

Tilleke
& Gibbins

COMPANY DIRECTORS IN THAILAND

Guidelines and Q&A on
Duties and Liability

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Role of Directors

Under Thailand's Civil and Commercial Code (CCC), private limited companies are managed by one or more directors under the control of a general meeting of the shareholders. Directors have two primary roles:

- Decision-making, which is typically exercised by voting at meetings of the board of directors on matters requiring the board's resolutions; and
- Overseeing the performance of the management, which includes setting goals, policies, and strategies, and providing guidance and instructions.

Directors can also undertake management responsibilities, whereby they would be called executive directors. Notably, the common positions of managing director, CEO, and president are only business titles, and they are not recognized or have any specific role or authority under Thai law.

Directors have the authority to manage a company by all lawful means necessary, within the bounds of the company's memorandum of association, articles of association, resolutions of shareholders' meetings, and applicable Thai laws. As long as directors act within that scope, their actions are legally binding on the company and they will not be held personally liable to the third party. Legally, foreign and Thai directors are not treated differently.

Directors' Duties

Directors must act in good faith to maintain the interests of the company. They have the duty to act with responsibility and due care, meaning that they must act as a prudent person in a similar business would act.

Similar to other jurisdictions, Thailand has adopted the concept of "fiduciary duties" for directors of a private limited company, which consists of the following three main duties:

- Duty of Care: Directors must apply the diligence of a careful businessperson.
- Duty of Obedience: Directors must comply with the laws, objectives, articles of association, and resolutions of the board of directors and the shareholders.
- Duty of Loyalty: Directors must avoid conflicts of interest unless consented to, and no competition with the company is allowed unless waived.

The CCC imposes several statutory duties on directors, such as causing proper books and accounts of the company to be prepared and kept, causing a balance sheet of the company to

be prepared and submitted for approval by the general meeting of the shareholders, and ensuring that payment of shares by the shareholders is actually made.

Public limited companies are governed by the Public Limited Company Act B.E. 2535 (1992), which imposes higher and more extensive standards and duties on directors. Directors of public limited companies listed on the Stock Exchange of Thailand are subject to even greater duties and standards of compliance under the Securities and Exchange Act B.E. 2535 (1992), as well as regulations of the Securities and Exchange Commission and the Stock Exchange of Thailand.

Binding Signatory Power

Foreign directors should be aware of binding signatory power. Only directors who are registered as binding signatories with the Ministry of Commerce can sign documents on behalf of a company. Such signatory power is often checked by third parties (e.g., banks and authorities) before dealing with a company. It is common practice to affix the company seal along with a director's signature. Personnel besides directors may be delegated such powers through a power of attorney.

Civil Liability of Directors

Directors are generally not personally liable to any third party if they act within the scope of their authority and do not act in breach of their fiduciary duties. The CCC empowers the company, its shareholders, and its creditors to hold directors liable to pay compensation for damages suffered by the company due to breach of any fiduciary duty. The burden of proof belongs to the party who initiates the civil lawsuit. Directors could avoid liability if they seek prior approval or post-action ratification from the general meeting of the shareholders. Resigning from the board will not bring immunity, since directors are still liable for breach of fiduciary duty for two years after resignation. Directors' and officers' liability insurance is an increasingly popular means of protection.

Criminal Liability of Directors

Directors and nondirector managers are criminally liable when they commit acts or omissions that are prescribed by certain laws as wrongful and subject to prescribed criminal penalties. Wrongful acts are generally fraudulent or intentional, but in some cases, negligent or even unintentional acts are punishable. Breaches of fiduciary duty do not lead to criminal liability unless the company is listed or permitted to issue securities to the public. Noncompliance with basic corporate duties, such as the timely submission of audited financial statements, is also a criminal offense and subject to the penalties under the Act on Offenses Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations B.E. 2499 (1956), as amended.

Directors can be personally liable for an offense committed by the company if it can be proved that the offense was committed by the express order or act of the directors., the failure to give an order, or an omission to do any act that is a director's duty under a specific law.

Directors' Q&A

01 Can I be sued?

Yes. The company is empowered to hold directors liable to pay compensation for damages suffered by the company due to breach of any fiduciary duty. Basically, the company itself, by the other directors, may bring such civil claim against you personally as a director of the company. Alternatively, the shareholders or the creditors may also initiate such lawsuit against you on behalf of the company.

As a defendant in a civil suit, directors are exposed to awards of compensatory damages, as well as liability for court fees and legal costs. Although Thai law permits recovery of legal costs from the losing party, the amount awarded is rarely close to the actual costs incurred. Even if successful, defense in civil proceedings is therefore inevitably costly.

In certain circumstances, companies may choose to indemnify their directors for liabilities and costs arising in the course of discharging their duties.

02 Can I be prosecuted for criminal offenses?

Yes. Directors, including nondirector managers, can be held criminally liable by various laws, such as company law, tax law, customs law, and others, if they commit acts or omissions that are prescribed by such laws as criminal offenses.

As Thailand does not recognize the concept of plea bargaining, defendants cannot voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges or in exchange for an agreed-upon sentence.

03 Who can prosecute me?

Depending on the alleged offense, investigations may be initiated by the relevant authority (e.g., Revenue Department, Office of the Consumer Protection Board, Office of the Securities and Exchange Commission, Department of Special Investigation) or the police. Subsequently, prosecution is then taken up by the public prosecutors of the Office of the Attorney General.

Criminal proceedings may also be commenced by an injured party. In Thailand it is not unusual for an aggrieved party seeking redress to commence both civil and criminal proceedings against a company and its directors simultaneously, meaning that concurrent sets of proceedings may be defended in different courts. Counterclaims for wrongful prosecution are also possible.

04

Can I be questioned and my home searched?

Yes. Government authorities have broad powers to gather information, issue written orders, summon witnesses to provide statements, and request documents. Officials can demand that a company employee produce documents under the circumstances of an investigation and raid the home or office of an employee to seize documents with a proper search warrant.

Enforcement authorities can also demand that an employee, officer, director, or any other responsible person of a company submit to questioning about the circumstances of the alleged offense. However, the questioned person has a constitutional right not to make self-incriminating statements. It is therefore essential to obtain legal advice and representation immediately upon the arrival of an enforcement authority at the company's premises or the employee's home, or upon receiving a request for documents or questioning.

05

Can I be liable for the company's acts?

Yes. Not only can directors be held criminally liable for their own wrongdoing as company directors, but they can also be held liable for an offense committed by the company if it can be proved that the offense was committed by the express order or failure or omission to do any act that is a director's duty under a specific law. Many laws stipulate that in such circumstances directors will be separately subject to criminal penalties similar to those imposed upon the company unless they can show the offense was committed without their knowledge or consent, or they acted reasonably in preventing the offense.

06

Are there any special laws governing foreign parties?

Yes. Under the Foreign Business Act, foreign shareholdings in almost all business activities must be below 50% (or lower in certain sectors) unless otherwise permitted by the relevant authority. Using a Thai "nominee shareholder" to circumvent the requirements is a criminal offense, and the law contains an express criminal liability provision affecting directors. Under the Alien Employment Act, foreign directors and officers working in Thailand without a work permit may be punished by imprisonment, fines, or both. Company directors may also face criminal prosecution if it is alleged that they knowingly employed foreigners without work permits.

More questions? Contact Tilleke & Gibbins for answers.

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