

the arbitrary setting of the price by one of the parties. Such is not the case of the buy and sell clause since the price is not arbitrarily set by the offeror. Since the offeror can be constrained to sell only at the offered price, he or she must—barring irrational behavior—take into consideration objective market considerations.

The clause is clearly legal if it foresees that, in case of disagreement, the price will be set by an expert.⁹ The same is true if the clause allows one party to force the sale in a public auction. In this case the parties should determine in advance the modalities of such sale.

Pacific Basin*

I. Australia

A. AUSTRALIAN BUDGET

The federal budget for 1992–93 was announced by the Australian Treasury on August 19, 1992. It includes the following new taxation proposals.

1. *Withholding Tax on Royalties*

With effect from the commencement of the 1994–95 fiscal year, a withholding tax at the rate of 30 percent will be imposed upon royalties remitted overseas. This new rate replaces the existing system whereby royalties are subject to tax at 39 percent, after taking into account allowable deductions.

The new system should not increase the tax payable by nonresidents who qualify for protection under one of Australia's double tax treaties. Most treaties limit the tax on royalties to 10 percent of their gross amount for any recipient not having a permanent establishment in Australia.

2. *Research and Development*

The tax deduction for eligible research and development activities will remain at 150 percent.¹ The concession will not apply to syndicated financing or lending arrangements for research and development expenditure on research alone. The

9. C. Civ. art. 1592.

*Prepared by Simon Berger of Baker & McKenzie, Chicago, Illinois, in cooperation with the firm's offices in the Pacific Basin.

1. Previous indications were that the 150 percent deduction would be scaled down.

existing limit of A\$10 million on allowable expenditure for a "pilot" plant that qualifies for the research and development deduction will be removed.

3. *Financial Instruments*

A new system will be set up for the periodic taxation of financial instruments, loan and credit agreements or notes, and similar contracts. Gains and losses will be spread over the entire term of the instrument and taxed on an accrual basis.²

II. China

A. NEW SHANGHAI COMPANY LAW

On May 18, 1992, the Shanghai municipal government promulgated the Provisional Regulations Concerning Joint Stock Limited Companies (the Regulations), which became effective on June 1, 1992. The Regulations will permit joint stock limited companies to be established in Shanghai in respect of any trade or business not expressly prohibited under municipal law.

A new company should have at least three sponsors, of which at least one should be a legally established enterprise registered in Shanghai. The Regulations provide for two methods of incorporation. The company may be established by means of sponsorship, in which event the sponsors must subscribe for all the issued shares of the company. Alternatively, a public company may be established by means of a share offer, in which event the sponsors must subscribe for at least 30 percent of the shares to be issued. Company employees may subscribe for an additional number of shares, which should not exceed 20 percent of the remaining issued shares, all of which are required to be offered to the public.

The relevant administrative department should submit application documents for approval;³ within thirty days following approval, the board of directors must apply to the Shanghai Administrative Bureau for Industry and Commerce to effect registration of the company's business.

Set out below are some significant provisions of the Regulations.

1. *Capital*

The company's registered capital should be at least RMB 5 million. In the case of a company that will have overseas shareholders, the capital should be at least RMB 30 million. Any increase or decrease in registered capital requires approval from the appropriate registration authority.

2. The income is deemed earned when payable under the instrument. The government is soon expected to issue an information paper providing further details of the new system.

3. Generally, this will be the Shanghai Foreign Investment Commission. Banks and other financial institutions should also apply to the People's Bank of China for approval.

2. *Shares*

Sponsors of the company may subscribe for their initial allotment of shares either in cash or by contributing property (such as buildings, plant and equipment, or proprietary technology), at their fair value as prescribed by the Regulations. However, not more than 20 percent of the registered capital should consist of shares subscribed for by an assets contribution. Companies may issue either ordinary or preferred shares. No one individual may hold more than 0.5 percent of the total shares, subject to special exceptions. In certain important industrial sectors provision is made for the municipality to maintain a controlling interest in any company.

3. *Rights of Shareholders*

The Regulations confer on shareholders a number of general rights, including the right to attend general meetings and vote, to appoint a proxy, to transfer shares, to inspect financial and accounting books, to supervise the management of the company, to receive dividends and bonuses, to participate in residual property following a dissolution, and such other rights as may be lawfully provided in the articles of association.

Annual general meetings of shareholders must be held once in each calendar year and should be convened within six months after the end of each fiscal year. The board of directors will convene extraordinary general meetings as required.

Resolutions of shareholders may be ordinary resolutions or special resolutions. A simple majority of shareholders present shall pass an ordinary resolution, although the necessary quorum is one-half the total number of shareholders. Special resolutions are required to be passed by a two-thirds majority of shareholders present, and the quorum requirement is two-thirds of all existing shareholders. Special resolutions are required for votes regarding the increase or reduction of capital; the merger, termination, or liquidation of the company; or the amendment of the articles of association.

4. *Directors and Supervisors*

The board of directors is the executive body appointed by the shareholders' general meeting and is accountable to the shareholders. The board must have at least three directors, who will be elected at a shareholders' general meeting. Directors may serve for maximum terms of three years and may be reelected on any number of occasions. Shareholders and nonshareholders may serve as directors.

In addition to the board of directors, a supervisory board will be responsible for immediate supervision of the company's business and accountable also to the shareholders' general meeting. The supervisory board will consist of at least three supervisors, of whom one-third must be employees of the company. These company employee representatives are subject to election and removal by a separate general meeting of the employees, and the remaining two-thirds (or less) will be

elected and removed by the shareholders' meeting. A supervisor may also serve up to three years and may serve consecutive terms. However, a supervisor may not also hold the position of director or manager of the company at the same time.

5. *Dissolution and Liquidation*

The Regulations provide for companies to be dissolved in specified situations, including the occurrence of events stipulated in the company's articles of association, a decision by the shareholders' general meeting in favor of dissolution, or the closure of the company due to the violation of municipal law. If the company is to be dissolved, it must make a public announcement and, within fifteen days thereafter, establish a liquidation committee to oversee the distribution of the company's assets. This committee should include representatives of creditors.

B. NEW SHENZHEN COMPANY LAW

On March 17, 1992, the Shenzhen Government promulgated the Provisional Regulations Concerning Joint Stock Limited Companies (the Regulations). The Regulations permit joint stock limited companies to be established in Shenzhen, and also apply to other companies listed on the Shenzhen stock exchange. Certain industrial enterprises remain prohibited from forming companies.

Companies may be established by means of sponsorship or by means of a share offer. In the case of companies established by sponsorship, at least five sponsors, not including company employees, must subscribe for all the issued shares of the company. If a public company is established by means of a share offer, the sponsors must subscribe for at least 35 percent of the issued share capital. The remaining shares may be subscribed for by company employees or offered to the public, in any proportion.

Application documents must be submitted to the Shenzhen Municipal Commission on the Economy, which will review them in conjunction with the relevant department and submit them for approval by the Shenzhen municipal government. Within thirty days following approval, the sponsors must register the company's business with the Shenzhen Municipal Administration for Industry and Commerce.

Listed below are some significant provisions of the Regulations.

1. *Capital*

The company's registered capital should be at least RMB 5 million, and in the case of a company that will have overseas shareholders, the capital should be at least RMB 30 million. Any increase or decrease in registered capital requires approval from the Shenzhen branch of the People's Bank of China.

2. *Shares*

Sponsors of the company may subscribe for their initial allotment of shares either in cash or by contributing property. Companies may issue either ordinary or preferred shares.

3. *Rights of Shareholders*

The Regulations confer on shareholders general rights broadly analogous to those provided for under the respective Shanghai company laws. The provisions relating to shareholders' general meetings and resolutions are also broadly similar in nature to the respective Shanghai laws.

4. *Directors and Supervisors*

The provisions relating to directors and supervisors are broadly analogous to those provided for under the respective Shanghai laws.

5. *Dissolution and Liquidation*

The regulations provide for the dissolution of companies in situations analogous to those provided for under the Shanghai company laws. A company to be dissolved must also make a public announcement and establish a liquidation committee within fifteen days. This committee should include representatives of creditors.

III. Hong Kong

A. SECURITIES CLEARING SYSTEM

Pursuant to the Securities (Clearing Houses) Act, passed in July 1992, provision is made for the establishment of a new central clearing and settlement system for the Stock Exchange of Hong Kong. This system is to be operated by the newly established Hong Kong Securities Clearing Company.

The new clearing system will include a centralized, electronic database that will record the clearing, settlement, and custody of securities transactions on the Stock Exchange, and other transactions including borrowing, pledging stock, and customer portfolio movements. Stockbrokers, custodians, and other financial institutions may be admitted as participants of the clearing system.

A long-term objective of the system is to render scrip issues of shares obsolete. For now the system provides for share certificates to be stored in a central depository, at the option of shareholders.

IV. Japan

A. REVISION OF FAIR TRADE COMMISSION RULES

The Japanese Fair Trade Commission (JFTC) has enacted revisions to its Rules on Filing Notification of International Agreements or Contracts (the Rules). The revisions are intended to reduce the range of international agreements required to be notified to the JFTC. The revised Rules apply to contracts concluded on or after March 30, 1992, and having a term of one year or more. Such contracts must be notified to the JFTC within thirty days of their execution. The principal requirements governing these notifiable contracts are outlined below.

1. *Technology Licensing Agreements*

The JFTC must be notified of any contracts for the licensing of technology rights on an exclusive basis, or exclusive distribution contracts that include licensed technology rights.

2. *Anticompetitive Agreements*

Notice of a contract between an international and a domestic company is required if the domestic party is influential in the domestic market or the contract includes provisions that are otherwise likely to lead to price control. For this purpose, influence in the domestic market means that the party has a domestic market share of 10 percent or more of a relevant product under a license or distribution agreement, or that the party's market share otherwise ranks it among the top three domestic suppliers.

3. *Joint Venture Agreements*

Joint venture agreements are prima facie notifiable. However, a joint venture arrangement with a domestic party whose business is defined as medium or small in scope is excluded from the requirement. For this purpose, a medium or small business is defined as:

- (a) an industrial enterprise that employs fewer than 300 people or has a capital of less than 100 million yen;
- (b) a manufacturer or wholesaler that has 100 or fewer employees and a capital of less than 30 million yen; and
- (c) a retail or service business that has fewer than fifty employees or a capital of less than 30 million yen.

4. *Other International Transactions*

In addition, the following types of contracts also require notification to the JFTC:

- (a) contracts that include mutual restraints on the import or export of goods;
- (b) contracts for joint or cooperative sales;
- (c) contracts for joint purchase arrangements; and
- (d) contracts for the joint development or registration of patents, or both.

However, the Rules do not make trademark and copyright license agreements subject to the notification requirement.

5. *Prereview of Contracts*

The JFTC has introduced a new procedure to enable international contracts that may be notifiable to be reviewed in advance by the JFTC. Either party may submit an application for prereview of the contract prior to execution or within thirty days following execution. The JFTC expects the prereview system to reduce the number of notifiable contracts to about 15 percent of their present number.

V. Philippines

A. RELAXATION OF FOREIGN EXCHANGE CONTROLS

The Central Bank of the Philippines has established new rules to further liberalize the foreign exchange regulations regarding receipts and disbursements of residents. The new rules became effective on September 1, 1992, and are contained in the Central Bank's Circular No. 1353. Among the major features of the circular are:

- (a) As a general rule foreign exchange may be freely sold and purchased. Receipts or earnings of foreign exchange may be deposited in foreign currency accounts in the Philippines or abroad.
- (b) Authorized agent banks may sell foreign exchange to residents for use in foreign transactions such as the payment of royalties, technology transfer payments, commissions, advertising or travel expenses. No approval of the Central Bank is required for such payments.
- (c) Authorized agent banks may sell foreign exchange to duly registered foreign investment companies to enable them to fully repatriate capital, profits, or dividends. Such sales may take place without Central Bank approval.
- (d) Philippine residents may invest currency abroad without Central Bank approval, subject to certain limitations.
- (e) Exporters are permitted to retain all foreign exchange receipts derived from exports and to use them freely for any purpose. They may also obtain short-term loans in foreign currency without Central Bank approval.

The Central Bank has also announced that it will continue to sell proceeds of foreign loans to authorized agent banks in exchange for Philippine pesos, to enable the loans to be serviced with the foreign currency.

VI. Singapore

A. REMEDIES FOR MINORITY SHAREHOLDERS

The Companies (Amendment) Bill 1992, introduced on July 31, 1992, proposes several revisions to the Singapore Companies Act. Among the changes are new provisions to protect minority shareholders. Under existing company law, a minority shareholder has a limited right to commence a legal action for wrongs done to him or other minority members. Any right of action is deemed to belong to the company, and any decision to commence proceedings is made by the directors. This provision applies unless the shareholders have a separate agreement that validly creates new rights for the shareholders.

Under the proposed new section 216(a) of the Companies Act, a shareholder or other interested person can apply to the court for leave to bring an action on behalf of the company, analogous to a shareholder derivative action. The court may grant leave to proceed if it is satisfied that the complainant has given reasonable notice to the directors and the directors have not commenced the action

themselves. In addition, the complaint must be in good faith and must appear to be in the best interests of the company.

The proposed new section 216(b) provides that where the members approve an alleged breach of a right owed to the company the complainant may be permitted to bring the action, but the members' approval is a factor to be considered by the court in granting permission to proceed.

B. SECURITIES DEPOSITORY SYSTEM

The Companies Bill also contains a new provision (section 130(c)) to establish a scripless system for the transfer of securities listed on the Stock Exchange of Singapore. A central depository system would be established whereby share certificates and other documents of title would be deposited and registered in the name of the depository. The depository would maintain its own register in respect of ownership, and the depositors named in this register would be deemed to be members of the company. A depositor may at any time withdraw title documents from the depository and register them in his own name.

VII. Taiwan

A. FAIR TRADE LAW

The new Fair Trade Law (the Law) came into operation on February 4, 1992. It includes antitrust provisions and provisions regulating misleading advertising and unfair competition practices.

The Law provides for the establishment of the Fair Trade Commission (the FTC) as an independent administrative committee, which will have semijudicial authority and the power to impose fines and other sanctions provided by the Law, as well as interpreting its provisions. Complaints may be brought either through the FTC or through the courts in the usual manner.

The Law contains important provisions relating to the following substantive areas.

1. *Resale Price Maintenance*

Article 18 of the Law contains a general prohibition against resale price maintenance. It provides that a business should allow any distributor or reseller full discretionary powers to determine the price for reselling goods to a third party. Any contract to the contrary shall be null and void, except in the case of consumer necessities or goods generally available in the market. The prohibition includes setting maximum and minimum price ranges or specifying discounts to be offered to customers. The provision does not impose criminal sanctions. Nevertheless, a seller that imposes its own penalties on a noncomplying buyer may be in breach of the restraint of trade laws. At the same time, the Law does not prevent a manufacturer or seller from making suggestions with regard to resale prices; and

if the suggestion is not followed, the seller need not renew the contract at the end of the term.

2. *Restraint of Trade*

Article 19 of the Law addresses other unfair trade practices including discrimination and boycotts, interference with price competition, and misappropriation of trade secrets. A principal element of a violation of article 19 is the existence of an unreasonable restriction, which constitutes a restraint on fair competition. In general, whether a restraint is permitted will depend on the purpose for which it is imposed, the nature of the products concerned, the structure of the relevant market, and the impact of the restraint on fair competition.

3. *Passing Off*

Article 20 of the Law contains prohibitions on using names, trademarks, packaging, or other identifying marks confusingly similar to those used by other companies or businesses. It also prohibits using a trademark identical or sufficiently similar to an internationally known trademark that is not registered in Taiwan. The prohibition is widely drafted and includes the manufacture, sale, transportation, import, or export of offending goods.

4. *Cartels*

Cartels are deemed to exist in the event of a "concerted action." Such an action is defined under article 7 as a situation in which two competitors enter an agreement or understanding for the purpose of jointly determining the price of goods or services, or imposing mutual limitations on sales, territory, technology, or equipment employed by the businesses, so as to achieve mutual restraint of their respective business activities. Article 14 contains a general prohibition on all concerted action, unless specifically approved by the FTC. In addition, article 10 of the Law prohibits monopoly businesses from engaging in a variety of actions deemed to be abuses of their dominant market position.

Violations of the Law are punishable by fines ranging up to NT\$1,000,000, by imprisonment of up to three years, and in some cases, suspension of business operations. A significant violation of article 14 (cartels) could result in a fine of up to NT\$1,000,000 and an order to pay treble damages in compensation.

VIII. Thailand

A. BANKING AND FINANCE LAW

Substantial amendments to the banking and finance legislation in Thailand were made during 1992.

1. *Banking Activities*

The new provisions expand the area of business available to commercial banks, so that they may:

- (a) act as brokers and agents in the sale of bonds, debentures, and bills issued to the public by the government and state enterprises;
- (b) supply information services, which includes economic, financial, and investment data; and
- (c) render financial advisory services such as financial analysis on rates of return from investment projects and financial instruments.

Commercial banks may also now issue negotiable certificates of deposit that evidence a fixed term of deposit with or without interest. The negotiable certificate of deposit may be transferred by delivery if issued to bearer, or by endorsement and delivery if issued to a specified person.

2. *Capital Funds for Banks*

The Commercial Banking Act has revised the definition of capital funds to ensure that capital availability is fairly stated in financial statements.

Capital funds must be reduced by the sum of accumulated losses and goodwill, and by the face value of the instruments issued by the bank.

3. *Finance Companies*

Finance companies have also had their permitted field of activities expanded. A finance company may now act as a broker and agent for selling government bonds and debt instruments issued by a state enterprise; supply information services including economic, financial, and investment data; issue negotiable certificates of deposit; and act as a sponsor for a listing of securities on the Stock Exchange of Thailand.⁴

B. SECURITIES LAW

The new Securities and Exchange Act⁵ (the Act) came into effect on May 16, 1992. The Act replaces the Securities Exchange of Thailand Act.

1. *Scope of Activities for Securities Business*

A securities business may now undertake a wide range of securities-related activities, including the following:

- (a) acting as a securities registrar, custodian, or paying agent;
- (b) offering investment advice or financial information services to the public;
- (c) acting as a broker or agent for the sale and purchase of securities;
- (d) acting as a sponsor for a listing application on the Stock Exchange of Thailand;⁶

4. A sponsor is required to ensure that the management of the listed company possesses appropriate qualifications and performs its functions in accordance with the policies prescribed by the Stock Exchange of Thailand. See *infra* part VIII.B.1.(d).

5. B.E. 2535 (1992).

6. See *supra* part VIII.A.3, and note 4.

- (e) underwriting the sale of securities for issuing companies and those owning securities; and
- (f) managing mutual or private funds.

2. *Securities and Exchange Commission*

The Act establishes the Securities and Exchange Commission (SEC), which has authority to formulate policies relating to the promotion, development, and supervision of the securities market. Its responsibilities include the issue and offer of shares, the operation of a securities business, and the operation of the Stock Exchange of Thailand, the Securities Trading Centre, and related organizations.

3. *Issue of Securities*

The Act allows companies to issue several types of securities. Public and limited companies are permitted to issue shares, debentures, bills, and warrants. Each share or debenture issued by a company must have the same face value and confer equal benefit on all holders.

4. *Public Offers*

A person intending to issue new securities to the public must obtain approval from the SEC and file with the SEC a registration statement, an offer memorandum, and a prospectus for the offer. The offer memorandum and prospectus will become effective either upon their approval by the SEC or automatically at the end of forty-five days from the date of filing with the SEC (if no objection is made by the SEC). The new securities may only be offered after the registration statement and the prospectus have been distributed to the public,⁷ except in the case of fully paid shares issued by a public company to existing shareholders.

Under the Act, any company that wishes to offer shares to the public must be a public company having at least fifteen shareholders, subscribing together for at least 5 percent of the registered capital of the company. The par value of each share must be at least 5 baht. The board of directors must consist of five members or more, at least half of which must be residents of Thailand. The promoters of the company must hold their shares for a period of two years before they may transfer them. Otherwise, restrictions on share transfers are generally prohibited.⁸ Debentures may only be issued with the approval of three-fourths of the voting shareholders.

When the SEC has approved an issue, and the registration statement and prospectus have been distributed, the company may offer the relevant securities to the public by means of the offer memorandum. Following the making of the offer, the company

7. Distribution to the public is achieved by advertising in a publication of general circulation and providing an address from which the documents may be obtained.

8. An exception is made for transfer restrictions intended to preserve a specified shareholder ratio between Thai residents and overseas shareholders.