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Memo: A Guide for Company Directors in Thailand

September 2021



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A. Introduction



A director of a company is a person who is responsible for managing the company's business affairs.

Every company must have at least one director. Larger companies may have many directors who collectively manage the business of the company. They are often collectively referred to as a "board of directors".

A director's job is to manage the business affairs of a company. In addition to the *Thai Civil and Commercial Code B.E. 2535 (1992)*, a company's articles of association may set out a director's powers and functions. The key responsibility of a director is to understand what the company is doing at all times and to properly enforce resolutions of the shareholders meetings.

A director needs to consider how any proposed actions will affect the company, especially if it involves large amounts of money. A director should be active and engaged in director's meetings. A director should also questions managers and staff about areas of the business, if necessary, and get professional advice if he needs information to make an informed decision.

This guide summarises key aspects of the *Thai Civil and Commercial Code B.E. 2535 (1992)* and highlights the most important powers, duties and liabilities of directors in Thailand. It does not, however, cover the potential liability of directors under other laws (e.g. under the Penal Code).

If you would like to receive further information from us, please let us know. In the meantime, we hope that you will find this guide useful.

B. Managing a company

I. What is a director?

According to the law, a director is the person appointed by the shareholder of the company to be registered as the company's director with the Department of Business Development (DBD) to manage the company's business and provide it with direction. Directors must manage the company's business under the control of the general meeting of shareholders and in accordance with the regulations of the company and applicable laws, including the *Thai Civil and Commercial Code B.E. 2535 (1992)*.¹

Directors are responsible for the managing the company's day-to-day business and may, or may not be, shareholders of the company. Directors owe duties to the company, its shareholders, and to other dealing with the company. Directors must act honestly in what they believe to be the best interest of the company and with such care as may be reasonable be expected of them in all circumstances.

Responsibilities of directors include for example determining and implementing policies and making decisions, prepare and filing documents with the DBD, which acts as the registrar under the *Thai Civil and Commercial Code B.E. 2535 (1992)*, or other government agencies, calling general meetings, including the annual general meeting of the shareholders, and maintaining and keeping records of the company required by law.

II. Requirements for directors

Under the *Thai Civil and Commercial Code B.E. 2535 (1992)*, a private limited company must have at least one director.² While there is no statutory requirement for at least one director of every company to be ordinarily resident in Thailand, for practical reasons, we would usually recommend that at least one director of a company resides in Thailand.

The minimum and/or maximum number of directors that a company can have will usually be stated in the company's articles of association. The company may also increase or reduce the minimum and/or maximum number of directors stated in the company's articles of association by a general meeting of the shareholders (by passing a special resolution to change the company's articles of association?).³

The *Thai Civil and Commercial Code B.E. 2535 (1992)* sets out the minimum qualifications for directors of companies as follows:

- A director must be a natural person who is at least 20 years old;
- A director must not be incompetent; and
- A director must not be an undischarged bankrupt.

A company may set out additional qualifications of directors in the company's articles of association, such as the requirement to hold shares in the company.

III. Appointment of directors

A company's first directors are usually chosen by the persons who incorporate the company and will be named in the application for registration of the company. Other director are generally appointed by an ordinary resolution of the shareholders at a general meeting.⁴

Every director must provide consent in writing to be appointed as a director of the company prior to being appointed.

IV. Removal, retirement and resignation of directors

The shareholders of a company may remove any director by passing an ordinary resolution during a general meeting and may also appoint another director by ordinary resolution.⁵

At the first ordinary meeting after the registration of the company and at the first ordinary meeting in every subsequent year one-third of the directors, or, if their number is not a multiple of three, then the number nearest to one-third must retire from office.⁶

A director may resign at any time by tendering his resignation in writing to the company. The resignation shall take effect from the date of resignation letter reaches the company.⁷ A director who resigns may notify the registrar of his resignation.⁸

¹ Section 1144. Limited Company Managers.

² Section 1144. This different to a Public Limited Company, which must have a board of directors consisting of at least five directors, provided that not less than one half of the total number of directors must have a residence in Thailand, Section 67 of the *Public Limited Companies Act, B.E. 2535 (1992)*.

³ Section 1150. Number and Remuneration of the Directors.

⁴ Section 1151. Number and Remuneration of the Directors.

⁵ Section 1151. Appointment or Removal of Director.

⁶ Section 1152. First Ordinary Meeting.

⁷ Section 1153 (1). Director Resignation.

⁸ Section 1153 (2). Director Resignation.

Under the *Thai Civil and Commercial Code B.E. 2535 (1992)*, a director shall vacate office if:

- The director becomes a bankrupt;
- The director becomes an incompetent person.

In addition to these grounds, a company's articles of association may set out additional grounds on which a director may be compulsorily be removed from his position.

When there is a change of a director or directors, the company shall effect the registration thereof within 14 days from the date of such change.⁹ Such a change will be effective for a third party only upon registration with the DBD.

V. Powers of directors

The directors of a company are responsible for managing the company under the control of the general meeting of shareholder and according to the regulations of the company.¹⁰ A director makes decisions regarding the day-to-day business of the company and must guide and monitor the performance of the company.

The *Thai Civil and Commercial Code B.E. 2535 (1992)* allows directors to exercise most of the powers of the company in carrying on business. This included the power of the company to borrow money, issue shares, enter into contracts, bring legal proceedings, hire staff, and grant security over the company's assets.

Directors can exercise their powers by passing a resolution of directors, also commonly known as a board of directors' resolution. Directors' resolutions are required under the *Thai Civil and Commercial Code B.E. 2535 (1992)* for certain matters such as determining the amount of dividend to be paid to shareholders or approving share transfers (if required by the company's articles of association).

Unless otherwise provided by the regulations of the company, the directors have the following powers as described in the *Thai Civil and Commercial Code B.E. 2535 (1992)*:

- The subsisting directors may act notwithstanding any vacancy among them but, if and so long as their number is reduced below the number necessary to form a quorum, the subsisting directors may act for the purpose of increasing the number of directors to that number, or of summon-

ing a general meeting of the company but for no other purpose;¹¹

- The directors may fix the quorum necessary for the transaction of business at their meetings and unless so fixed the quorum shall (when the number of directors exceeds three) be three;¹²
- Questions arising at any meeting of directors are decided by a majority of votes, in case of an equality of votes the chairman has a casting vote;¹³
- A director may at any time summon a meeting of directors;¹⁴
- The directors may elect a chairman of their meetings, and fix the period for which he is to hold office, but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present may choose one of their members to be chairman of such meeting.¹⁵

Further, the directors of a company may delegate any of their powers to managers or to committees consisting of members of their body. Every manager or committee shall, in the exercise of the power so delegated, conform to any order or regulation that may be imposed on them by the directors.¹⁶ It is not compulsory under the law for a company to appoint a managing director.

VI. Legal duties of directors

Given the wide range of powers that the directors enjoy over the affairs of the company, the *Thai Civil and Commercial Code B.E. 2535 (1992)* imposes a number of legal duties on directors to ensure that they act properly and in the best interest of the company.

The duties of a director can be broadly divided into three categories:

- Statutory duties;
- Fiduciary duties; and
- Duties of care, skill and diligence.

⁹ Section 1157. Registration of the Change of Directors or Directors.

¹⁰ Section 1144. Limited Company Managers.

¹¹ Section 1159. Quorum Needs for Directors to Act.

¹² Section 1160. Directors can reduce number for a quorum.

¹³ Section 1161. Shareholder Voting Rights.

¹⁴ Section 1162. Directors Meeting.

¹⁵ Section 1163. Meeting Chairman.

¹⁶ Section 1164. Delegation of Powers to Managers.

1. Statutory duties

The directors must in their conduct of the business apply the diligence of a careful business man. In particular they are jointly responsible:

- For the payment of shares by the shareholders being actually made;
- For the existence and regular keeping of the books and documents prescribed by law;
- For the proper distribution of the dividend or interest as prescribed by law;
- For the proper enforcement of resolutions of the general meetings.¹⁷

A director must not without the consent of the 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 concern carrying on business of the same nature as and competing with that of the company.

2. Fiduciary duties

The fiduciary duties which a director owes to a company essentially concern the duty to act in good faith. This duty encompasses:

- Acting in the interest of the company; and
- Avoiding conflict of interest.

3. Duties of care, skill and diligence

The level of skill may vary with regard to the activities of the company, and a distinction may be made between non-executive and executive directors.

Establishing, whether a director is careful does not depend on his qualification or the activity of the company. The director should take business decisions after taking all available information into account and act with the standard of care that can reasonably be expected of a person who carries out the particular functions which he has in relation to his company. The necessary standard of care is an objective one. It is determined by looking at a fictive reasonable director in the same position.

It should be noted, though, that directors are allowed to delegate their powers and to trust their delegates as well as other directors to carry on their functions properly. Directors may, in general, especially rely on reports, statements, financial data and other information prepared or supplied, and on expert advice given by employees and professional advisers whom the directors on reasonable grounds believe to be reliable and competent.

This applies, however, only where there is no sensible reason for suspicion. A director who relies on others has to act in good faith, make proper inquiries where the need for such inquiries is indicated by the circumstances and must not have knowledge that his reliance is unwarranted. Further, directors are generally not obliged to supervise their co-directors and can usually not be held responsible for their acts or omissions.

Further, directors have to exercise reasonable diligence in the discharge of the duties of their office. The term "diligence" does not have a clear-cut definition. What is reasonable may depend on the type of director and the activity of the company.

To comply with these duties, directors must ensure that they:

- Act honestly and carefully in dealing with the company and on its behalf with others;
- Give the interest of the company, its shareholders and its creditors top priority, which includes acting in the company's best interest (even if this may not be in the director's own personal interest);
- Understand their legal obligations under the *Thai Civil and Commercial Code B.E. 2535 (1992)* and the company's regulations and comply with them in making their decisions;
- Are kept informed about the company's financial position and performance, ensuring the company can pay its debt on time, keeps proper financial records and does not take on obligations that it cannot satisfy;
- Do not allow or agree for the business to be carried out in a way likely to create a substantial risk of serious loss to the company's creditors;
- Use any information received through their position properly and not to the detriment of the company; and
- Avoid conflicts of interest and disclose any material personal interest which may influence how they vote on board resolutions.

¹⁷ Section 1168. Standard of Care for Directors.

VII. Failure to comply with directors' duties and legal requirements

Directors of a company must ensure that they comply with their duties under the *Thai Civil and Commercial Code B.E. 2535 (1992)* and other relevant laws such as the *Labour Protection Act B.E. 2541 (1998)*. In addition, they must also ensure that the company complies with its legal obligations. *The Act Prescribing Offences Related to registered partnerships, limited partnerships, limited companies, associations and foundations, B.E. 2499 (1956)* imposes specific penalties on directors if a company fails to comply with the *Thai Civil and Commercial Code B.E. 2535 (1992)*, such as imprisonment or a fine or to both.

If there is a breach of directors' duties under the Thai Civil and Commercial Code causing injury to the company, the company or, in case the company refuses to act, any of the shareholders may enter claims against the directors for compensation; such claims may also be enforced by the creditors of the company in so far as their claims against the company remain unsatisfied.¹⁸

The liability of the directors of a limited company may be unlimited; in such case, a statement to that effect must be inserted in the memorandum.¹⁹ The unlimited liability of a director terminates at the expiration of two years after the date at which he ceased to hold office.

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 on which such acts were approved.²⁰

¹⁸ Section 1169. Claims against Directors.

¹⁹ Section 1101. Director's Liability is Unlimited.

²⁰ Section 1170. After Approval of General Meeting, Director no longer liable.

C. Our services

We are able to assist in ensuring full compliance with the *Thai Civil and Commercial Code B.E. 2535 (1992)* and other laws. This includes advice and training on the rights and duties of directors of a company to facilitate your daily work and minimise your compliance risks.

We would further be happy to assist with general compliance matters, such as accounting, payroll, corporate secretarial services and tax compliance, as well as general legal and tax advice.

We hope we can be of assistance to you. Should you have any questions, please do not hesitate to contact us.

Your contact



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Luther in Asia

Expertise

Our office works closely together with the other Luther offices in Asia and Europe. We take a holistic approach, dealing with Asia-wide compliance issues, assisting with the creation of international holding structures and ensuring tax-efficient repatriation of profits.

We provide the complete range of legal and tax advice to clients doing business in and from Asia. To offer a seamless service, we have teams in Europe as well as in Asia, led by partners with many years of experience on both continents. That way, we can immediately answer questions concerning investment decisions and provide our clients with an accurate assessment of the particularities of their projects, no matter where they are located.

Our lawyers unite substantial practical knowledge in important legal areas and cover the entire spectrum of law in Asia and beyond. We support foreign investors in the assessment of location and investment criteria, the structuring of investment projects, acquisitions and joint ventures. Finding and implementing solutions for sensitive areas like technology transfer and know-how protection also form part of our work. Alongside our clients we negotiate with future partners and local authorities and ensure the enforcement of their rights, in and out of court as well as in arbitration proceedings.

The services of our lawyers are complemented by our accountants, HR professionals and tax consultants offering all the services one would necessarily associate with a “one-stop shop” concept, from outsourced administration to accounting, payroll and tax compliance. Additionally, we provide corporate secretarial services, especially in Asian “common law” countries.

Collectively, our lawyers, tax consultants and professionals combine the competence and experience necessary to comprehensively assist comprehensively on all business matters in Asia. Our tax experts advise on individual and corporate tax compliance as well as on withholding tax issues, on Double Taxation Agreements and on complex international tax structures. Our accountants and professionals carry out the time-consuming administrative tasks of accounting and payroll functions a business must undertake, allowing our clients to concentrate on growing their business.

Singapore

Singapore is a leading international trade and financial hub. As such, it serves as Asian headquarters for many international companies operating within the Asia-Pacific region.

With a staff strength of more than 90, Luther is by far the largest continental European law firm in Singapore. More than 25 lawyers from Singapore, Germany, France and other jurisdictions cover the full range of corporate and commercial legal work as well as the structuring of investments within South and South East Asia.

Our team is supported by excellent local Singaporean lawyers, notary publics, tax advisors, accountants, corporate secretaries and other professionals.

Shanghai

Shanghai is the main hub for doing business in China, and with a team of more than 20 international lawyers, Luther is the largest German-speaking law firm in the city. Our China team consists of German and Chinese legal experts most of whom have over a decade of experience in developing and entering the Chinese market.

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Region

Our two principal Asian offices in Singapore and Shanghai are complemented by offices and teams in Yangon (Myanmar), Bangkok (Thailand), Delhi-Gurugram (India), Kuala Lumpur (Malaysia) and Jakarta (Indonesia).

This network of Luther offices is further strengthened by the long-established business relationships that we have successfully developed both locally and with our regional partners in Australia, Hong Kong, Japan, New Zealand, the Philippines, South Korea and Vietnam.

Hits the mark. Luther.

Luther Rechtsanwaltsgesellschaft mbH is one of the leading corporate law firms in Germany. With some 420 lawyers and tax advisors, we can advise you in all fields of German and international corporate law. In addition to having offices in every economic centre throughout Germany, we are also present in ten locations abroad: in Brussels, London and Luxembourg in Europe, and in Bangkok, Delhi-Gurugram, Jakarta, Kuala Lumpur, Shanghai, Singapore and Yangon in Asia.

Our advisory services are tailored to our clients' corporate goals. We take a creative, dedicated approach to achieving the best possible economic outcome for each of our clients. The name "Luther" stands for expertise and commitment. With a passion for our profession, we dedicate all our efforts to solving your issues, always providing the best possible solution for our clients. Not too much and not too little – we always hit the mark.

We know how crucial it is to use resources efficiently and to plan ahead. We always have an eye on the economic impact of our advice. This is true in the case of strategic consulting as well as in legal disputes. We have complex projects on our agenda every day. At Luther, experienced and highly specialised advisors cooperate closely in order to offer our clients the best possible service. Thanks to our fast and efficient communication, permanent availability and flexibility, we are there for you whenever you need us.

Luther won the JUVE Award 'Law Firm of the Year 2019'.



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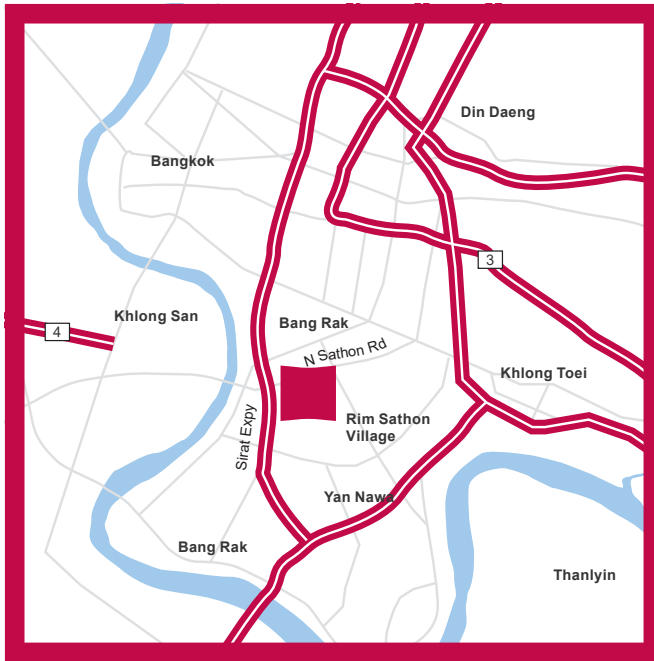


Our locations

Our and our local partners' offices in important European and Asian markets



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