

## Chapter 6

### 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.<sup>2</sup> 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.<sup>3</sup>
- (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.<sup>4</sup>

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

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<sup>2</sup> W.R. Cornish, *Intellectual Property*, ( 3<sup>rd</sup> ed., 1996), Sweet & Maxwell, p 49.

<sup>3</sup> 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.

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.

## **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

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<sup>4</sup> W.R. Cornish at p 50.

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.<sup>5</sup> 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.<sup>6</sup>
- Exclusive jurisdiction on matters concerning international trade e.g. international sale, carriage, payment, insurance and related juristic acts.<sup>7</sup>
- Exclusive jurisdiction on the arrest of ship ( a sort of Mareva injunction).<sup>8</sup>
- Exclusive jurisdiction on anti-dumping and subsidies.<sup>9</sup>

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<sup>5</sup> The IP&IT Court Act, s 30.

<sup>6</sup> The IP&IT Court Act, s 7 (1) - (4)(9).

<sup>7</sup> The IP&IT Court Act, s 7 (5) (6).

<sup>8</sup> The IP&IT Court Act, s 7 (7).

<sup>9</sup> The IP&IT Court Act, s 7(8).

- Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.<sup>10</sup>
- 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.<sup>11</sup>
- 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.<sup>12</sup>
- Use of pre-trial conference to facilitate a speedy, efficient and fair trial.<sup>13</sup>
- Use of video conferencing for the examination of witnesses outside the court, including overseas, can be requested.<sup>14</sup>
- Full day and continuous hearing as against piecemeal.<sup>15</sup>
- Use of deposition and affidavit in conjunction with oral evidence.<sup>16</sup>
- Speedy inquiry and orders for preliminary injunctions.<sup>17</sup>
- Possibility of the appointment of expert witness as *amicus curiae*. A friend of the court.<sup>18</sup>
- Leap-frog procedure where appeals lie directly to the IP & IT Division of the Supreme Court.<sup>19</sup> 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.<sup>20</sup>
- Possibility of *in camera* proceedings in appropriate cases for the protection of IPR or damage to international trade of the parties.<sup>21</sup>

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<sup>10</sup> The IP&IT Court Act, s 7(11).

<sup>11</sup> The IP&IT Court Act, s 19.

<sup>12</sup> The IP&IT Court Act, s 29 and Rules 20 - 22 of the Rules for IP&IT Cases.

<sup>13</sup> Rule 27 of the Rules for IP&IT Cases.

<sup>14</sup> 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.

<sup>15</sup> The IP&IT Court Act, s 27.

<sup>16</sup> Rules 29 -31 of the Rules for IP&IT Cases.

<sup>17</sup> Rules 12 - 19 of the Rules for IP&IT Cases.

<sup>18</sup> The IP&IT Court Act, s 31.

<sup>19</sup> The IP&IT Court Act, s 38.

<sup>20</sup> Rule 23 of the Rules for IP&IT Cases.

<sup>21</sup> Rule 24 of the Rules for IP&IT Cases.

- Possibility of extending the jurisdiction of the court to other matters by further amending legislation.<sup>22</sup> 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.<sup>23</sup>

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*

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<sup>22</sup> The IP&IT Court Act, s 7(10).

*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 disarranged 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.<sup>24</sup> 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:

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<sup>23</sup> The IP&IT Court Act, s 7 para. 2.

<sup>24</sup> 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.

- (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:

*‘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.<sup>25</sup>

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<sup>25</sup> 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.*

*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*

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*.<sup>26</sup> 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 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

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*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.*

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 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

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

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)<sup>27</sup>, a somewhat 'reformed' *anton piller 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.

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<sup>27</sup> **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 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.*

## 1.7 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:

- (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*<sup>28</sup>, 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.<sup>29</sup>

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<sup>28</sup> [1982] A.C. 380; [1981] 2 All E.R. 76.

<sup>29</sup> *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*

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

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.

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.<sup>30</sup>
- 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

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<sup>30</sup> 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.

country of the forum to determine what the appropriate attorney's 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 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*<sup>31</sup> 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 discretionary. 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.

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<sup>31</sup> W.R. Cornish at p 61.

- 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 is 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 infrequently resorted to.<sup>32</sup> 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.<sup>33</sup>
- 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.<sup>34</sup>
- Compare the maximum penalty for theft *simpliciter* which carries the maximum penalty of three years' imprisonment and 6,000 baht fine.<sup>35</sup>
- Double the penalty, should the accused be found to have re-committed the offence within 5 years after the completion of the previous sentence.<sup>36</sup>

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<sup>32</sup> W.R. Cornish at p 63.

<sup>33</sup> 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.

<sup>34</sup> S 69 para.2 Copyright Act B.E. 2537 (1994).

<sup>35</sup> Criminal Code s 334.

<sup>36</sup> 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

- A half of the fine will go to the right owner.<sup>37</sup>
- Right to claim damages in addition to fine.<sup>38</sup>
- 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.<sup>39</sup>
- 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.<sup>40</sup>
- 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.<sup>41</sup>

## 1.10 Conclusion

It is refreshing that TRIPS recognizes intellectual property rights as private rights. It may be suggested 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. The establishment of the Central IP&IT Court inaugurated since

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imprisonment and the accused re-commits the offence while in the period of suspension because the previous sentence has not quite been completed.

<sup>37</sup> S 76 Copyright Act B.E. 2537 (1994).

<sup>38</sup> S 76 Copyright Act B.E. 2537 (1994).

<sup>39</sup> S 75 Copyright Act B.E. 2537 (1994).

<sup>40</sup> S 74 Copyright Act B.E. 2537 (1994).

<sup>41</sup> 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.

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.

## **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.

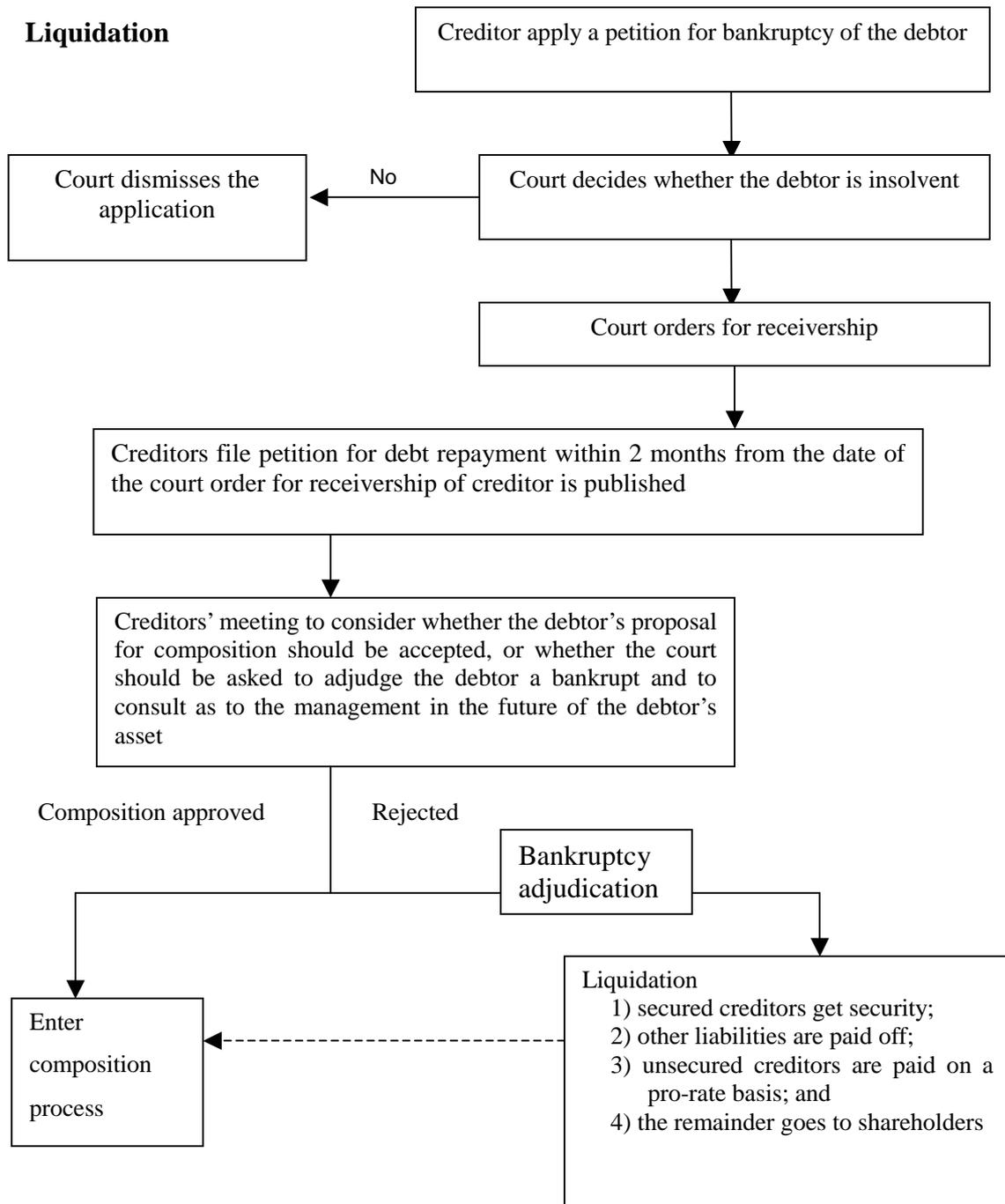
The law was comprehensively amended in 1998 and 1999 due to the need of a reform in the bankruptcy law. The reorganization procedure and some other changes are the result of the effort by the government to modernize the system. To strengthen the changes made to the law, the Thai parliament also approved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

## 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.<sup>42</sup> 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

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<sup>42</sup> Special resolution requires the supporting of at least three-quarters of the value of debts and the majority in the number of creditors attending and voting.

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)

#### **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**

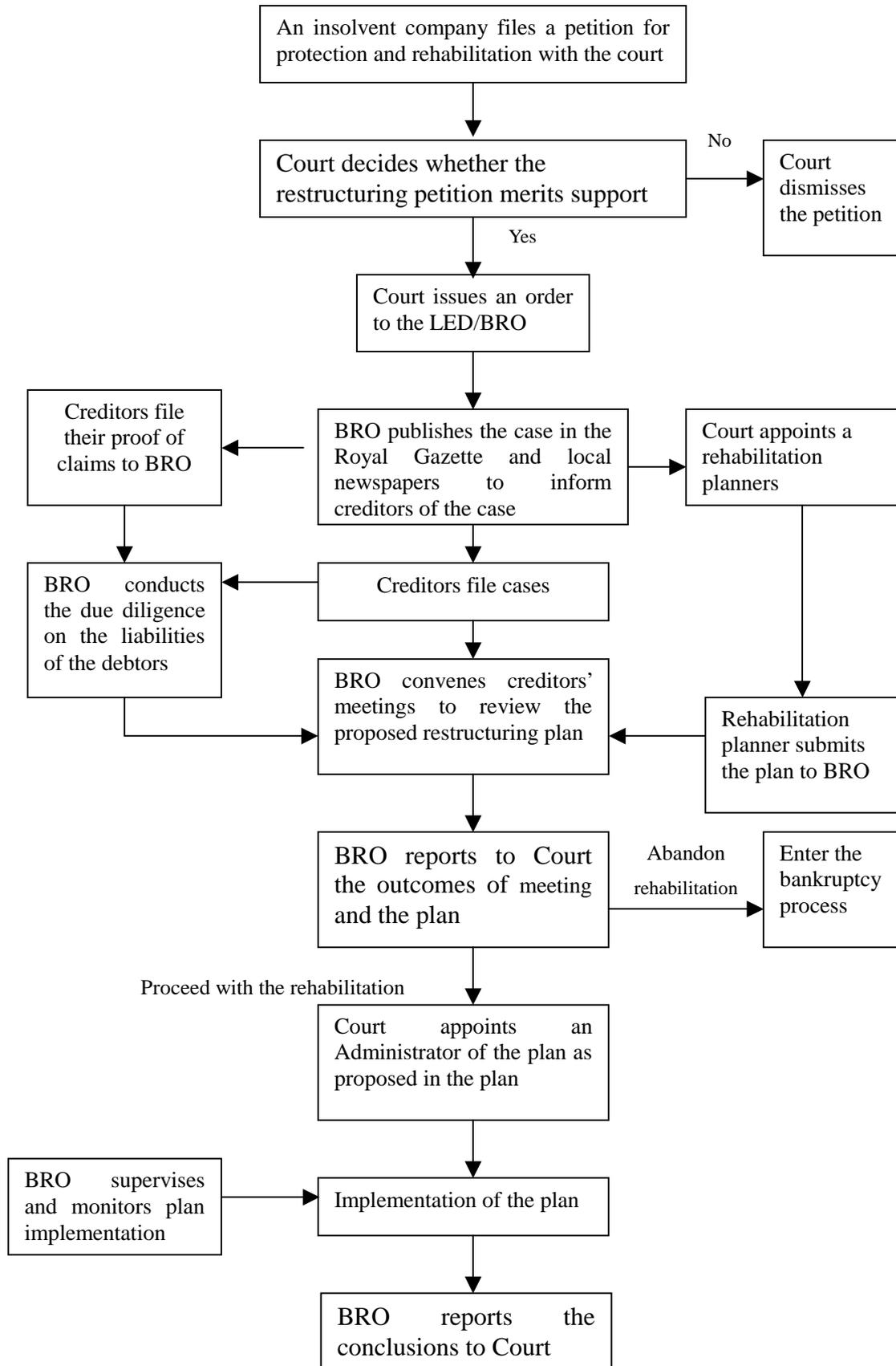
The process of business reorganization under the new law is more like a hybrid of US Chapter 11 type and the Judicial Management of the Singaporean law. In short, this reorganization could be described as the court supervised formal attempts to restructure the finances of a financially distressed enterprise. 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 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.



### **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<sup>43</sup> 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 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.<sup>44</sup>

## **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

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

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 dividends on *pari passu* basis. Section 130 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.

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<sup>44</sup> Re Srithai Superware (1999).

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.