

LEGAL ORIENTATION FOR FOREIGN DIRECTORS

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Many foreigners hold the high and respected position of director of their respective companies because they know how to manage a company, run a business, make profits, etc. But acting in that capacity, do they know how to comply with Thai law? In other words, do they know and understand what the legal implications of the job are? This article will discuss certain basic legal requirements and responsibilities as well as practice guidelines which beginning directors should be familiar with.

At the stage of business startup, foreign directors should be aware that the minimum number of directors is only one unless stated otherwise by a company's Articles of Association. Except in special cases, there is no requirement with respect to a director's nationality, and it is permissible for a company to have a sole foreign director.

Legally, foreign directors and Thai directors are not treated differently. The distinction is that foreign directors need a work permit to work in Thailand (and the term "work" is defined quite broadly under the law). Thus, foreign directors residing abroad should apply for a work permit to work in Thailand for more than 15 days. Even if they only intend to attend a meeting or training of less than 15 days, it is recommended that their companies file a 15-day notification with Labor officials to keep on the right side of the law.

While a director's position may bring money and prestige, it also brings issues of a more serious nature, i.e. power, responsibility, and duty.

Power enables directors to manage a company by all lawful means necessary within the scope stipulated in the company's Memorandum of Association, Articles of Association, resolutions of shareholders' meetings, and applicable Thai laws. As long as directors act within such scope, their actions are legally binding on the company and they shall not be held personally liable for such acts if done in good faith and due care.

Directors are appointed by shareholders to manage the company for them and in their best interests. Consequently, directors bear responsibility towards the shareholders, a principle known as fiduciary duty. Directors shall exercise the judgment of careful business persons, a concept which was expanded on by the Thai Supreme Court in a past ruling that such judgment should be comparable to that of business persons in the same industry or business. In addition to loyalty to their companies, directors shall not participate in competing businesses or put themselves in situations of conflict of interest without full disclosure to the shareholders.

Thai corporate law sets forth certain joint statutory duties for all directors such as ensuring that payment for shares is actually made by the shareholders. In this respect, directors shall not allow the offsetting of share payment against any debts of the company to shareholders. Other joint tasks of directors include the maintenance of books and accounts, lawful payment of dividends, and enforcement of shareholders' resolutions.

Of utmost concern to Thai and foreign directors alike is limited personal liability. The guiding principle is to act faithfully with due care and within the scope of their powers in order to avoid personal liability brought against them by injured persons. However, negligence,

omissions, mismanagement, and self-dealing could lead to derivative suit brought by the shareholders on behalf of the company. Directors could avoid such liability if they seek prior approval or post-action ratification from the shareholders. Resigning from the Board will not bring immunity since directors are still liable for wrongdoing 2 years after the offense. Directors' and officers' liability insurance is becoming an increasingly popular means of protection.

Criminal liability is another issue that is of paramount concern to directors as it can be initiated by injured persons such as employees, shareholders, and the public prosecutor, and may involve statutes such as the Revenue Code and labor law. Even commendable and effective management actions could trigger a violation of the criminal provisions of a statute without intention. Fortunately, some statutes provide directors a safety clause whereby they can raise the defense that they had nothing to do with the wrongful act or tried their best to prevent the same. Still, directors should watch out for other statutes that provide no such clause.

Finally, foreign directors should be aware of binding signatory power which may sound unfamiliar. Only directors 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 the company. It is common practice to affix the company seal along with a director's signature. Non-director personnel may be delegated such powers through a Power of Attorney.

In summary, it would be wise for foreign directors to familiarize themselves with the above lessons to avoid committing costly mistakes. ♦