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This issue covers the following topics:

I. Expected Amendment to Treasury Stock Regulation to Facilitate Share Buyback Program

1. Background

Treasury shares are shares which are owned by the issuing company as a result of buyback from its shareholders under certain circumstances permitted by law. In Thailand, numerous public limited companies established under the Public Limited Company Act ("**Company**") use the treasury share mechanism as a financial tool for various purposes, e.g., returning profits to shareholders, and creating a financially attractive image. There are laws outlining the concept and the process of share buyback for the Company. Recently, there has been an attempt to amend the law concerning the treasury share and the cabinet has approved the draft amendment of such law on 9 February 2021 which turns the spotlight on this matter. Thus, this article will elaborate on the concept of treasury share under the current relevant laws and provide a glimpse of the updated amendment thereon.

2. Key concept of treasury shares under current Thai law

In principle, Thai laws do not allow a limited company or the Company to own its share[1]. Owing to such rule, no company can, in principle, conduct a share buyback. However, the exceptions for the Company to own its own share and conduct the share buyback is only available for the Company as stipulated under the Public Company Limited Act of 1992.

The Company may conduct a share buyback only in these following circumstances[2]:

(i) The Company may repurchase shares from the shareholders who vote against the shareholders' meeting's resolution for the amendment of its article of association in relation to the right to vote and the right to dividend of which such shareholders see that it is unfair to themselves; or

(ii) The Company may repurchase shares for the purpose of financial administration when such Company has accumulated profits and surplus liquidity and such repurchase will not cause financial difficulty to the Company.

The shares that are bought back will not be counted as a quorum in the shareholders' meeting and will have no right to vote and right to dividend[3].

1 Section 1143 of the Civil and Commercial Code and Section 66 of the Public Company Limited Act.
2 Section 66/1 of the Public Company Limited Act.
3 Section 66/1 paragraph 2 of the Public Company Limited Act.

As stipulated under the Ministerial Regulation prescribing rules and procedures for the repurchase of shares, disposal of repurchased shares and deduction of repurchased shares of companies of 2001, dated 23 November 2001 ("**Ministerial Regulation of 2001**"), the procedure of share buyback for each abovementioned circumstance is different. Moreover, if the shares to be repurchased are listed with the Stock Exchange of Thailand ("**SET**"), there will be additional procedures under SET's relevant regulations that need to be followed.

Pursuant to the Ministerial Regulation of 2001, regarding the share buyback under (i), the shareholders who vote against the shareholders' meeting's resolution on amending the Company's articles of association in relation to the right to vote and the right to dividend and wish to sell shares back to the Company, shall notify their intention to sell shares within five days as from the date of such resolution. Such Company is required to send such shareholders a repurchase offer and also disclose the information of share repurchase to the public[4].

In terms of share buyback for financial management under (ii), the Company is required to have accumulated profits and surplus liquidity by considering the Company's ability to repay debts which will become due in the following six months[5]. The Company has to prepare a share-repurchase plan containing the following non-exhaustive examples: accumulated profits information, number of share to be repurchased, criteria in share pricing, period of disposal and deduction of repurchased shares. It shall also disclose those in the plan to the public in advance no later than 14 days prior to the date of share repurchase. Additionally, it has a one-year time constraint before conducting the next share repurchase[6].

After the share buyback, the Company has to dispose the repurchased shares after six months as from the completion of share repurchase under (i) and (ii). It shall dispose the repurchased shares by way of sale on the main board or general offer to the public if the shares are listed with SET. In contrast, if not, the shares shall be sold by general offer to the public only. If the Company does not dispose or cannot dispose of all repurchased shares within a specified period of time, the Company is required to reduce its paid-up capital by deducting repurchased shares which have not yet been disposed of[7].

3. Update on the proposed amendment in relation to treasury share

In recent years, the Ministry of Commerce has proposed a draft amendment of the Ministerial Regulation of 2001 mainly concerning procedures for share buyback and the disposal and deduction of repurchased shares ("**Draft Amendment**") as it considered that the current regulation needs to be revised in order to be more flexible. The purpose of the revision is to facilitate the private sector to efficiently manage its finance to benefit shareholders, capital market and national overall economy.

The Draft Amendment substantially proposes to revise the substance related to the share buyback for financial management under (ii) above as follows:

- The Draft Amendment is expected to curtail (a) the waiting period during which the Company shall wait before commencing disposal of the repurchased shares from six months to three months and (b) the waiting period for launching the next share-repurchase plan from one year to six months. Furthermore, in the case the Company disposes of repurchased shares to directors or employees, the waiting period is further shortened to one month.

- It aims to explicitly state the avoidance of redundant procedures with respect to public disclosure of share buyback plan so that the Company does not need to undertake bothersome overlapping disclosing procedure. Expectedly, the Company, whose shares are listed with SET, will be exempted from the duty to disclose a share-

4 Sections 1 and 2 of the Ministerial Regulation of 2001.
5 In the case of a listed company, there will be one additional requirement in relation to the proportion of free-floating shares, other than (i) and (ii). If a listed company wishes to conduct a share buyback, such share buyback shall not cause the ratio of minority shareholders to be less than 15% of the paid-up capital and the number of minority shareholders to be less than 150 shareholders (Section 4 of the Notification of the Board of Governors of SET Re: Disclosure of Information **and Other Acts of a Listed Company in the case that a Listed Company Repurchases Their Own Shares and Disposes of Such Repurchased Shares of 2001 and Section 64 of the Regulation of SET Re: Listing of Ordinary Shares or Preferred Shares as Listed Securities of 2015).**
6 Sections 6, 9 and 11 of the Ministerial Regulation of 2001.
7 Sections 12, 13 and 14 of the Ministerial Regulation of 2001.

repurchase plan to the public which is stipulated in the Draft Amendment given that the Company already complies with SET's regulations that requires such Company to disclose a share-repurchase plan and such disclosure requirement is not less than the procedures as stipulated in the Draft Amendment.

- Alternative means of disposal and deduction of repurchased shares are expected to be added. According to the Draft Amendment, the Company will be able to dispose repurchased shares by offering to its shareholders in accordance with the shareholding proportion or to its directors or employees.

Currently, the Draft Amendment has been forwarded to the Council of State for further consideration. The Council of State will consider the Draft Amendment together with the relevant authorities e.g. the Ministry of Commerce, the Securities and Exchange Commission. It appears that the Draft Amendment will be modified upon consideration.

4. Conclusion

As the Draft Amendment is subject to alteration, the detail thereof is still obscure. Additionally, it still has to undergo many processes before its enactment. We will keep the reader updated once the finalized amendment is released.

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II. Can Personal Seals Be Used Instead of Signatures in Doing Business Transactions in Thailand?

1. Background

In conducting cross-border business transactions, especially when one's counter party is a Japanese person or a Japanese company, one may encounter the situation where such counter party affixes their personal seal instead of their signature on business documents such as powers of attorney (POA) or corporate guarantees. We are informed that, in Japan, personal seals are generally called "*hanko*" (判子) or "*inkan*" (印鑑) and are often used by individuals instead of their signatures, largely because the legal system in Japan principally allows the registration of personal seals and the law there principally assumes that a document is genuine if it bears a personal seal. In contrast, in Thailand, one may be more familiar with signature only, or, if acting on a company's behalf, the affixing of the company seal together with signature by the authorized director. However, we would like to provide you with our analysis as to whether the affixing of only a personal seal binds individuals to the transactional documents, based on the Civil and Commercial Code of Thailand ("**CCC**").

2. Key provisions under the CCC

In general, there are several business transactions which, under the CCC, are required to be executed in writing and to be signed by the relevant party(ies) in order that such transaction be valid and/or enforceable; for instance: the sale and purchase of immovable property (Section 456 of the CCC); the lease of immovable property (Section 538 of the CCC); the loan of money for a sum exceeding THB 2,000 (Section 653 of the CCC); mortgages (Section 714 of the CCC); insurance (Section 867 of the CCC); and share transfers (Section 1129 of the CCC).

In accordance with Section 9 paragraph 1 of the CCC, in those business transactions that are required to be executed in writing, one must sign the relevant transactional documents. However, under Section 9 paragraph 2 of the CCC, there is also some room for alternative methods for individuals to execute a transactional document without signing; for example, by affixation of "fingerprint(s)", "seal(s)" and "other similar mark(s)", which can be deemed effective as a signature, though on the condition that there must also be the signatures of two (2) witnesses. Based on the said Section 9 paragraph 2, a personal seal such as the *hanko* of Japanese individuals, could be considered to be a type of "seal" or "other similar mark" that can be deemed a signature under the CCC.

3. Use of personal seals in practice

Based on the provisions of the CCC as elaborated above, and with the caveat that we have yet to identify any Supreme Court decision(s) that have directly ruled on the use of personal seals, the use of personal seals, such as *hanko*, alone, instead of signatures, should be acceptable as a replacement for signatures, provided that such be certified by the signatures of at least two (2) witnesses. However, the business transactions in which personal seals are used should be those between private individuals and which do not involve registrations at or notifications to governmental authorities, or which are not governed under any specific laws that require otherwise; for example: provision of loans; lease of immovable property for a period not exceeding three (3) years; and employment.

With respect to documents which are to be submitted – whether for registration or as correspondence – to a governmental authority, e.g. the Department of Business Development or the Revenue Department, or with respect to documents which must be submitted to entities such as banks, it is advised to carefully take into consideration the applicable laws, regulations, or rules relevant to each such governmental authority, or the applicable internal rules of the banks as to whether the affixing of personal seals alone is accepted, even if the signatures of at least two (2) witnesses are provided. In practice, it might be reasonable to assume that the use of personal seals may be accepted only in limited circumstances.

4. Conclusion

It is advisable that the use of personal seals such as *hanko* in the manner mentioned above be limited to business transactions between private individuals which do not involve registrations at or notifications to governmental authorities, or which are not governed under any specific laws that require otherwise. Nonetheless, since the use of personal seals is not typical under business practices in Thailand, the use of signatures is highly recommended. In any case, prudent businessmen and businesswomen should, if they wish to continue the use of a personal seal, seek advice from professional legal advisors prior to conducting the relevant business transactions in order to aim to preclude trouble which may arise therefrom.

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