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WHO WIELDS THE POWER IN A PRIVATE THAILAND LIMITED COMPANY?

This is an outline of the respective powers of directors with binding signatory power, the Board of Directors, the Managing Director(s), the Chairman of the Board and other officers, and the shareholders in private Thailand limited companies.

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Introduction

The source of all company law applicable to private limited companies incorporated in Thailand is the Civil and Commercial Code of Thailand (CCC), which contains the general provisions applicable to juristic persons in Sections 68 through 80, and provides in Sections 1012 through 1024 and 1096 through 1273 for the establishment and regulation of limited liability companies.

This CCC was written and introduced in 1929, and the company law provisions, based on then British company law, were subsequently modified to a certain extent to keep pace with the many changes that have taken place over the intervening period in the business and commercial world. The most recent modification to the CCC was made in 2008, designed to simplify, improve, and eliminate unnecessary statutory procedures. The amended law allows the conversion of a registered and limited partnership to a limited company, reduces the minimum number of shareholders from seven to three, and allows for company incorporation to take place in one day.

Even though modifications were made, there are many areas of company practice in Thailand where the appropriate registration officials have themselves by administrative fiat imposed some requirements in addition to those which are found in the CCC, in an effort to bring the general body of Thai company law into line with modern business practice.

A recent modification implemented by registration officials is the Order of the Central Registrar Office 66/2558, issued in March 2015. This concerns, among other things, a new requirement whereby a confirmation letter issued by a commercial bank is required for any registration of new company formation or any capital increase which causes the registered capital of such company to exceed THB 5 million. In the past, only a receipt of capital payment signed by an authorized director was required to prove that the payment of shares was received by a company.

With this modification, if a newly formed company has a Thai director, and this company is not a Board of Investment (BOI) or Industrial Estate Authority of Thailand (IEAT) promoted company, all shareholders have to transfer the entire shares subscription price to the personal bank account of the Thai director and request the commercial bank to issue a confirmation letter for registration purposes. The company's bank account must be opened soon after company formation, as all capital payment must be transferred from the director's personal account to the company's bank account, and then the confirmation letter issued by the bank must be filed with the registrar within 15 days from the registration date.

On the other hand, if a newly formed company has no Thai director at the time of company formation, the registrar will allow the registration of company formation first without submission of the proof of capital payment. The company, however, has 15 days to open a bank account, inject funds into the company's bank account, and proceed with the filing of the confirmation letter issued by the bank to the registrar.

The Department of Business Development (DBD) of the Ministry of Commerce (MOC) is charged with the responsibility to act as the companies' registrar and to regulate and control compliance by companies with the CCC.

The scope of this paper does not extend to the exceptions to some of the rules and procedures which are bent to facilitate the trading of various capital and debt instruments on the Securities Exchange of Thailand of "authorized" and "listed" companies.

Directors with Binding Signatory Power

One area where additional MOC administrative requirements have been imposed is the area of law governing the powers of directors of Thailand limited companies to act on the company's behalf and to commit the company by their signatures.

Although the CCC mentions seals which are binding on partnerships (see CCC Section 1064), the only reference to a limited company's seal is in CCC Section 1128, which reads, in part, as follows: "*Every certificate of shares . . . shall bear the seal of the Company . . . .*" Even today, the common seal of a Thailand company is very often merely a rubber stamp rather than a metal press, and duplicates are commonly made. DBD officials, who have authority over the incorporation and regulation of limited companies, have imposed on all companies incorporated in Thailand certain requirements as to powers of those directors to bind the companies in a legal sense by affixing their signatures in conjunction with the company seal.

CCC Section 1111(6) provides that an application for registration of a limited company must contain the following language: "*If the directors have power to act separately, their respective powers and the number or names of the directors whose signature is binding on the company*." Although the word "if" in this provision would appear to make the provision optional, it is now an administrative requirement of the DBD officials that details be registered with the DBD regarding the identity and number of directors of a limited company whose signatures, in conjunction with the company seal, are required to be binding upon the company.

The officials point out, with some justice, that there is generally no legal presumption which can be made under Thai law as to the exact extent of authority of a company director—however, CCC Section 77 provides: *"When there are several managers, if it is not otherwise provided in the regulation or the constitutive act or otherwise provided by law, decisions as to the affairs of juristic person are made by a majority of the managers."* The general public, who do not have access to the private minutes of

meetings of a company's board of directors, are entitled—for their own protection—to have made public the identity of the particular directors who have the authority to bind the company by their signatures.

The signatory authority of directors of a Thailand limited company can be registered at the DBD in a number of different ways. For example, it is possible to register the sole signature of any one director if it is combined with the company seal, and this will be binding upon the company. Similarly, the joint signatures of any two directors or, for example, the joint signatures of any three directors can be registered, and this will be binding upon the company when combined with the company seal or absent the seal.

The signatory authority of directors of a Thailand limited company may also be registered at the DBD by the company making reference to certain directors by name. It is possible to register, for example, the sole signature of Mr. Smith when combined with the company seal, and this will be binding upon the company. Similarly, the joint signatures of Mr. Smith and Mr. Jones can be registered when combined with the company seal, and this will also be binding upon the company.

When a Thailand limited company is registered under the Treaty of Amity and Economic Relations between the United States and the Kingdom of Thailand, and a sole signature is binding on the company, this sole signature must be the signature of a Thai citizen or an American citizen; if joint signatures are binding on the company, then the joint signatories must be Thai and/or American; if three or more signatories must sign together to bind the company, then at least a majority of these signatories must be Thai and/or American. In interpreting the Treaty, the Thai government will not allow non-American directors to register their signatures as binding.

A Thailand limited company may, in its articles of association (Articles), specify the signatory authority of directors which will be registered at the DBD and/or the procedure for determining such signatory authority.

For example, the Articles might stipulate the sole signature of any one director as stated, or the joint signatures of a specific number of directors as stated. If the Articles provide for classes of directors, for example Class A and Class B directors, the Articles may stipulate the sole signature of any Class A director, or the sole signature of any Class B director, or the joint signatures of any Class A director together with any Class B director, or the joint signatures of any other combination of Class A and/or Class B directors.

It is common to provide in the Articles that *"the signatures of the directors which shall be binding upon the company, when combined with the company seal, shall be determined by the Board of Directors, and the same shall be registered with the competent authorities."*

Although CCC Section 77 would seem to give a majority of the directors the power to determine signatory authority when the Articles are silent as to signatory authority, DBD officials require that when the Articles are silent as to signatory authority, the directors' signatures which are binding on the company shall be determined by the shareholders in a general meeting.

Where the shareholders must determine the binding signatory power in a general meeting, either because the Articles provide for this, or because the Articles are silent as to signatory authority, then only the shareholders—and not the directors—have the power to change the binding signatory power.

Although it is permissible for directors with binding signatory power to delegate that power to another person, or other persons, under a power of attorney, Thai governmental agencies will almost never

recognize this power of attorney. Consequently, even routine documents which a Thai limited company must sign and lodge with the Thai government must almost always be signed by the registered binding signatory power.

Private parties, however, may recognize such powers of attorney—although in a major transaction, they often will not accept the signature of anyone who is not a binding signatory even if this person is acting under a power of attorney issued by the binding signatory power. Again, these powers of attorney are usually acceptable to third parties in routine transactions and are valid in law in accordance with their terms of appointment.

Board of Directors

As a rule of thumb, with respect to the international operation of a Thailand limited company, the board of directors has all power not reserved to the shareholders in the CCC or the Articles, plus such additional powers which might be given to the board of directors in the Articles.

An example of "such additional powers" is the common provision in the Articles which requires board approval of transfers of shares. In the absence of this provision in the Articles, the shareholders would be free to transfer their shares to anyone without board approval.

As is the case with all "rules of thumb," there are numerous exceptions; but the rule of thumb correctly underlines the caveat that one must read a Thai limited company's Articles if one is to understand the respective powers of the board of directors and the shareholders, with respect to the internal operation of a company. The power, which is reserved to the shareholders under the CCC, is discussed further under the section on shareholders' powers.

Some Thailand limited companies do not have Articles as such. These companies have passed a resolution at the statutory meeting of shareholders (the meeting which precedes the final incorporation) to the effect that the relevant provisions of the CCC governing limited companies are adopted as the Articles of the company. Where a company does not have Articles as such, any Articles would be irrelevant to an understanding of the respective powers of the board of directors and the shareholders, and such powers would be governed only by the CCC.

The CCC provides, in Section 1144, that every limited company shall be managed by a director or directors under the control of shareholders in a general meeting and according to the Articles of the company.

A director is considered to be a "representative" of the company according to the law of juristic persons. CCC Section 70 states, "*the will of a juristic person is declared through its representatives.*" Therefore, although there are certain matters which will be explained below which are under the control of the shareholders, the directors declare the will of a limited company. This is subject, however, to whatever limitations are imposed on the directors in the Articles.

What the foregoing means and/or the way the foregoing is interpreted in Thailand, is that the day-to-day management of a company is under the control of the board of directors, which is elected by the shareholders, while certain major matters, which will be explained below, are under the control of the shareholders. The shareholders have no direct power to manage a Thailand limited company. As the shareholders cannot delegate a power that they do not have, and, as the power of management is vested in the board of directors, it would be impossible for the shareholders to remove the authority to manage a Thailand limited company from the board, even though they have the power to change the membership of the board.

The “control” of the board of directors by the shareholders is an indirect form of control. If the board, or a board member, does not perform to the satisfaction of the shareholders, the only recourse the shareholders have—apart from initiating civil or criminal proceedings against the director, which would not be an option unless the director had violated a law or acted ultra vires—is to remove the offending director(s) at a general meeting of shareholders, or to refuse to reelect the offending director(s) when his/her/their term of office expires.

The percentage of shareholders required to remove and/or elect a director is a majority present at the relevant general meeting of shareholders, unless a higher percentage is required in the Articles. Shareholders representing at least one-fourth of the capital is a quorum for a general meeting, unless a higher quorum is required by the Articles.

If a director is removed, or not reelected upon the expiration of his/her term (a minimum one year, and a maximum three years term of office), then he/she must be deregistered at the DBD, and the binding signatory power must sign the documents required to be submitted to the DBD to deregister the director. If the binding signatory power were to refuse to sign these documents, then the shareholders’ only recourse would be to remove the director(s) holding binding signatory power and elect a replacement(s), or to amend the binding signatory power (which in turn might require amending the Articles, which itself requires more than a majority vote—see below for further explanation).

If the binding signatory director were to refuse to sign the documents for deregistering the director, then CCC Section 1023 seems to suggest that third persons may continue to recognize such person as a director. For example, as between the shareholders, and the shareholders and the company, such person would no longer be deemed to be a director, provided that the minutes of the shareholders’ meeting which failed to reelect the person as a director, or removed the person as a director, reflect that the person is no longer a director. (See CCC Section 1024.)

The foregoing is also relevant to the common situation where the binding signatory signs the documents required to deregister the director, and the documents are lodged with the DBD, but it takes the DBD several days to act on the documents and/or issue certification that the director is no longer a director of the company. Until the DBD deregisters the director, such director can, as to third persons, continue to exercise his/her power as a director. Once the DBD has deregistered a director, however, all third persons are deemed to know that the person who was deregistered is no longer a director. (See CCC Section 1022.)

If the shareholders were to remove the director(s) holding binding signatory power, and elect a replacement(s) as stated, then interesting “Catch 22”-type problems beyond the scope of this paper come into play. For example, if the director(s) holding binding signatory power have been removed, and refuse to sign the deregistration documents, then how do you deregister them?

An exception to the aforementioned rule that the shareholders must elect directors is found in Section 1155 of CCC, which states as follows: *“Any vacancy occurring in the board of directors otherwise than by rotation may be filled up by the directors, but any person so appointed shall retain his office during such time only as the vacating director was entitled to retain the same.”*

Section 1155 does not preclude the shareholders from filling the vacancy at a general meeting, and it would be possible to provide in the Articles that *only* the shareholders would have the right to fill the vacancy.

When a Thailand limited company is registered under the Thai-U.S. Treaty of Amity and Economic Relations, then at least a majority of the members of the board of directors must be Thai citizens and/or American citizens.

Managing Director(s), Chairman of the Board, and Other Officers

There is no provision under Thai law for any director or any other person to be elected or nominated to any office as President, Vice-President, Treasurer or Secretary—all of which are common in other jurisdictions.

It is provided in Section 1163 of the CCC that the directors may elect one of their number as chairman of the board, and it should be noted that in the case of a tied vote at a board of directors' meeting, the chairman of the meeting will, under Thai law, have a casting vote unless this power is specifically excluded in the Articles of the company.

The chairman of the board of directors of a company is not required to be a Thai citizen or even a permanent resident of Thailand.

The registration officials at the Ministry of Commerce prefer that board of directors' meetings of Thailand companies be held in Thailand, unless permitted otherwise by the Articles. Concerning the board meeting, a physical meeting must be arranged, as the DBD issued a notification in 2008 stating that circular-written resolutions of board of directors' meetings and proxies for directors are no longer allowed.

Under CCC Section 1180, the chairman of the board of directors shall preside at every meeting of shareholders (general meeting) unless the Articles require otherwise. If there is no such chairman, or if at any general meeting he is not present within 15 minutes after the time appointed for holding the meeting, the shareholders present may elect one of their members to be chairman.

Under CCC Section 1193, in the case of an equality of votes at a general meeting, whether on a show of hands or on a poll, the chairman of the meetings shall be entitled to a second or casting vote, unless required otherwise under the Articles. Importantly, unless expressly provided in the Articles or upon motion at each general meeting, votes of shareholders are by a show of hands (i.e., one vote per shareholder) rather than by poll (i.e., one vote per share).

There is no provision in Thai law for the appointment of a managing director of a company, but by custom and administrative practice, such appointment can be—and often is—made by the directors themselves.

It should be noted that the appointment of a particular director as chairman of the board, or as managing director, does not of itself confer any additional legal authority upon that director, nor give him any additional power whatsoever, save only for the chairman's potential right in some cases to exercise a casting vote. The most important point, from a practical viewpoint, is still the registration (referred to supra) relating to directors' signatory authority. Indeed, it is not uncommon for a chairman of the board to be a director with no binding signatory authority at all, and for a managing director to have no greater signatory authority than that conferred on other directors.

It should also be noted that situations have occurred where an alien had a work permit authorizing him to work as a managing director, and then a second alien applied for a work permit to work as general manager in the same company. The Labor Department denied the second alien's application on the grounds that the position of managing director includes the powers of general manager (a general manager need not be a director), and therefore, the position of general manager was redundant. Therefore, if a company envisions having more than one alien employee with broad managerial duties, or having an alien general manager, we recommend that the board of directors of such a company not include an alien director holding a work permit as managing director. Perhaps such company should not

even have a Thai with the title of "Managing Director" (Thais do not need or have work permits to be able to work in Thailand).

Shareholders

Under CCC Sections 1190 and 1182, voting is by a show of hands, i.e. one vote per shareholder, not one vote per share, unless a poll is demanded or required under the Articles. To reemphasize: this is a hidden trap!

Even if voting is by poll, there would probably not be one vote per share if the Articles provided that no shareholder is entitled to vote unless he/she is in possession of a certain number of shares. CCC Section 1183 states: *"If the regulations of the company provide that no shareholder is entitled to vote unless he/she is in possession of a certain number of shares, the shareholders who do not possess such number of shares have the right to join in order to form the said number and appoint one of them as proxy to represent them and vote at any general meeting."*

Although the Board can, without the shareholders' approval, make a call (demand) upon the shareholders for all money due on their shares, the shareholders can prohibit the board of directors from making this call (demand) by resolution passed at a general meeting according to CCC Section 1120, which reads as follows: *"Unless otherwise decided by a general meeting, the directors may make calls upon the shareholders in respect of all money being due on their shares."*

Would it be permissible under CCC Section 1120 for the shareholders in a general meeting to nullify a call that had already been made by the board of directors? We are not aware that this issue has ever arisen in Thailand. As a practical matter, the issue, if it ever should arise, would probably be moot. If the board of directors, having made a call, refused to revoke the call after the shareholders in a general meeting had passed a resolution to nullify the call, the shareholders could remove directors and replace them with a majority of directors who would do their bidding. This assumes that the shareholders could form the quorum required for a general meeting (50 percent of the shares unless a higher quorum is required by the Articles) and the vote required to remove the director(s) who offended them (a majority of the votes present at the general meeting unless a higher percentage is required by the Articles).

As a caveat to the above, CCC Section 1184 states: *"No shareholder is entitled to vote unless all calls due by him have been paid."*

The shareholders must approve the matters specified below, except as otherwise indicated. The approval would be by ordinary resolution, except as otherwise stated, or as otherwise provided in the Articles.

1. **Certain important matters as specified in the Articles.**

   A company may provide in its Articles that certain specific matters must be approved by the shareholders with a majority vote (or higher) by either an ordinary resolution, or by special resolution.

   A "special resolution" is a resolution passed at a shareholders' meeting by a majority of not less than three-fourths of the total votes of shareholders attending the meeting and eligible to cast votes. The notice period to call for such shareholders' meeting is at least 14 days. A higher percentage will be required if the Articles provide for this. The required procedure for special resolutions is explained in Section 1194 of the Code. (Note: these percentage votes are matters of public policy and cannot be changed by the shareholders.)

2. **The annual balance sheet and profit and loss statement required by CCC Section 1196, 1197, and 1214.**

3. **Declaration of dividend.**

   CCC Section 1201 states, in part: *"No dividend may be declared except by resolution passed in a general meeting."* An exception to the foregoing is provided in CCC Section 1201 which further states, in part, *"The directors may from time to time pay to the shareholders such interim dividends as appeared to the directors to be justified by the profits of the company."*

   CCC Section 1170 states: *"When the acts of a director have been approved by a general meeting, such director is no longer liable for the said acts to the shareholders who have approved them, or to the company. Shareholders who did not approve of such acts cannot enter their action later than six months after the date of the general meeting in which acts were approved."*

4. **Election of auditors and fixing of their remuneration (CCC Sections 1209, 1210, and 1211).**

   Directors, however, can fix auditors' remuneration subject to the shareholders' subsequent approval (see CCC Section 1170 above).

5. **Increases and reductions of capital.**

   A limited company may increase (CCC Section 1220) or reduce (CCC Section 1224) capital only by special resolution.

6. **Amendment or replacement of memorandum of association and amendment or replacement of the Articles.**

   Amendment or replacement of memorandum or Articles requires a special resolution (CCC Section 1145).

7. **Dissolution by means of special resolution to dissolve under CCC Section 1236(4).**

   The other ways to cause the dissolution of a limited company, apart from special resolution to dissolve, are listed in CCC Sections 1236 and 1237.

   CCC Section 1236 states:

   "A limited company is dissolved:
   1) *In the case, if any, provided by its regulations.*
   2) *If formed for a period of time, by the expiration of such period.*
   3) *If formed for a single undertaking, by the termination of that undertaking.*
   4) *By a special resolution to dissolve.*
   5) *By the company becoming bankrupt."*

   CCC Section 1237 states:

   "A limited company may also be dissolved by the court on the following grounds:
   1) *If default is made in filing the statutory report or in holding the statutory meeting.*
   2) *If the company does not commence its business within a year from the date of registration or suspends its business for a whole year.*
   3) *If the business of the company can only be carried on at a loss and there is no prospect of its fortunes being retrieved.*
   4) *If the number of the shareholders is reduced to less than three.*

However, in the case of default in filing the statutory report or in holding the statutory meeting, the court may, instead of dissolving the company, direct that the statutory report be filed or the statutory meeting be held as it may think fit."

Dissolution of a Thailand limited company includes liquidation (i.e., the assembling and mobilization of the assets, settlement with the creditors and debtors, and apportionment of the remaining assets, if any, among the shareholders). The dissolution of a Thailand limited company is different from the British concept of "winding up" which involves liquidation but would not necessarily lead to the cessation of the Company's existence as a juristic person (legal entity), whereas a Thailand limited company ceases to exist upon the conclusion of the dissolution procedure.

8. Amalgamation (CCC Section 1238).

Amalgamation means the merger or consolidation of two limited companies.

9. Election and removal of directors.

According to CCC Section 1151, *"A director can be appointed or removed only by general meeting."* This is subject to the aforementioned exception under CCC Section 1155, where the directors may fill a vacancy on the board of directors.

10. A director undertaking commercial transactions of the same nature as and competing with that of the company.

CCC Section 1168 states, in part, as follows:

". . . A director must not without the consent of a general meeting of shareholders, undertake commercial transactions of the same nature as and competing with that of the company, either on his own account or that of a third person, nor may he be a partner with unlimited liability in another commercial concern carrying on a business of the same nature as and competing with that of the company.

The foregoing provisions apply also to persons representing the directors."