**Chapter Eleven**

**Intellectual Property**

**Suggested answers to the review questions and case problems**

**1. Discuss the major characteristics of a limited partnership.**

**Answer:** A limited partnership is an advanced form of union where there are two types of partners: general partners—who are jointly and unlimitedly liable for partnership debts; and limited partners—who are not personally liable for partnership debts beyond their capital contribution (Section 1077, Civil and Commercial Code). In other words, the limited partners (investors) assume limited liability for partnership debts in proportion to the capital that they have invested while general partners assume responsibility for the management of the partnership and liability for all partnership debts. Therefore, investors in limited partnership can be assured that their personal financial loss will be limited to the amount of the investment they have made in the partnership.

Legal provisions that govern ordinary partnerships also apply to limited partnerships in situations where there is no particular code provision applicable to them (Section 1080, paragraph 1, Civil and Commercial Code).

**2. List and explain the advantages and disadvantages of a sole proprietorship.**

**Answer:** An important advantage of the sole proprietorship is the ease and low cost of creation, as few legal formalities are needed. Generally, it is simple to create this form of business organization and it does not require any kind of approval. Moreover, the sole proprietor owns all the business and is entitled to receive all the profits that arise from the activity. Other major advantages of the sole proprietorship includethe flexibility of management and the possibility for the owner to transfer or sell the business to another person at any time she desires to do so. No approval is needed from anyone else.

With regard to the disadvantages, the sole proprietor is responsible for the business’s contracts and is jointly liable for the consequences of a wrongful act committed by his employee in the course of employment (Section 425, Civil and Commercial Code). Therefore, the owner has unlimited personal liability for all the debts of the business, meaning that liability for losses incurred by the sole proprietorship extends beyond his business assets. The unlimited liability is an important matter to be taken into account before choosing the business form. Another disadvantage is the lack of continuity of the activity in case of death of the owner. As a matter of fact, when the sole proprietor dies, the proprietorship is automatically dissolved.

**3. Explain the differences between a registered partnership and an unregistered partnership.**

**Answer:** An unregistered ordinary partnership is a form of association where all partners are jointly and wholly liable for all the obligations of the partnership without limitations. It is regulated by Sections 1025–1076 of the Civil and Commercial Code. An unregistered ordinary partnership is not a juristic person. As a consequence, it is subject to personal income tax.

An ordinary partnership may voluntarily be registered with the commercial registrar according to the provisions of the Civil and Commercial Code. After registration it becomes a separate juristic entity from the partners and therefore must pay corporate tax upon its income.

Partners of ordinary partnerships cannot carry on (or be partners with unlimited liability of) any business of the same nature of that of the partnership or competing with it without the consent of the other partners (Section 1066, paragraph 1, Civil and Commercial Code). If a partner acts contrary to this provision, the registered partnership is entitled to claim from him all the profits which he had made or compensation for the injury which the registered partnership has suffered (Section 1067, paragraph 1, Civil and Commercial Code).

The liability is the same as that of the unregistered ordinary partnership with two exceptions. Firstly, the liability of partners for debts of the partnership incurred before his resignation is limited to two years from the date of resignation (Section 1068, Civil and Commercial Code). Secondly, the assets of the partnership must be examined before a creditor can claim a debt payment from the partners (Sections 1070 and 1071, Civil and Commercial Code). Thus, if the partnership suffers losses and its assets are not sufficient to pay the creditors in full, the latter may file claims against the distinct and separate assets of the single partner.

Another difference with respect to the unregistered partnership lies in the possibility of acquiring rights against a third party. If the partnership is registered, partners may acquire rights against third persons even though their names do not appear in the transaction.

**4. Describe the rights among partners of a limited partnership.**

**Answer:** Once the limited partnership exists, the limited partners (investors) assume limited liability for partnership debts in proportion to the capital that they have invested. General partners, on the other hand, assume responsibility for the management of the partnership and liability for all partnership debts. Therefore, investors in limited partnership can be assured that their personal financial loss will be limited to the amount of the investment they have made in the partnership.

Apart from the right to participate in management, limited partners have the same rights as general partners. Limited partners have the right to receive, inspect, or copy partnership books and information concerning the partnership. The Civil and Commercial Code also establishes a fiduciary duty between limited and general partners to use good faith in transactions related to the partnership. Moreover, partners with limited liability may carry on business of the same nature as that of the partnership (Section 1090, Civil and Commercial Code).

**5. Define a private limited company and explain how it is created.**

**Answer:** A limited company is defined in the Civil and Commercial Code as an organization in which capital is divided into shares and the liability of the shareholders is limited to the amount unpaid on the shares respectively held by them. This is to say that their responsibility is limited to the remaining unpaid amount, if any, of the par value of their shares. The amount of a share may not be less than five baht and a minimum of three shareholders is required at all times.

In order to form a limited company, there must be at least three promoters who subscribe their names to a memorandum of association and otherwise comply with the provisions of the Civil and Commercial Code. When creating a company, its promoters are required to be among the company’s initial shareholders and each must hold a minimum of one share at the time the company is set up. The registration of a private limited company also requires the selection of the corporate name. The name for the corporation must be available for use and must always end with the word “limited.”

Once the name reservation has been approved, all shareholders must sign a memorandum of association (MOA). The memorandum of association is the constitutive document of a company and must indicate the following basic elements as provided by Section 1098 of the Civil and Commercial Code: the name of the company, along with its main place of business, registered capital, intended scope of business activities, and declaration of limited liability. The memorandum of association must also contain the names, personal information, and signatures of the subscribers as well as the number of shares they subscribed.

After the memorandum of association is registered with the Company Registrar at the Ministry of Commerce and all the shares to be paid in money have been subscribed, the promoters must hold a statutory meeting to make all the appointments. Pursuant to Section 1108 of the Civil and Commercial Code, the statutory meeting has to discuss essential points including the adoption of the articles of association, the ratification of contracts entered into by the promoters, their remuneration, the number of preference shares and ordinary shares, the appointment of the initial directors and auditors of the company, and the determination of the respective powers of the directors.

Following the statutory meeting, the promoters pass the business of the company to the directors. Within three months from the statutory meeting, the directors must require all promoters and subscribers to pay upon each share at least 25% of the value and then apply for registration of the company. Hence, a certificate of registration is issued to the company. If registration does not take place within three months after the statutory meeting, the company’s statutory meeting is considered as voided and all the money received from the applicants must be repaid.

**6. Describe the major characteristics of a public limited company.**

**Answer:** Public limited companies are governed by the Public Limited Company Act B.E. 2535 (1992), as amended by Public Limited Company Act No. 2 B.E. 2544 (2001) and Public Limited Company Act No. 3 B.E. 2551 (2008). A public limited company is a company established for the purpose of offering shares for sale to the public, and the liability of the shareholders is limited up to the amount paid on the shares owned (Section 15, Public Limited Company Act). Capital of a public company is divided into equal shares, which are indivisible. Each share must have a face value of at least five baht each and be fully paid up. As for private limited companies, there is no specific minimum registered capital requirement.

Public limited companies may be classified as listed and non-listed depending on whether they are listed or not on the Stock Exchange of Thailand. In the first case they are referred to as public listed companies. The legal framework of corporate governance of public listed companies includes the Public Limited Company Act, the Security and Exchange Act, and other regulations under the Stock Exchange of Thailand and the Security and Exchange Commission. In the second case, they are called public unlisted companies and governed exclusively by the Public Limited Company Act.

**7. List and describe the main forms of foreign business presence.**

**Answer:** Foreign business in Thailand is principally governed by the Foreign Business Act B.E. 2542 (1999). The main objective of the Act is to regulate foreign-owned businesses and protect specific local industries. The Foreign Business Act provides several conditions that a foreigner must fulfill in order to set up a business in Thailand if the business activity falls under the scope of the Foreign Business Act.

With regard to the form of foreign business presence, the most popular form of business organization among foreign investors is the private limited company. However, foreign companies may decide to carry out certain business in Thailand through a branch, representative office and regional office instead of a company limited.

**8. Make a list of the advantages and disadvantages for each form of business organization.**

**Answer:** Before starting a new business, it is necessary to decide which form of business organization will be most suitable for the new venture. The choice will be dictated by convenience or suitability with regard to the following issues: liability of the owners, the ease and cost of formation, taxation, need for capital, goals, and market prospects.

With regard to the sole proprietorship, the advantages include the ease and low cost of creation, the flexibility of management and the possibility for the owner to transfer or sell the business to another person at any time she desires to do so. Also, all profit flows directly to the owner. Concerning the disadvantages, the sole proprietor is responsible for the business’s contracts and is jointly liable for the consequences of a wrongful act committed by his employee in the course of employment (Section 425, Civil and Commercial Code). Besides, it is difficult to raise capital: it can only use the sole proprietor’s personal saving and consumer loans.

The advantages and disadvantages of a partnership are basically the same as those of a proprietorship. Partnerships based on relatively informal contracts are easy and inexpensive to form. However, the liability of general partners to third persons is joint and unlimited and the partnership terminates when a general partner wishes to sell out or dies. The personal assets of each partner are subject to liability to debts incurred by the partnership. Creditors of a partnership may sue each of the partners directly for payment of the entire amount of partnership debt. Also, partners must make decision together therefore disputes or conflicts may occur.

The company is the most important form (in terms of size) of business organization in Thailand. Limited companies are legal entities, separate and distinct from any of its shareholders. The law considers this type of business organization to be a person, capable of having its own rights and incurring its own liabilities. The biggest advantage of this form of business organization is the limited liability of its shareholders. In fact, the liability of the shareholders is limited up to the amount paid on the shares owned. This means that they are not personally liable for the contractual obligations, debts, negligence or torts of the company. Also, companies can easily raise additional funds through the sale of stock. Starting a company, however, do present some disadvantages. Specifically, starting a company is more complicated, more regulated and more expensive to incorporate than other forms of business organization.

**9. In April 2011, Ben opens a noodle shop called Bami Kiaw in Pattaya. The shop is a sole proprietorship. Whenever Ben orders supplies, he always signs the contract under the name of the shop, not under his name. In March 2012, however, Ben does not have enough money to pay all the suppliers. Krit, a meat vendor from Sattahip, decides to sue him. Ben replies that he is not personally liable because all contracts are signed under the business’s name. Who wins?**

**Answer:** Under the above scenario, it is necessary to identify what kind of organization Ben’s business is and apply the corresponding rules. Since the noodle shop Bami Kiaw is a sole proprietorship, the owner is solely and personally responsible for all debts and obligations related to the business. In other words, the business and the sole proprietor have one identity. Although Ben signed the contracts under the name of the shop, this does not have any relevance. Ben is still personal liable for all his business debts to the full extent of his personal wealth. Therefore, if Krit decides to sue, he will probably prevail.

**10. Naiyana is a civil engineer who lives in Rayong. On April 24, 2008 she decides to open with her colleagues a rooftop wine bar in Bangkok, Sensation. Sensation is a classy bar where customers can taste, discover, and appreciate a wide variety of wines. On January 13, 2009 after less than nine months in business, Sensation wine bar failed. The bank and suppliers sued for payment. Determine what form of organization would be most appropriate for Sensation wine bar and explain the reason of your choice.**

**Answer:** Before starting a new business, Ms. Naiyana should consider several elements before making her decision. The choice should be dictated by convenience or suitability with regard to the following issues: liability of the owners, the ease and cost of formation, taxation, need for capital, goals, and market prospects. To different types of business organizations correspond different relationships between members, different relationships with third parties, forms of liabilities, and organizational structures.

In the case above, Ms. Naiyana decides to open a rooftop wine bar with her colleagues. Since she is not alone in this new venture, sole proprietorship cannot be used to open Sensation. It must also be considered that after less than nine months in business, Sensation wine fails. This means that a partnership does not represent the most appropriate form of business organization because of the unlimited liability of its partners. Given the circumstances, the most suitable form of business organization would be a limited company. As a matter of fact limited companies are legal entities, separate and distinct from any of its shareholders and the liability of the shareholders is limited up to the amount paid on the shares owned. By choosing a limited company to set up their business, Ms. Naiyana and her colleagues would not be liable for more than their capital contribution.