for doing so is a *force majeure*. Once the court allows the late filing, such creditor will be treated as if the claim had been filed in time. However, it is extremely rare for the court to allow as such.

Basically, all true claims are allowable in bankruptcy. The main exception is the claim which cannot be enforceable under civil law such as a debt arising out of gambling is not provable. In the past the debt which the creditors advance to the debtor with the knowledge that the debtor is insolvent is not provable but after the amendment to the Bankruptcy Act in 1999, such debt if advanced for the purpose of allowing the debtor to continue its business will be deemed to be provable.

Sections 130 and 130 bis provide the clear rule for priority in bankruptcy. Generally secured claims rank first followed by the administrative expenses of the official receiver. Unpaid taxes and Wages claims ranked further below and the said two types of claims now rank equally. It was the case that wages claim was junior to unpaid taxes before the amendment in 1999, but it is not the case today. Below those are the general unsecured creditors who will receive

[44] Re Srithai Superware (1999).

dividends on pari passu basis. Section130 bis provides the clear rule for subordinated creditors, who will generally come last among creditors. Should there be anything left, it will go to equity holder.

2.3.2 Avoidance Power

Avoidance of transaction can happen in two manners.

1. Fraudulent transfer
2. Preferential transfer

A transfer is fraudulent and will be revoked if it is made to transfer any property during the time that the debtor is insolvent. It is the burden of the applicant to prove the intention of the parties. However, if the transaction is made one year prior to the insolvency filing or without consideration or undervalued, the burden is shift to the debtor and the transferee to prove the negative.

Preferential transaction can be revoked by the court on a motion made by an official receiver or planner if it is made within three months prior to the insolvency filing. In case of a preferential transaction made to an insider, the said period is extended to one year.

Only the official receiver in case of bankruptcy may apply for a revocation of the fraudulent or preferential transfers. In case of rehabilitation, the power extends to planner and plan administrator.

2.3.3 Executory Contract

There is only one rule for the person representing the estate to reject a burdensome contract. In case of bankruptcy, the official receiver has to reject the contract within three months after he knows it. Basically, the official receiver will ask the creditors' committee to give a recommendation on the action.

In case of reorganization, the power is vested with the creditors and this matter will be recommended in the plan by the planner. If the plan is approved, the plan administrator will have to reject the contract within 2 months.

There is no rule regarding the assumption of contracts in bankruptcy law. Ipso facto clause tends to be considered as not valid and there is no need for the assumption rules as required in some jurisdictions.

2.4 Management and Insolvency

Basically, insolvency does not constitute a criminal offence in Thailand. Directors of companies still owe fiduciary duty to the shareholders and must inform the shareholders if the equity of the company depreciates to one-thirds of the previous value. Failing to do so could lead to a compensation to be paid. To bring the case, shareholder may rely upon the law of torts. Due to the fact that most companies in Thailand are family owned, it is rare to see any action raised by shareholders.

The company law prevents the shareholders and directors from being personally liable in insolvency. The practice of Thai banks somehow forces stakeholders to give personal guarantees on loans to ensure their personal liabilities.

2.5 Disclosure Procedure

Information is to be clearly disclosed under the provisions of bankruptcy law. In the bankruptcy case, the debtor must go through a process of a public examination where judges, official receiver, and creditors can examine the debtor's information. Also after the receiving order, the debtor must inform official receiver of the details of all assets and liabilities. He or she must also surrender books and trade records within seven days from the day of the order. Creditors have a right to examine claims filed with official receiver and also have a right to object them.

In a rehabilitation case, a planner will take control of the company, so the debtor must surrender records to the planner, not the official receiver. However, there is no public examination in respect of rehabilitation.

Basically, the court can summon any party to give information pertaining to the case.

Although the law may provide the channel to gaining information, it is very rare to receive information from debtor in bankruptcy cases. Most information will normally be collected through the investigation by the official receiver. In reorganization,

information is more reliable due to the keeping of books and records. In some cases there appeared to be some problems with books' keeping. In this case, the planner may retain professionals to assist.

2.6 Reorganization/Composition Plan

2.6.1 Content of the Plan

Currently, there are eight plans submitted to creditors' meeting. Five plans were approved and three plans failed. The methods of restructuring seem to consist of various tactics. Generally, rescheduling of debts is very common. This sometimes can come in the form of converting debts into long-term bonds. Debt-equity swaps are seen in many cases as well as the sale of equity. In one plan, there is a sale of the whole operation to a newly set-up company instead of the sale of shares.

Creditors normally rank above stakeholders in normal judicial enforcement process and in the plan. However, the plan can allow stakeholder to receive some benefit even though creditors may sustain losses, if allowed by the majority of creditors. It is seen in the case where new capital is provided by the stakeholders. In most cases inflation is not taken into account in the plan.

2.6.2 Post-confirmation Procedure

After a plan has been approved by the court, the person named in the plan as a plan administrator will take control and proceed in accordance with the plan. Plan Administrators can be anyone prescribed in the plan. Remuneration of the person is fixed by the plan as well as his or her authority.

The plan administrator can be dismissed by a court order if he or she commits any fraud. The work is generally supervised mainly by the creditors' committee and the official receiver. Reports on the work must be filed with the official receiver every three months.

Chapter Seven: Alternative Dispute Resolution in Thailand

1. Court-Annexed Conciliation

Alternative Dispute Resolution is a new terminology of an old concept. Non-aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous *'win-win solution'* trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation. It represents a new challenge to the legal profession. This Research proposes to examine some of the lessons we have learned from introducing or perhaps more accurately, reintroducing court-annexed ADR into dispute resolution mechanism in Thailand.

1.1 Practice Guidance on Court-Annexed Conciliation and Arbitration

Similar to the English practice where the Lord Chancellor may issue *Practice Directions*, the President of the Supreme Court in Thailand may issue *Practice Guidance* for judges in order to achieve uniformity and fair dispense of justice. Influenced by the much-publicized use of ADR in the United States[45], in 1996, the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration.[46]The Practice Guidance may be summarized as follows:

(a) In cases where the presiding judge is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation process.

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[45] Chief Judge Clifford Wallace formerly of the US Court of Appeals for the Ninth Circuit was a major stimulant in Thailand for this influence.

[46] *Practice Guidance Concerning Conciliation dated 7 March B.E.2539 (1996).* The Practice Guidance was issued by virtue of s 1 of the Statute of the Court of Justice (then in force) whereby the President of the Supreme Court was empowered, in the capacity as head of the Judiciary to lay down 'directions' for judges. In practice these 'directions' are invariably termed 'Practice Guidance'.

(b) In cases where the conciliation fails and the issue in dispute involves technical point of fact where the assistance of a neutral or an expert may be helpful in the speedy resolution of the case, the court, with the approval of the parties may appoint an arbitrator to rule on the matter given. The award thus rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment.

(c) In cases where the conciliation fails and the presiding judge considers that it might not be appropriate for him or her to continue sitting in the case, he or she may withdraw from the case except where it is contrary to the intention of both parties.

(d) Each court may designate a special room for conciliation purposes. The atmosphere shall be informal. The judge and the lawyers shall not put on their gowns.

(e) Where a speedy settlement is achieved, the court may consider returning the court fees to the parties. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US$ 4,650@43฿ per $) payable at the filing of the Claim. This is designed as an incentive for settlement in certain cases.

Conciliation is now practised by courts of justice throughout the country with encouraging figures of success. Even cases at the appellate level may be settled by conciliation. It is widely used in the Civil Courts in Bangkok, in the civil jurisdiction of provincial courts throughout the country, in the juvenile and family courts for cases concerning family law, in the Central Labour Court for cases of labour disputes and in the Central Intellectual Property and International Trade Court for cases of intellectual property and international trade disputes.

1.2 Role of the Judge: Inquisitorial V. Adversary

Although the Thai legal system may be classified as belonging to the civil law tradition whereby the German *Bürgerliches Gesetzbuch* (BGB), the French *Code Napoléon* and the Japanese Civil Code played a dominant part in the formation of its Civil and Commercial Code. The English common law had a significant influence on the Thai Commercial law in particular on Book III of the Civil and Commercial Code entitling Specific Contracts. On the procedural side, with the influence of the English Inns of court and legal educational institutions where Thai judges of earlier times were exposed to, Thai procedural law may

be described as adversary. This predicament may raise some jurisprudential problem.

There are two conflicting views as to the role of a civil court. The traditional English view is that the court should play a passive role and leave the conduct of the case to the parties; the court should act as an umpire to see that the parties play the game of litigation according to its rules and to give an answer at the end to the question 'who's won?' The continental view is that once the parties have invoked the jurisdiction of the court it is its duty to investigate the fact and the law and give a decision according to its view of the justice in the case with regard to any public interest that may involved.

The question to ask is if a judge on the bench attempt to lead a negotiation towards settlement of the dispute, would he in any way be compromising or be seen as compromising his role as a passive neutral?

The truth is judges in Thailand have little or no difficulties on the problem raised. The reason may be based on the fact that on the true analysis, the Thai legal system is a blend between the civil and common law family. Thai judges are familiar with conciliation. The Civil Procedure Code, since its promulgation in 1935, prescribes in section 20 that the Court shall have the power, at any stage of the proceedings, to attempt compromise or conciliation between the parties on the issue in dispute.

The Thai courts, when conducting a conciliation process, will depart from their traditional passive role of a judge in the adversary system, to the role of a more active judge in the inquisitorial system. However, when the judge feels uneasy or inappropriate for him or her to continue sitting in the case, he or she shall withdraw. Otherwise the judge may be challenged on the ground of bias. However, the instance is very rare. The status of a judge, being in a position of respect, may actually assist the process of conciliation. In a case in the remote part of Thailand, the plaintiffs and the defendants are brothers and sisters involving in a bitter dispute on the matter of an inheritance where the father died intestate. After some lengthy session of arguments and allegations, the presiding judge, who acted as the conciliator, asked the parties in earnest. "Do you folks still offer merits to your father?" Both parties answered in an empathic "Yes". It is common indigenous belief that when one's elder dies, the living relatives shall offer merits to the dead for him to get on to a better life after death. The judge said in a loud voice. "Then don't bother to do any more merits. Your father cannot go anywhere. Actually, he is crying and suffering at the

moment because you lots are fighting over his assets. He cannot rest in peace because of you." The dosage of "shock therapy" did catch the attention of the parties and led to amicable settlement. This is hardly the role of a judge in an adversary system. But the important thing is that it works.

In the process of conciliation, it is always helpful for the conciliator to refrain from making a statement or opinion. It is always more prudent to form a question than to make a statement. For examples, You don't suppose to have any problems on the Statute of Limitation? I suppose you can justify on the amount of damages claimed? Where does the burden of proof lie? Etc.

1.3 Some Techniques Used in Court-Annexed Conciliation

Recently, section 20 of the Civil Procedure Code[47] which initiated court-annexed conciliation since 1935, has been amended to incorporate further modern techniques in conciliation. Three more paragraphs are added as follows:

For the purpose of conciliation, where the court deems appropriate or where on request of a party, the court may order that the conciliation be conducted behind closed doors in the present of all or any of the party with or without attorney.

Where the court deems appropriate or where on request of a party, the court may appoint a sole conciliator or a panel of conciliators to assist the court with the conciliation.

Rules and means of court-annexed conciliation, the appointment, powers and responsibilities of conciliators shall be governed by Ministerial Regulations.[48]

Furthermore, section 19 of the Civil Procedure Code empowers the court, for the purpose of conciliation, to order litigants in the proceedings to be present in court, although legal representation is appointed. The sanction for disobeying the court order to make a personal appearance is contempt of court. (section 31(5))

There are some practical points used in court-annexed conciliation where the judge acts as conciliator in Thailand:

- Conciliation is conducted in a conference room not in the courtroom. Formalities are dispensed with. Secrecy is enforced. Public and the press are barred from witnessing the conciliation proceedings.

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[3] As amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).
[48] No such regulations have yet been formulated.

- Non-disclosure agreement is made. Without prejudice condition is added to facilitate the invention of options for compromise.
- Although the law allows conciliation without attorney, in practice the conciliator never discourages the present of an attorney. Attempt to do so is likely to have an adverse effect on the trust of the parties in dispute towards the conciliator. The decision to exclude attorney should come from the party itself. It is the conciliator who should say, attorneys are welcome.
- Caucuses with each of the parties to the exclusion of the other are helpful; sometimes to dilute some of the less-than-reasonable claims or to increase some of the more-reasonable offers. Although the law allows the use of caucuses, it is best policy to obtain the consent of the parties first.
- An atmosphere of joint effort to solve the problem is perhaps the best environment to create in conciliation. Parties are invited to present options to settle the dispute. Each option caters for the mutual interests of the parties. Conciliator to be sensitive to the need and legitimate interest of each party.
- Conciliator to be careful about objectivity and neutrality. Instead of making a statement in the affirmative. Asking a question is more "politically correct" and may achieve the same result.
- Refreshments, coffee breaks, (good) working lunch or even a few jokes of the day do help the atmosphere in a negotiation. Miracles sometimes happen during these "time-out".
- It is arguable the wisdom of forcing litigant to appear in conciliation with the threat of contempt of court. The devise is sometimes used in consumer claims where the defendant is a corporation.
- Under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claims disputes[49].

1.4 Court-Annexed Arbitration

Court-annexed arbitration is a welcome development of 'case management'. It helps solve the problem of backlog of cases. It is particularly useful in construction cases where the services of an expert are of great importance. It can save days, weeks or even months of court time in the testimony of expert witnesses. Court-annexed arbitration often occurs at the pre-trial conference where a difficult question of fact is singled out for special consideration by a specialized arbitrator.

Court-annexed arbitration has been included in sections 210 - 222 of the Civil Procedure Code since its publication in 1935, but the provisions have never been used until very recently when ADR is seriously considered and practised. Court-annexed arbitration arises when the parties fail to put an arbitration clause in the contract and later bring a civil action in court. At the pre-trial conference when considering the issues in dispute, the judge may, in consultation with and by consent of the parties, refer complicated technical issues on question of fact to arbitration. This is seen as a means of involving a judge in case management. Most of the advantages of arbitration as a means of dispute resolution can be obtained by court-annexed arbitration. However since the award is incorporated into the final judgment of the court, it loses the enforceability of the award abroad under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958. Since the incorporation of arbitration clause in a contract is of recent phenomenon in Thailand, many commercial disputes that would have gone to arbitration were brought to courts of justice creating a great amount of backlog. Referring some of the issues to arbitration is a welcome option for judges at the pre-trial conference.

2. Arbitration in Thailand

Phenomenal success in economic growth and the rapid expansion of international trade and joint ventures in Asia and the Pacific in the 1980s and the early part of 1990s contributed to the mushrooming of new international commercial arbitration centres across the region from Vancouver to Sydney. While ICC Rules are still predominant in the international commercial arbitration 'market', businesses and the legal profession are looking to alternatives. Newer countries to the arbitration scene view the establishment of a 'national' arbitration centre as something akin to the pride of a nation. Foreign investors, particularly in the government contracts involving more often than not, huge infra-structural constructions are faced with the problems of, among others, means of dispute resolution, choice of forum, choice of applicable substantive law etc.

2.1 International Commercial Arbitration

Schmitthoff, in his celebrated book *The Export Trade*, observes:

[49] Section 193 paragraph two of the Civil Procedure Code as amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

It is almost a truism to state that arbitration is better than litigation, conciliation better than arbitration, and prevention of legal disputes better than conciliation.[50]

The advantages of arbitration compared to litigation are traditionally listed as follows:

(a) privacy.

(b) tribunal of the parties' choice.

(c) informality of proceedings.

(d) speed and efficiency.

(e) lower costs.[51]

(f) finality of the award.

Effective enforcement of foreign judgments and foreign arbitral awards plays an important part in global promotion of international trade. The ultimate end of both litigation and arbitration from the plaintiff's or claimant's point of view is the effective enforcement of the judgment or award. The most certain method to ensure the enforceability of a judgment is to litigate in the national court of the defendant. But most international businessmen and their lawyers are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national court of the plaintiff or, possibly, in a neutral country. Unless the defendant has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. In case of arbitration, if the respondent does not voluntarily pay, the claimant will have to seek judicial assistance in the enforcement of the award regardless of where the arbitration took place.

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50 Schmitthoff, *The Export Trade* (6th edn), Steven & Sons, p 365.

51 In many cases whether arbitration incurs lower costs than litigation is debatable.
With respect to one of the direct costs -filing fees and other tribunal fees-arbitration can be more expensive than all other forms of dispute resolution including litigation. Since in most jurisdictions filing fees and court fees are nominal. The International Chamber of Commerce (ICC) Court of Arbitration's filing of registration fee is $ 2,000 and an additional administrative charge, a percentage of the amount in dispute is added. In an apparent effort to counter its reputation for being too expensive, the ICC announced that the administrative charge is now capped at $ 50,500 regardless of the amount in contention. Attention must also be given to the fact that while judges work may be described as public service, most arbitrators charge for fees. Two other factors must also be taken into consideration. First, attorney fees can be huge if the trial lasts a long time. Secondly, in comparing arbitration costs to litigation costs, one must remember that arbitral awards are not themselves enforceable and if the losing party does not voluntarily pay additional costs for a judicial enforcement proceeding will be incurred.
See McDermott in an excellent article, *'A Comparison of Arbitration Conciliation and Litigation for Resolving International Trade Disputes'*, a paper presented at the 1989 Bangkok Conference on International Arbitration organized jointly by the Thai Law Society, the International Bar Association, the Law Association for Asia and Pacific and the Asia-Pacific Lawyers Association.

2.1.1 Enforcement of Foreign Arbitral Awards

In purely domestic disputes, the debate whether to arbitrate or litigate may be finely balanced, much may depend upon the circumstances of each case. However, where the dispute is set in an international context, the balance comes down firmly in favour of arbitration. The main reason being while there are no international conventions on the global basis for the enforcement of foreign judgments, there is a widely accepted international convention governing the enforcement of foreign arbitral awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention of 1958, a convention under the auspices of the United Nations to replace the League of Nations' Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, is easily the most important international treaty relating to international commercial arbitration. The New York Convention is generally regarded as a major force behind the rapid development of arbitration as a means of resolving international trade disputes in recent decades. As of to-day, a total of 125 nations have acceded to the convention including the major trading nations e.g. the USA, USSR, Japan, France, Switzerland, the Federal Republic of Germany and the UK as well as African countries such as Nigeria and Ghana, Arab countries such as Kuwait and Egypt and Latin American countries such as Chile, Cuba and Mexico. In the Asean region: Thailand acceded to the New York Convention in 1959, Cambodia in 1960, Philippines in 1967, Indonesia in 1981, Malaysia in 1985, Singapore in 1986, Vietnam in 1995 and Brunei Darussalam in 1996.

2.1.2 Scope of the New York Convention

Article I of the Convention provides that the Convention shall apply to:

arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ... it shall also apply to arbitral awards not considered as domestic awards...

However, Article I also provides that:

any State may on the basis of reciprocity declare that it will apply the Convention

to ... awards made only in the territory of another Contracting State... to differences arising out of legal relationships ... which are considered as commercial under the national law of the State making such declaration.

The two exceptions are referred to as the '*reciprocity reservation'* and the *'commercial reservation'* respectively. The Convention requires a minimum of conditions to be fulfilled by the party seeking enforcement. The enforcing party need only supply the duly authenticated original award or a certified copy thereof and the original arbitration agreement or a certified copy of it. After submitting the described documents, the party submitted will have established a *prima facie* right to obtain enforcement of the award. It is up to the other party against whom enforcement is sought to prove the existence of one or more of the grounds for refusal of enforcement enumerated in Article V of the Convention. These are the only grounds upon which enforcement may be refused, the court before which enforcement is sought may not review the merits of the award. The grounds for refusing to enforce an award are:

(a) invalidity of the arbitration agreement.
(b) violation of due process.
(c) arbitrator exceeded his authority.
(d) irregularity in the composition of the arbitral tribunal or arbitral procedure.
(e) award not binding, suspended or set aside by a competent authority of the country in which, or under the law of which, that award was made.

In addition, under Article V (2), there are two other grounds for refusal of enforcement, which can be raised by a court on its own motion:

(a) non-arbitrability of the subject matter.
(b) public policy of the enforcing country.[52]

2.1.3 Thailand and the Enforcement of Foreign Arbitral Awards

Thailand is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The New York Convention is

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52 See McDermott, *A Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region,* in conjunction with the article cited in note 25 *supra*, this paper is presented by the learned author at the 1989 Bangkok Conference. See also

plainly a considerable improvement upon the Geneva Convention, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It replaces the Geneva Convention as between States, which are parties to both Conventions. At present all State Parties to the Geneva Convention have joined New York and thus rendering the significance of the Geneva Convention more academic than practical.[53]On the bilateral basis, Thailand has entered into a bilateral treaty with the United States of America - the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America 1968. Article II, 3 of the Treaty provides that arbitration agreements between nationals, including companies, of the two countries shall not be unenforceable merely because the arbitration is to be held in the other country or because one or more arbitrators are not nationals of the country where enforcement is sought. Treaty, convention and international agreement on arbitration of which Thailand is a party are ratified by Parliament in the Arbitration Act B.E. 2530 (1987). Section 29 of the Act provides:

Foreign arbitral awards shall be recognized and enforced in the Kingdom of Thailand only if it is made in pursuant to the treaty, convention or international agreement to which Thailand is a party and it shall have effect only as far as Thailand accedes to be bound.

Foreign arbitral awards made in pursuant to the treaty, convention or international agreement to which Thailand becomes a party after the effective date of this Act shall be recognized and enforced in the Kingdom of Thailand in accordance with this Act, subject to the conditions prescribed in the Royal Decree.

One of the most interesting features of the Arbitration Act 1987 concerning ratification is that the Act not only gives ratification to treaty, convention and international agreement on the recognition and enforcement of foreign arbitral awards to which Thailand is already a party *before* the enactment of the Act, but also to the same *after* the enactment of the Act. That is, the Act, in essence, gives a *carte blanche* to foreign arbitral awards in the future. This may be understood as a very positive attitude towards international commercial arbitration by the

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Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (2nd edn, 1991) Sweet & Maxwell.

53 The last two countries of the Geneva Convention which acceded to the New York Convention were Portugal on 18 October 1994 and Mauritius on 19 June 1996.

Parliament. The Thai Supreme Court shares a similar attitude by enforcing foreign arbitral awards long before the enactment of the Arbitration Act 1987.[54]

2.1.4 Scope of the Arbitration Act 1987

The Arbitration Act B.E. 2530 (1987) covers both domestic and international commercial arbitration. Under section 6, an arbitration agreement must be evidenced in writing in order to be enforceable. The writing may be in the form of correspondence, telegram, telex or other similar documents. If any party to an arbitration agreement commences any legal proceedings in the court against the other party contrary to the arbitration agreement, the other party may apply to the court, before the day of hearing of evidence or the day of judgment if there is no hearing of evidence, to stay the proceedings. If the court is satisfied that there is no ground to render the arbitration agreement null or unenforceable, the court shall make an order staying the proceedings. In the arbitral process, an arbitrator may seek judicial assistance in compelling the testimony of witnesses, production of documents or other evidence, granting interim measures to protect the interests of the parties prior to the award or the ruling of the court on question of law.

The arbitral award must be made in writing signed by the arbitrator or umpire, as the case may be, stipulating clearly the reason given for the award. Unless otherwise agreed by the parties, the award must be given within 180 days from the day of the appointment of the arbitrator or umpire. The period, if not extended by mutual agreement, may be extended with leave from the court.

There are two sets of provisions for the enforcement of arbitral awards, one for the domestic awards and the other for foreign awards.

2.1.4.1 Domestic Awards

The court may refuse to enforce a domestic award if the award is contrary to the law applicable to the dispute, or derived from an unlawful act or means, or falls outside the scope of the arbitration agreement. Appeal against the order or judgment of the court is prohibited unless:

[54] See, for examples, Supreme Court Decision Nos. 465/2478 (1935) and 698/2521 (1978).

(a) there is allegation that the arbitrator or umpire did not act in good faith or one of the parties used fraud ;
(b) the order or judgment is contrary to public order ;
(c) the order or judgment does not conform with the arbitral award ;
(d) the inquiring judge made a dissent or certified that there is good cause for appeal ; or
(e) the order is made provisional pending arbitral process for the protection of interests of the party.

2.1.4.2 Foreign Awards

Foreign arbitral awards mean awards made by arbitration conducted abroad or mainly abroad and one of the parties is not of Thai nationality. To enforce a foreign award, the party seeking the enforcement must submit its application to the court of competent jurisdiction within one year of the delivery of the award to the other party. The application must be accompanied by the following documents:

(a) the original award or a certified true copy thereof ;
(b) the original arbitration agreement or a certified true copy thereof ; and
(c) a Thai translation of both the award and the arbitration agreement to which the translator has sworn as to the correctness and duly certified by an officer of the Ministry of Foreign Affairs, a Thai consulate or diplomatic delegate abroad.

The Act has a separate provision relating to the enforcement of awards under the Geneva Convention and under the New York Convention. Since all members of Geneva are now members of New York, hence the difference is now purely academic. It is proposed to deal only with the enforcement to the awards made in pursuant to the New York Convention. Sections 34 and 35 of the Arbitration Act 1987 provide that the New York Convention awards may be denied of enforcement upon proof that[55]:

(a) either party is incompetent according to the law applicable to the party ;
(b) the arbitration agreement is not legally binding according to the law of the country agreed upon or of the country of the award where no such agreement exist ;
(c) the adverse party was not given adequate notice prior to the appointment of the arbitrator or the commencement of arbitration

[55] The enforcement of Geneva Convention awards is provided in ss 32 and 33.

proceedings or was unable to participate in the arbitration for other reasons;

(d) the award is outside the scope of the arbitration agreement ;

(e) the arbitrator was not appointed in compliance with the arbitration agreement or, if no agreement was made on the appointment procedure, under the law of the country where the award was rendered;

(f) the award is not final or has been revoked or suspended ;

(g) the subject matter of the dispute is not arbitrable under Thai law ; or

(h) enforcement of the award would be contrary to public order or good morals or the principle of international reciprocity

Public order, *ordre public* or public policy may be cited by the court to deny enforcement of foreign judgments in Thailand much in the same way that judges in the Continent of Europe enlarge the scope of the defence to the enforcement of foreign judgments by revoking *ordre public*. It is feared, albeit no court decisions have confirmed it, that the award given without reason and contrary to Section 20 (the award must be accompanied by reason clearly stated), may be unenforceable as contrary to natural justice and hence against public policy. It is always advisable to have the awards fully reasoned in order to seek enforcement in the civil law countries.

Harmonization of the enforcement of arbitral awards is one thing but the harmonization of the law relating to the enforcement of foreign judgments is a much more difficult matter. There are no international conventions on the global basis for the enforcement of foreign judgments. It is suggested that any achievement on this matter in the Asean region will best be conducted on the bilateral basis. Considerations must be given to the extent of jurisdiction claimed by each Party State and the judgments for reciprocal treatment confined to specific areas. A good example of legal harmonization in the Asean region, an encouraging starting point, is the Agreement Concerning Judicial Cooperation between Indonesia and Thailand in 1978 which falls short of reciprocal enforcement of judgments.

2.1.5 A Critique of International Commercial Arbitration in Thailand[56]

In recent times, commerce and industry have often found arbitration as the preferred means of dispute resolution to litigation in law court. More and more businessmen and lawyers with international dealings often find the inclusion of an arbitration clause in their contracts almost a standard practice. In recent past, the arbitration clause invariably incorporated the rules and the service of arbitration centres abroad. Thailand has thus been the receiving end of the enforcement of foreign arbitral awards. It was thought, in many quarters, that as a matter of economic interest, if not national pride, Thailand should establish an arbitration centre of its own to promote and administer domestic arbitration with the capability of undertaking international commercial arbitration. The Thai Board of Trade had the first attempt. The Law Society had also a similar scheme. Law professors and academics attempted with *ad hoc* arbitration too. All with little success. The principal factor thought to be underlining the above predicament was unacceptance from the public. The public found it hard to accept the forum as a replacement for the court of justice in terms of integrity, acceptability and enforceability of the awards.

The first serious attempt to deal collectively and effectively with international commercial arbitration in Thailand was the establishment of the Arbitration Office, Ministry of Justice in 1990. The Ministry of Justice, which is entrusted by the Arbitration act B.E. 2530 (1987) to oversee its administration took pains in explaining its role and the assurance of independence and neutrality of an arbitration centre administered by a government organ. In the booklet introducing the Arbitration Office, it states:[57]

The role of the Ministry in this Office is to lend the creditability of the Ministry of Justice to the Office and hence, hopefully, the acceptability from the public...

The Arbitration Office has its own conciliation and arbitration rules. These rules are based upon the UNCITRAL and AAA rules. At present the Office has enlisted 128 eminent lawyers and other professionals in its list of arbitrators. Parties are free to nominate qualified professionals from outside the list as

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56 See Hutter, 'International Commercial Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) December 1992, at 1, for a critical analysis of the legal environments of international commercial arbitration in Thailand.

57 Ministry of Justice, *The Thai Arbitration Institute, Arbitration under the*

arbitrators. The list of arbitrators is classified into 15 categories, for example, international trade, investment, intellectual property, carriage of goods by sea, malpractices, construction contracts etc. While Thai and English are the languages often used in arbitration at the Arbitration Office. Parties are free to choose any other languages of their preference. Chinese is sometimes used in the arbitral process. Foreign lawyers are welcome either as arbitrator or legal adviser in the arbitration which involves foreign party. Albeit a body sponsored by the Government, the Arbitration Office maintains its independence and integrity intact by the Thai Government. The Office has no control over the discretion of the arbitrators in each case. It merely acts as secretariat to the arbitral process...

Laos has now an arbitration office within the Ministry of Justice. Ironically, in Thailand a special committee has been set up to 'privatize' the Office from the Ministry of Justice. A calculated move after assurance that the Arbitration Office has created a reputation on its own and can administer without budgetary support from the Government.

2.2 Problems Obstacles and Remedies for the Development of Arbitration in Thailand[58]

The problems, obstacles and remedies for the development of arbitration in Thailand can be viewed from three perspectives: the Executive, the Legislature and the Judiciary.

From the Executive point of view, one would like to see governmental departments and state enterprises resort more to alternative dispute resolution. Heads of governmental departments and state enterprises tend to take their grievances to court or defend their cases until final judgment of the highest court in the land. The trend derives from the fact that these heads of governmental departments and state enterprises try to avoid personal responsibility of any alleged 'wrong decision'. The policy is that it is always safer to wait and observe only the final judgment of the court. This lack of courage to settle the dispute at an early stage or to attempt out-of-court settlement for fear of criticism of lack of transparency may work against the reputation of the government. A recent dispute between the Express and Rapid Transit Authority of Thailand, Ministry of Interior and Bangkok Expressway Company Limited, a consortium led by Kumakai Kumi of Japan on the Second Stage Expressway Agreement whereby the Express and Rapid Transit

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Auspices of the Ministry of Justice, at 4.

Authority took Bangkok Expressway to the Civil Court on the face of an arbitration clause in the contract between them. The case brought serious repercussion on the Thai-Japan relationship on investment of infra-structure constructions and the reputation of the embryonic arbitration system in Thailand.[59]Another criticism one might raise against the attitude of governmental departments and state enterprises is the tendency to defer payment under the arbitral award until the final judgment enforcing the award has been pronounced. To remedy these problems and obstacles to arbitration, the Arbitration Office, through the Ministry of Justice has recently proposed to the Cabinet to issue a resolution to the effect that governmental departments and state enterprises shall resort more to alternative dispute resolution and shall exercise their discretion to have an early resolution to the dispute. It is hoped that the Cabinet resolution, when issued, will give more courage to heads of governmental departments and state enterprises to end their dispute quickly and constructively by whichever means which is fair, speedy and efficient.

From the Legislature point of view, the most urgent piece of legislation which needs to be looked at in order to create a more congenial atmosphere to international commercial arbitration is the law governing the practice of foreign lawyers in Thailand: the Alien Occupation Act B.E. 2521 (1978) and clause 39 of the Schedule to the Royal Decree B.E. 2522 (1979) regarding occupations and professions which are prohibited to aliens. In essence the law prohibits aliens from 'providing legal service'. The Ministry of Justice has proposed an amendment to exclude the 'service of a foreign arbitrator or a foreign attorney in an arbitral proceedings where the case involves a foreign party, regardless of the applicable law, provided that the party engaging the foreign arbitrator or attorney has also engaged a local attorney in the case'. A slight modification of the Singapore experience after the *Turner's case*[60] and the amendment to the Legal Profession Act thereafter.

The present predicament is that the Arbitration Office has successfully persuaded the Ministry of Labour and Social Welfare to issue work permits to foreign arbitrators to practice in Thailand on the contention that the work of an arbitrator is not that of giving legal service but he or she is working in a quasi-judicial capacity. The work of a judge is not giving legal service but dispensing justice, likewise the work of an arbitrator. As far as the attorney is concerned, he or she is treated as a representative of the party so no legal qualification is asked. In practice, foreign arbitrators and attorneys are active at the

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[58] See The Arbitration Office, 'Report on the Promotion and Development of Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) June 1994, at 21.

[59] See Maolanont, 'If You Have a Client Like 'Ninomiya' of Kumakai Kumi' *Botbandit* (Journal of the Thai Bar Association) December 1993, at 31.

[60] [1988] 2 MLJ 280.

Arbitration Office of the Ministry of Justice. However, the proposal for the amendment to the Act is now taking seriously in the relevant circles.

The requirement under the Revenue Code for an arbitrator to 'affix and cancel' a stamp duty in the amount of 0.1% of the award is also proposed to be canceled for creating unwarranted burden on the arbitrators.

Lastly, when one looks at the Judiciary's perspective, there are certain reforms that one wishes would happen. It is very fortunate that the enforcement of arbitral awards and the motions filed under the Arbitration Act concerning intellectual property and international trade disputes are now under the jurisdiction of the Intellectual Property and International Trade Court. With the mechanism of the 'rules of the court', it is hoped that the practice of arbitration law will be more unified and consistent in view of the specialized Bench and Bar.

However, one would hope that the court will construe more leniently the existence of a valid arbitration clause. In a number of court decisions,[61] the Supreme Court held that since an arbitration clause is an agreement which restricts the right of a party to resort to the court of justice and hence the clause must be construed narrowly and strictly. In a number of cases, loosely worded arbitration clauses: *'If an arbitrator will have to be appointed, the party shall be obliged by the award', 'amicable arbitration in Hamburg', 'If an arbitration has to be set up, it shall be in Bangkok' etc*. are held to be unenforceable and hence the court entertains jurisdiction over the dispute. It is feared that the word *may* as in the clause*, the party may submit the dispute to arbitration,* may be unenforceable for the word *may* denotes a choice to the party and not a strict restriction on the parties. Here is an example:[62]

> *Clause 27: Settlement of Disputes*
>
> *27.1 Reference to Arbitration*
>
> > *Unless otherwise stated in this Agreement, any dispute, controversy or claim arising out of or in connection with this Agreement shall first be submitted to the Panel in order to ascertain whether an amicable settlement can be achieved, and in the event that no such resolution can be achieved*

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61 For examples, See Supreme Court Decision Nos. 945/2498 (1955), 49/2502 (1959), 3429/2530 (1987).

62 This example is taken from the Second Stage Expressway Agreement between Expressway and Rapid Transit Authority of Thailand Ministry of Interior and Bangkok Expressway Company Limited.

within 60 days or such other period as may be agreed between the parties, either party may settle such dispute or controversy by submitting it to arbitration in accordance with the Arbitration Act of Thailand.

The caveat is that, for the moment, it is always prudent to draft in a more mandatory form *e.g.* the claimant *shall* submit the dispute to arbitration.

2.3 Conclusion

With the expansion of trade and investment in the Asia-Pacific region and the growing needs for effective mechanism and management for international commercial litigation, arbitration and other forms of alternative dispute resolution; many arbitration centres have been established in the region in direct competition with the more established centres in Europe and America. One sees less, but increasing attempt to create or promote international litigation as an alternative to arbitration. Both forms, of course, incorporate conciliation or settlement conference in their agenda. Prospective clients will have more opportunity than in the past for forum shopping. A predictable phenomenon in the climate of free market economy. The more difficult question is 'quality control'.

In Thailand, a serious attempt is being made by the Arbitration Office to reform the existing Arbitration Act which, following the old English tradition, treats domestic and foreign arbitration in different regimes. It is now in the process of drafting a single Act applicable to both domestic and foreign arbitration. Attitudes of people having interest in arbitration are also changing, in a more congenial way. The Ministry of Finance is drafting the implementation Act for the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) of which Thailand has signed on December 6, 1985 but has failed to ratify so far.

With the 1991 amendment to the Civil Procedure Code, a more extensive claim of jurisdiction has been made. This will inevitably or naturally be followed by the introduction of reciprocal enforcement of civil and commercial judgments agreements, bilaterally or multilaterally. Something dreaded only in recent past. With the establishment of the Intellectual Property and International Trade Court, it seems to be the only logical solution if one were to give a full meaning to the word *'International Trade Court'*

Chapter Eight: Conclusion

At the turn of the century when western colonial powers were at its peak in this part of the world, two major legal systems were here competing for its supremacy on the nations of the East. Of course, there were the English Common Law and the Continental Civil Law. Japan and Thailand chose the Civil Law system in line with the German *BGB* and the French Code *Napoléon* for their law reform. However, in order to appreciate fully the Thai legal system, one must realize that Thailand belongs to the civil law system merely by the fact of its codification. The contents of the Thai Civil and Commercial Code are as varied as the major legal systems in the world themselves. English law played an important part on the Commercial Part of the Code whereas one could find traces of the ancient Thai law, a form of Hindu's *Dharmasastra*, in the Parts on Family and Succession of the Code. On the other hand, as far as the procedural aspect is concerned, Thai procedural law could be classified as adversary instead of inquisitorial like most of the Continental systems.

However, the modern view is also expressed that Thai procedural system combined the adversarial and the inquisitorial system. Whereas the fact-finding relies heavily on party-prosecution; each party controls and develops the preparation and presentation of his own cause, it also assigns to the court the basic responsibility for gathering the materials for decision.[63] It is widely recognized that the position of the judge is one of the most important factors in the proceeding. However, Thai judge does not act absolutely as a "case manager"[64] like it was deemed in civil law system, and not a "blind umpire"[65] in common law system. The concept of a judge as an independent umpire between litigating parties is one basic to the common law adversary proceeding especially Anglo-American adversarial tradition considers the judge's independence is endangered if he claims too great a role in the proceedings. The combined role of judge-conciliator seems to be generally unknown in American litigation.[66] Thai judge could possibly suggest settlement discussions, help the parties to find a basis for compromise.[67] Nevertheless, subject to the Conciliator Rules provided by each Court according to the Civil Procedure Code Article 20, judges could even propose a possible formula for settlement and may be able to convert a

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[63] The Civil Procedure Code Article 119, 187 and the Criminal Procedure Code Article 228.
[64] This concept is developed by **Peckham, *The Federal Judge as a case manager: The New Role in Guiding a Case from Filing to Disposition,*** 69 Calif. L. Rev. 770 (1981); **Resnik,*Managerial Judges,*** 96 Harv. L. Rev. 376 (1982).
[65] **Flanders, *Blind Umpire – A Response to Professor Resnik,*** 35 Hasting L. J. 505 (1984).
[66] Vincent Fisher-Zernin and Abbo Junker**, *Arbitration and Mediation: Synthesis or Antithesis,*** 5(1) Journal of Int'l Arbitration 21 (1988).
[67] The Civil Procedure Code Art. 20

legal dispute into a business problem which is the goal of informal conflict settling mechanisms but they have to be a panel other than a panel of judges of whom that case is in charged.

Generally, proceedings in civil & commercial cases and criminal cases are governed by the Civil Procedure Code 1935 and the Criminal Procedure 1935. As to the Civil Procedure Code, the rules of which are practical, giving the Court wide discretion in directing the proceedings in the cases. The trials must be held openly in court before all parties; except in case of default of appearance or in case of necessity to maintain order in court, the Court may proceed with the hearing in the absence of the party in default or the party expelled on the ground of improper behavior; and except where the subject matter should not be disclosed to the general public, the Court may sit *in camera,* i.e. the public and the press are excluded, and no report of them may be published without the Court's leave. Other essential principles of civil procedure include, *inter alia,* the followings: Both sides are given an equal opportunity to be heard, and are entitled to legal representation. Witnesses are subjected to examination-in-chief, cross-examination and re-examination. Little weight is given to any evidence where there has been no opportunity of cross examination. The judgement must state the grounds on which it is based. The losing party may make an appeal against the judgement to the Court of Appeal or the Regional Court of Appeal except where the appeal is prohibited by the Code or other law. With further restrictions, appeal may lie against the judgement of the Court of Appeal to the Supreme Court whose judgement is taken to be final. Although the judgement may be appealed to the Court of Appeal and further appealed to the Supreme Court, the lodging of an appeal or further appeal does not entail a stay of execution of the judgement or order to the Court of First Instance. The party lodging the appeal may, however, apply to the Court of Appeal or the Supreme Court for such stay of execution. During the proceedings, parties in all tiers of the Court could apply for the interlocutory injunction in order to protect their interests.

The Criminal Procedure Code 1935 applies to trial of criminal cases in all Courts of Justice except in Kwang Courts, Juvenile and Family Courts, and Intellectual Property and International Trade Courts which have their own special criminal procedures. Usually, four types of personnel of the law are involved in criminal proceedings. They are police officers, public prosecutors, lawyers, and judges.

Investigation and inquiry in order to find the offender and establish his guilt are the responsibility of the police officers. The file of inquiry will be submitted by the police officer to the public prosecutor for consideration and the offender will be prosecuted if the public prosecutor concludes that there is enough evidence to support the conviction. At the trial, it is the burden of the public prosecutor to prove to the satisfaction of the Court that the defendant is guilty as charged. The Court will conduct a trial by hearing evidence from both sides openly in court before the defendant. It should also be added that the accused is entitled to full legal representation. In certain cases it is obligatory on the part of the judges to call upon and appoint a lawyer in his defense. An injured person himself may prosecute the alleged offender. In such a case, a preliminary hearing will be held by the court to ascertain that there is *a prima facie* case to justify compelling the defendant to appear in court and proceedings with trial. This is a filtering process to safeguard an innocent person from being prosecuted unnecessarily. If the judge is of the opinion that there is *a prima facie* case, he will issue a summons or a warrant of arrest on the accused. In practice a warrant is not issued unless a prior summons for the accused's appearance proves ineffective. Attendance of the accused during trial is obligatory. But there are certain exceptions. The evidence of the prosecutor will be adduced first. Witnesses of the prosecutor are examined-in-chief by the prosecutor, cross-examination by the accused or his lawyer if he so wishes, and re-examined by the prosecutor. Subsequently, the accused is entitled to adduce his evidence. Judgement will be delivered within 3 days after the closing date. Appeal against judgement of the Courts of First Instance either on the question of fact or on the question of law may be made to the Court of Appeal or the Regional Court of Appeal. Appeal on the question of fact may be barred if the offences have the maximum punishment of not more than 3 years' imprisonment or fine not exceeding 60,000 Baht, and such offence are dismissed by the Court. Appeal against judgement of the Court of Appeal will lie to the Supreme Court subject to certain restrictions such as the case when the Court of Appeal upholds the acquittal judgement, and so on.

However, for the last two decades, There has been an attempt to establish a new system of specialized court within the system of the Court of Justice, for example, The Central Labour Court, The Central Tax Court, The Central Intellectual Property and International Trade Court, and the most recently The Central Bankruptcy Court, all of which have their own special procedures in order to ensure convenience,

expediency and fairness of the proceedings. The panel of judges always consists of professional judges who possesses competent knowledge of the matters involved, for example, Labour law, Intellectual Property, International Trade, Tax, etc. and also the expert, so called “Associate judges” to sit collaborately on the bench except for the panel of judges in the Tax Court and the Bankruptcy Court. Once there was an attempt to establish the Administrative Court with which an expert judge associated to be one of specialized court in the system of the court of justice but there was no support by the cabinet or the parliament. Finally the Administrative Court was established to be a new organization with judicial power other than the existing court of justice. However, no matter what kind of judges in the specialized court are, they could properly exercise their discretion, considers their own expertise sufficient to decide the case. They do not mind acting as self-appointed specialists deciding question of highly contested even among experts. We can say that Thai specialized court have both bench and bar because we have expert on the bench which is a double guarantee of specialization.

The role of a judge in Thailand as well as the role of a judge elsewhere in the world is changing rapidly. Like any other members of the society, judges need to make their contribution to the society. Their role on the bench is changing too. Judges in Thailand are playing a more constructive role of settlement of disputes. More and more conciliation techniques are attempted. In many cases the role of a judge is becoming more involved, more inquisitive and more active than the traditional passive role of a judge in the adversary system.

We are living in an increasingly changing society. We are certainly living in an interesting time. To the audience who are more acquainted with Thailand, the comparison of the judiciary to *"the last recourse for the people”* is all too familiar. Time and again, the judiciary acts as insulation against oppression and unfairness for the people, irrespective of their economic, religious, ethnic or social background.

It is hoped that the Thai judiciary today can maintain the reputation it once enjoyed almost a hundred years ago when Walter Graham, in his book, *Siam*, (3rd edn, London: Alexandra Moring, 1924 Vol. I, pp 372-373) said:

...The Ministry has built up a service probably the cleanest and straightest Siam has ever

seen, and containing in its ranks officers who could compare favourably with the members of the judiciary of many European countries. In fact, about the year 1909, the Ministry of Justice was the bright particular star in the administration of the country. ..

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Appendix 1

Case Statistic of the Central Intellectual Property and International Trade Court

1January - 31 December 2000

Intellectual Property

Civil Cases

	Amount of Controversy (baht)	Cases Filed	Cases Disposed	Percentage Case Disposal
1 Trademark infringement	1,156,669,055.42	74 [34]	35	47.29
2 Appeals against decisions of Trademark Board	-	16 [3]	5	31.25
3 Cancellation of trademark registration	-	9 [0]	3	33.33
4 Copyright infringement	3,282,670.88	54 [16]	25	46.29
5 Appeals against decisions of Patent Board	-	2 [1]	1	50.00
6 Patent infringement	-	3 [2]	2	66.66
Total	**1,159,951,726.30**	**158** [56]	**71**	**44.93**

Criminal Cases

1 The Penal Code	Cases Filed	Cases Disposed	Percentage Case Disposal
- Offences under Sections 271 - 275	71 [14]	21	
Total	**71** [14]	**21**	**29.57**

2 The Trademark Act	Cases Filed	Cases Disposed	Percentage Case Disposal
- Counterfeiting (Section 108)	30 [0]	30	100.00
- Imitating (Section 109)	11 [1]	11	100.00
- Importing, selling, offering for sale of goods under Sections 108, 109	1,262 [17]	1,256	99.52
- Giving or offering a service under Sections 108, 109	-	-	-
Total	**1,303** [18]	**1,297**	**99.53**

3 The Copyright Act	Cases Filed	Cases Disposed	Percentage Case Disposal
- Copyright infringement (Section 27)	-	-	-
- Infringement of audiovisual work, cinematographic work, and sound recording (Sections 28 - 29)	1 [1]	-	00.00
- Infringement of computer program (Section 30)	5 [5]	-	00.00
- Selling, offering for sale of work infringing the copyright (Section 31)	914 [117]	794	86.87
- Computer program			
- Other forms of literary work			
- Cinematographic work			
- Sound recording			
- Art work			
- Musical work			
- Infringement of performer's rights	-	-	-
Total	**920** [123]	**794**	**86.30**

4 The Patent Act	Cases Filed	Cases Disposed	Percentage Case Disposal
- Patent infringement	6 [4]	5	
Total	**6** [4]	**5**	**83.33**

Intellectual Property Cases - Total	**2,458**	**2,187**	**88.97**

International Trade

	Amount of Controversy (baht)	Cases Filed	Cases Disposed	Percentage Case Disposal
1 Carriage of goods by sea	586,683,677.95	136 [58]	88	64.70
2 Other forms of international carriage of goods	58,043,381.70	96 [38]	54	56.25
3 International sales of goods	4,097,179,592.98	61 [34]	40	65.57
4 Letter of credit and trust receipt	72,920,885,315.76	797 [243]	331	41.53
5 International services (finance)	8,384,922,926.20	59 [31]	33	55.93
6 Other forms of international services	113,448,634.08	45 [38]	17	37.77
7 Arrest of ships	59,446,774.08	17 [1]	13	76.47
8 Enforcement arbitration awards	2,082,351,382.00	5 [2]	3	60.00
9 Others	-	-	-	-
Total	**88,302,961,684.75**	**1,216** [445]	**579**	**47.61**

Case Statistics of all Courts throughout the Kingdom of Thailand

1 January - 30 November 2000

Courts	Case Filed				Case Disposed				Percentage Case Disposal
	Civil Cases	Bank-ruptcy Cases	Criminal Cases	Total	Civil Cases	Bank-ruptcy Cases	Criminal Cases	Total	
The Supreme Court	4,670	174	4,734	9,578	3,991	99	3,977	8,067	71.28
Courts of Appeal	3,708	233	7,253	11,194	4,237	198	6,058	10,493	71.28
Courts of Appeal Region 1	1,290	37	3,078	4,405	961	53	2,387	3,401	46.68
Courts of Appeal Region 2	462	13	1,844	2,319	552	12	1,290	1,854	53.65
Courts of Appeal Region 3	628	11	1,980	2,619	590	14	1,946	2,550	90.78
Courts of Appeal Region 4	485	14	1,835	2,334	481	13	1,723	2,217	58.92
Courts of Appeal Region 5	599	16	2,015	2,630	273	11	1,624	1,908	49.28
Courts of Appeal Region 6	318	14	2,030	2,362	332	19	1,849	2,200	62.02
Courts of Appeal Region 7	416	5	2,234	2,655	464	10	1,972	2,446	59.66
Courts of Appeal Region 8	366	10	1,709	2,085	322	14	1,396	1,732	43.56
Courts of Appeal Region 9	249	7	1,496	1,752	511	14	1,364	1,889	60.54
Total Cases of the Court of Appeal	8,521	360	25,474	34,355	8,723	358	21,609	30,690	60.56
Total Cases of the Court of First Instance	284,499	2	496,039	780,540	281,300	614	480,920	762,837	76.50
The Central Bankruptcy Court	257	120	880	0	1,000	113	795	908	72.24
Juvenile and Family Courts	1,769	0	7,856	9,625	1,665	0	8,230	9,895	87.49
The Central Labour Court	15,702	0	0	15,702	15,739	0	0	15,739	71.06

Courts	Case Filed				Case Disposed				Percentage Case Disposal
	Civil Cases	Bank-ruptcy Cases	Criminal Cases	Total	Civil Cases	Bank-ruptcy Cases	Criminal Cases	Total	
The Central Tax Court	316	0	0	316	239	0	0	239	54.07
The Central Intellectual Property and International Trade Court	818	0	1,909	2,727	548	0	1,882	2,430	71.74

Appendix 2
Members of the Working Party

Honorary Advisor

Prasobsook Boondech

Educational Background
LLB. Thammasat University
Barrister-at-Law, Thai Bar Association
Barrister-at-Law, Lincoln's Inn, UK

Previous Posts
Judge attached to the Ministry of Justice
Judge of Tak Provincial Court
Director of Legal Affairs Division, Office of the Judicial Affairs
Chief Judge of Song Khla Provincial Court
Secretary-General, Office of the Judicial Affairs
Senior Judge of the Court of Appeals Region 3
Judge of the Supreme Court

Present Posts
Chief Justice of the Central Intellectual Property and International Trade Court

Members

Vichai Ariyanuntaka

Educational Background
LLB.(Hons.) Chulalongkorn University
Barrister-at-Law, Thai Bar Association
LLB.(Hons.) University of Wales, UK
LLM. London University, UK
Barrister-at-Law,Gray's Inn, UK

Previous Posts
Judge of Srisaket Provincial Court
Judge attached to the Ministry of Justice working as
Director of Legal Affairs Division
Chief Judge attached to the Ministry
Deputy Secretary-General, Office of the Judicial Affairs
Director of the Arbitration Office
Executive Director of the Arbitration Office
Editor-in-Chief:Botbandit Journal,
Law Journal of the Thai Bar Association (1990-1995)

Present Posts
Judge of the Central Intellectual Property and International Trade Court
Part-time lecturer in Comparative Law, Intellectual Property Law and International Commercial Arbitration at Chulalongkorn, Thammasat and Ramkhamhaeng Graduate Schools of Law

Wutipong Vechayanon

Educational Background
LLB.(Hons.) Thammasat University
Barrister-at-Law, Thai Bar Association
LLM. Harvard University, US

Previous Posts
Judge of Pechaboon Provincial Court
Deputy Secretary-General, Office of the Judicial Affairs
Judge of the Central Intellectual Property and International Trade Court

Voravuthi Dvadasin

Educational Background
LL.B.Thammasat University
Barrister-at-Law, Thai Bar Association
LLM.Tulane University, USA

LLM.University of Pennsylvania , USA
LLM.University of London, UK

Previous Post
Judge of Baytong Provincial Court
Judge of Kabinburi Provincial Court
Judge Attached to the Ministry working as Director of Legal Affairs Division
Judge Attached to the Ministry working as Deputy Secretary-General, Office of the Judicial Affairs
Judge attached to the Ministry working as Deputy Secretary-General, Office of the Judicial Affairs
Chief Judge attached to the Ministry working as Deputy Secretary-General, Office of the Judicial Affairs
Executive Director, Arbitration Office, Thailand

Present Posts
Chief Judge of Chiengmai Juvenile and Family Court

Jagkrit Jenjesda

Educational Background
LLB.Ramkamkheang University
Barrister-at-Law, Thai Bar Association
M.C.J. Howard University, USA
M.C.L. The Dickinson School of Law, USA

Previous Posts
Chief Judge Attached to the Ministry working as the Supreme Court Assistant Judge
Director of Judicial training Institute, Ministry of Justice
Judge Attached to the Ministry working as the Director
Judge of Saraburi Provincial Court
Judge of Takuapa Provincial Court
Judge Attached to the Ministry working as Dusit Kweang Court
Judge Attached to the Ministry working as Criminal Court Judge
Judge Attached to the Ministry working as Civil Court Judge
Judge trainee, Ministry of Justice
Attorney, Thongchai International Law Clinic

Present Posts
Chief Judge Attached to the Ministry working as the Central Intellectual Property and International Trade Court Judge

Wisit Wisitsora-At

Educational Background
LLB.(Hons.) Thammasat University
Barrister-at-Law, Thai Bar Association

LLB.(Hons.) University College of Wales, UK.
Barrister-at-Law, of Grays' Inn, UK

Previous Post
Official Receiver of the Legal Execution Department
Judge Attached to the Ministry working as in different Courts : Civil Court, Supreme Court, and Songkla Magistrate Court
Judge Attached to the Ministry working as Deputy Secretary-General, Office of the Judicial Affairs
Adjunct lecturer – in law at various universities including Thammasat University, Ramkhamheaeng University and Durakijbundit University
Editor – in Chief of the Ministry of Justice Law Journal (1996 -1998)

Present Posts
Executive Director, Business Reorganisation Office, Legal Execution Department, Ministry of Justice
Deputy Director – General, Legal Execution Department, Ministry of Justice

Surapol Konglap

Educational Background
LL.B. Thammasat University
Barrister-at-Law, Thai Bar Association
LL.M Thammasat University
LL.M University of London(Queen Marry and Westfield College),UK

Previous Post
Judge of Sakon Nakorn Provincial Court
Secretary of the Civil Court
Judge of the Thonburi Criminal Court

Present Posts
Judge of the Central Intellectual Property and International Trade Court

Sittipong Tanyapongpruch

Educational Background
LLB.Ramkhamhaeng University
Barrister-at-Law, Thai Bar Association
Master of Comparative Law (MLC), California Western School of law, San Diego, California, USA
LLM.Southern Methodist University, Dallas, Texas, USA
LLM.Queen Mary and Westfield College, University of London, UK

Previous Posts
Judge of Thonburi Kwaeng Court
Judge of The Civil Court of Southern Bangkok
Assistant Judge in Supreme Court
Judge of Criminal Court
Judge of Surin Provincial Court
Judge Attached to the Ministry working as Deputy Secretary-General, Office of the Judicial Affairs

Present Posts
Executive Director, Arbitration Office, Thailand

Secretariat

Panyong Putthipat

Educational Background
LLB. Ramkhamhaeng University

Legal Officer, Arbitration Office

Liaison

Phattarasuda Boonkitticharoen

Educational Background
LLB. Chulalongkorn University
Barrister-at-Law, Thai Bar Association

Legal Officer, The Central Intellectual Property and International Trade Court