



Tilleke & Gibbins

Legal Duties and Liability of Directors

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“Directors’ Liability in Thailand” - AustCham Thailand’s SB&E Committee
Business Briefing

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The Laws

Type	Governing Laws & Regulations	Regulator	Whose duties?	Level of Control & Compliance
Private Company	Civil and Commercial Code	DBD	Directors	Low
Public Company	Public Limited Company Act	DBD	Directors	Medium
Listed Public Company	Public Limited Company Act + Securities and Exchange Act (Major Amendment in 2008)	DBD, SEC, and SET	Directors and Executives	High

DBD = Department of Business Development
 SEC = Securities & Exchange Commission
 SET = Stock Exchange of Thailand

Role, Authority and Power of Directors

Role of Directors

Decisional Making Role

- ▶ Making decision by voting at Board meeting
- ▶ Matters required by laws or third party
- ▶ Matters proposed by management

Supervisory Role

- ▶ Setting goals, policies and strategies
- ▶ Monitor and oversee
- ▶ Evaluate

Role, Authority and Power of Directors

Title and Position

- ▶ Non-official title
 - Executive Director / Non-Executive Director
 - Managing Director, CEO, CFO

- ▶ Official Title
 - Authorized Director = Director(s) with signing authority
 - Independent Director and Audit Committee (for listed companies only)

Role, Authority and Power of Directors

Singing Authority

Directors who have authority to sign and thereby bind the company

Registered with registrar and shown in Company Affidavit

Delegation of signing authority by Power of Attorney



Role, Authority and Power of Directors

Most companies do not limit scope of authority of directors

Objectives

Registered with registrar – Known to the public

Usually very broad

If violates – act only binds the director, not company

Articles of Association

Registered with registrar – Known to the public

Rules of Board's and shareholders' meeting and shares

If violates – act only binds the director, not company, but can be ratified

Resolutions of Board/shareholders

Not registered – Not known to public

Can be any matter

If violates – act still binds the company

Role, Authority and Power of Directors

Power

Shareholders	<ul style="list-style-type: none">• Approve matters required by laws or AOA• Appoint/remove directors
Directors	<ul style="list-style-type: none">• Approve matters required by laws or AOA or internal regulations or policies• Appoint/remove executives
Executives	<ul style="list-style-type: none">• Approve other matters• Appoint/remove employees

Meeting of the Board

Private company

No frequency requirement

Listed company

At least once every 3 months

Duties of directors must be self-performed

Not permissible

Attendance by proxy



Adopt resolution without a meeting (Circulated Resolution)



Meeting of the Board

Electronic Attendance

Historically not allowed until NCPO Order No. 74/2557 issued on June 27, 2014.

- ▶ Board meeting/ shareholders' meeting can be attended by electronic means (phone/video conference)
- ▶ At least 1/3rd of quorum must physically attend (therefore maximum of 2/3rd of quorum can electronically attend)
- ▶ No electronic attending from outside Thailand
- ▶ Comply with security measures imposed by Ministry of Digital Economy and Society, e.g., identity check, recording, administrator

Case Study: Paper Meeting



Case Study: Paper Meeting

Khun Sondhi Limthongkul Case - B.E. 2539-2559 (A.D. 1996-2016)

▶ Facts:

- The non-listed parent company (A) borrowed money from Krungthai Bank. Two subsidiary companies (B and C) are listed on the Stock Exchange of Thailand acted as surety guaranteeing performance to repay that borrowing. A defaulted and the bank sued B and C as surety to pay for the loan.
- Directors of B and C (including Khun Sonthi) 1) **made up a Board resolution** approving the surety and submitted them to the bank (The meeting was not real as testified by one of the directors) and 2) omitted to disclose the suretyship in the audited financial statements.

Case Study: Paper Meeting

▶ **Accusations and Penalty Rates:**

Directors of B & C were deemed to:

- **Falsify accounts or documents of the company in a manner to deceive the company, shareholders, or other person to lose benefits** (Section 312(2) of the Securities and Exchange Act).
- Dishonestly act to obtain unlawful gains which has caused damages to the company (Section 311 of the Securities and Exchange Act).
- Dishonestly mismanage the company's asset (Section 307 of the Securities and Exchange Act).

Each offence is subject to 5 – 10 years of jail and/or Baht 500,000 – 1,000,000 fine.

▶ **Sentences:** 17 acts x 5 years each = 85 years of jail.

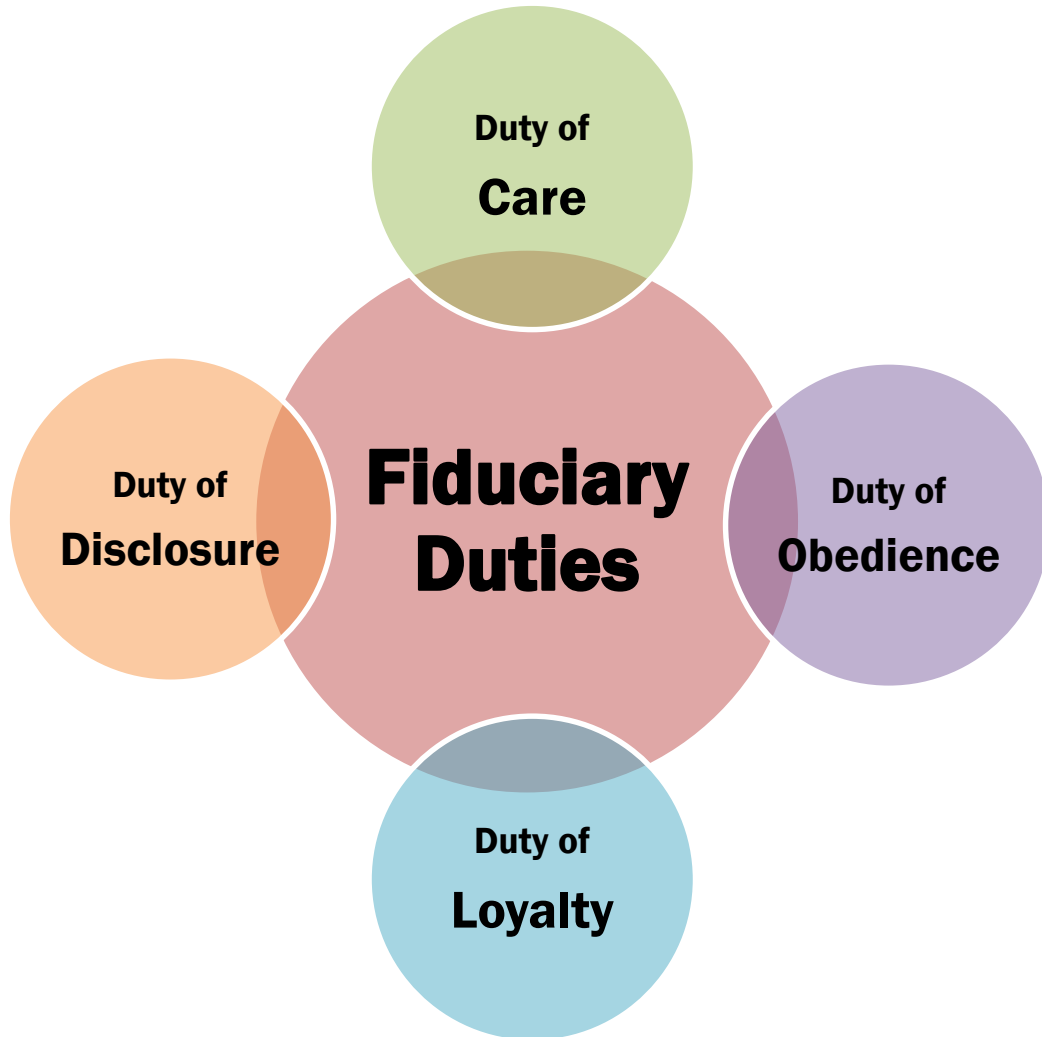
Duties of Directors

Fiduciary Duties

- ▶ Directors are chosen and appointed
- ▶ Act as trustee
- ▶ Management of assets for the interest of others (shareholders)



Duties of Directors



C O L D

Duty of Care

- ▶ Act with **diligence and accountability** – broad and subjective
- ▶ Act on an informed basis
- ▶ Make reasonable sound judgment
- ▶ Negligence leads to liability



**Duty
of Care**

Duty of Care

Private Company

The directors must in their conduct of business apply the **diligence of a careful business man.**

Section 1168 of the Civil and Commercial Code

Remark: Amplified by a Supreme Court ruling to diligence of a careful business man **in that business/industry.**

Duty of Care

Listed Company

Perform their duty with "responsibility", "due care"

1. Ordinary Person Test – same business/circumstance
2. Personal Factor Test – Position, scope of responsibilities, qualifications, etc.
3. Business Judgement Test – Not liable even when decision causes damages to the company when meeting 3 checklist.

Duty of Care

Listed Company

Business Judgment Test

1. Decision made with honest belief and reasonable ground that it is for the best interest of the company
2. Decision made based on information honestly believed to be sufficient
3. Decision made without conflict of interest

Duties of Obedience

Comply with laws, Objectives, Articles of Association, resolutions of shareholders

- ▶ Observe, obey, monitor and control
- ▶ Legal requirements and prohibitions
- ▶ Knowledge of relevant laws
- ▶ Seek professional advice
- ▶ **Non-compliance leads to liability**



**Duty of
Obedience**

Duties of Obedience

Statutory Duties

- ▶ Required actions – **Private Company**
 - Ensure share payment is made
 - Dividend is distributed
 - Submit list of shareholders and audited financial statements

Duties of Obedience

Statutory Duties

- ▶ Prohibited actions – **Private Company**
 - Dishonestly disclose false information or omit the truth regarding company's financial performance to the shareholders' meeting – **fine**
 - Dishonestly act to obtain unlawful gains which has caused damages to the company – **fine**
 - Falsify, omit, destroy, alter, etc. accounts or documents of the company in a manner to deceive the company, shareholders to lose benefits – **fine and/or jail**

Case Study: Esso Delayed Submission of Oil Report



Case Study: Esso Delayed Submission of Oil Report

► Facts

- The defendant is a company which produces and imports lubricant oil (a controlled good)
- Company has a duty to report the amount of oil produced and imported every 3 months (an Act on Pricing of Goods and Anti-Monopoly in 1979 – now cancelled)
- The defendant delegated this responsibility to an employee
- Employee failed to submit the Q2 report of 1985 by the deadline

Case Study: Esso Delayed Submission of Oil Report

▶ Legal issue

- Failure to comply with section 43 of the Act
- Penalty (imprisonment 5 years max and/or fine THB 100,000 max)

▶ Plaintiff

- Public prosecutor by request of the Ministry of Commerce

▶ Defendants

- Company
- Managing Directors

Case Study: Esso Delayed Submission of Oil Report

▶ Supreme Court Judgment

- Company - THB 20,000 fine
- Managing Directors - 1 year imprisonment and THB 20,000 (suspended sentence for 2 years)
 - Responsible for the actions of employees within the scope of authority and policy of the company
 - Failure to ensure legal compliance of the employee

Duty of Loyalty

- ▶ Act in good faith for the best interest of the company
- ▶ Avoid conflict of interest unless consented
- ▶ No competition with the company unless waived
- ▶ Fraud and dishonesty lead to liability



**Duty of
Loyalty**

Duty of Loyalty

Private Company

Non-competition

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,....

Section 1168, para. 3 of the Civil and Commercial Code

Duty of Loyalty

Private Company

- Non-competition unless waived

Listed Company

- Act in good faith
- Non-competition unless disclosed before appointment
- No vote if conflict of interest
- Disclose of interest in the company
- No lending to directors/employees except for lawful schemes
- No compensation other than by shareholders' resolution

Duties of Disclosure

Provide accurate, adequate, truthful, up-to-date information to shareholders and on a timely manner

- ▶ At shareholders' meetings
- ▶ In financial statements, business operation report, prospectus and registration documents
- ▶ Misstatement, misleading and omission lead to liability



Duty of Disclosure

Duties of Directors

Private Company

No specific disclosure requirement

Listed Company

Directors shall immediately notify the company of

- a) His direct or indirect interest in any contract entered into by the company
- b) His holding of shares or debentures in the company or affiliated companies

Representation and Liability

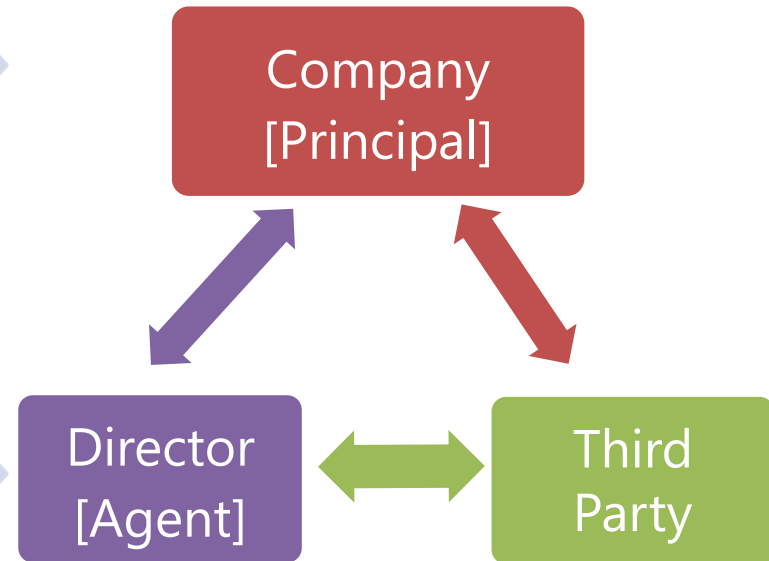
Representation

Agency Law

- Director is **agent** of the company
- Acting **for** the company when dealing with third parties
- Act done by director is binding upon company

Juristic Person Law

- Director is **representative** of the company
- Acting **on behalf of** the company
- Intention of the company is expressed by its directors



Civil Liability

Civil Liability

- ▶ **Cause:** Any act or omission
- ▶ **Consequence:** Damages to company and/or third party
- ▶ **Principle:** Liable to the company, not third party



Civil Liability

Damage to third party

Principle of agency law applies

The agent (director) is NOT personally liable to third party if acting within the scope of authority given by the principal (company)

Civil Liability

Private Company

Directors are liable for breach of any duty which has caused damages to the company.

Liability – Pay compensation

Expiration - 2 years after director left the position.

Civil Liability

Private Company

Party who can bring civil claim against the directors:

1. The company
2. Any shareholder
3. Any creditor

Civil Liability

Private Company

Statutory Exemption

No liability if director obtains **pre-approval or ratification** at the general meeting of the shareholders.

(Any objecting shareholder has time limit of 6 months to sue.)

Civil Liability

Private Company

Practical Exemption

Absence from meeting (for Decisional Making Role)

Vote against the action/transaction (for Decision Making Role)

Civil Liability

Private Company

Safeharbour

1. Indemnity Letter by the Company
2. Directors & Officers Liability Insurance (D&O Insurance)

Criminal Liability



Criminal Liability

- ▶ Breach of duty of care basically does not lead to criminal liability.
- ▶ Principle: Act or omission that is specifically prescribed to be criminal offence under the law.
- ▶ Criminal charge can be brought by injured person (company, shareholder, third party, etc.) or authority (registrar, revenue official, police, etc.)
- ▶ Penalties: fines, imprisonment, or both

Criminal Liability



Criminal Liability

- ▶ Director can be held liable for offence by director or offence by company.
- ▶ Corporate duties, false statements or omission to general meeting or in books or accounts of the company, fraud, etc.
- ▶ Non-compliance or violation to regulatory duties under various law, tax, customs, labor, etc.
- ▶ Generally not jointly liable across the Board and certain laws provide safeharbour.

Breach of Fiduciary Duties

Private Company

- ▶ Breach of fiduciary duty by director gives no criminal claim by company.

Listed Company

- ▶ Breach of fiduciary duty by director gives criminal claim by SEC or company.
 - Minimum fine of Baht 500,000 if cause damages to the Company or someone earns benefits
 - Minimum fine of Baht 1,000,000 and/or up to **5 years of jail** if act **dishonestly**.

Case Study: Asia Trust Bank



ASIATRUST Bank



Case Study: Asia Trust Bank

► Facts

- Asia Trust Bank was founded in 1965 by Johnny Ma (FX trading expert)
- Heavily borrowing from offshore for domestic lending; approved low competency money lending and credit facilities without collateral or under-collateral
- Lending to companies with ties to directors/ their families
- Directors and management of ATB were closed to Johnny Ma
- During 1980 - 1983, non-performing loans and Baht devaluation put ATB in financial trouble
- The Bank of Thailand ordered certain corrective measures and finally took over majority stake in 1984.

Case Study: Asia Trust Bank

▶ Parties

- Plaintiff – Siam Bank (previously Asia Trust Bank)
- Defendants – 7 Directors
 - Director 1 – Johnny Ma (President and Chairman)
 - Director 2 – Johnny Ma's wife
 - Director 3 – Johnny Ma's son (Vice President)
 - Director 4 – Senior Manager, Executive Vice President (Domestic Loan)
 - Director 5 – General Manager
 - Director 6 – Senior Manager (Human Resource)
 - Director 7 – Executive Vice President (Overseas Operations)

Case Study: Asia Trust Bank

► Issues

- The 7 directors jointly failed to perform their duties with care and in compliance to the banking regulations, codes of conduct, and good practice when approving low competency loans and fails to take necessary legal actions to recover which caused great damages to the bank (total 28 debtors with total losses of Baht 2 billion)
- Section 1168 - The directors must in their conduct of business apply the **diligence of a careful business man**
- Section 1169 – When directors have caused damages to the company, the company itself, or its shareholders, or creditors may bring claim against the directors.

Case Study: Asia Trust Bank

▶ Supreme Court Rulings (A.D. 1998)

- The directors must have knowledge and understanding of the company's business in order to be able to *apply the diligence of a careful business person*.
- ATB directors' failure to ask for collateral when approving loan and failure to take legal actions when debtor defaulted constituted the lack of diligence. Their claim of no direct responsibility to lending, no banking knowledge, no position in management were not acceptable excuses.
- Directors may not be held liable to loan approved after they have left the position.

Case Study: Asia Trust Bank

▶ Supreme Court Sentencing (A.D. 1998)

- Joint Liability: All 7 directors are jointly liable to pay ATB for damages related to non performing loans in the gross amount of Baht 2,300 million.
- Separated Liability: For certain transactions, the directors shall be separately liable as follows:
 - Director 1 and 2– jointly THB 669 million
 - Director 2, 5, 6, 7 are liable only to domestic loans as follows:
 - Director 2 – THB 515 million
 - Director 5 – THB 332 million
 - Director 6 – THB 444 million
 - Director 7 – THB 587 million
- The directors shall pay Plaintiff's attorney fees of Baht 500,000

Case Study: Santika Pub Fire



Case Study: Santika Pub Fire

► Facts

- Santika Pub was owned by the White & Brothers (2003) Ltd.
- Mr. Suraya was the Director but Mr. Wisuk was the de facto owner and manager
- 31st Dec 2008 – Santika Pub Fire
- The pub arranged special effect (fireworks) indoors; ceiling caught fire, and burnt people alive
- Architectural plan not compliant with the Building Control Act
 - No fire exit and signs
 - No emergency lights
 - The number of guests (over 1000 people) exceeded the maximum building capacity (500 people max.)
- **67 Dead, 45 Severely Injured**

Case Study: Santika Pub Fire

▶ Parties

- Plaintiffs – Public prosecutors and 57 joint plaintiffs
- Defendants
 - Defendant 1 – Pub's de facto owner and responsible person
 - Defendant 2 - 5 – Pub staffs and the singer who lit the sparklers
 - Defendant 6 – Fireworks and Special Effect Installation Company (Focus Light Sound System Ltd.)
 - Defendant 7 – Director of Focus Light Sound System Ltd.

Case Study: Santika Pub Fire

▶ Criminal Code

■ Section 291

- **Negligent** acts (including omissions) causing **death**
- Imprisonment (10 years max) and fine (THB 20,000 max) or both

■ Section 300

- **Negligent** acts (including omissions) causing **serious bodily injuries**
- Imprisonment (3 years max) or fine (THB 6,000 max) or both

■ Section 225

- Causes fire by **negligence**
- Imprisonment (7 years max) or fine (THB 14,000 max) or both

Case Study: Santika Pub Fire

▶ Supreme Court Judgment (November 4, 2015)

- 1st defendant (Mr. Wisuk - Pub's de facto owner and responsible person) sentence for 3 years imprisonment for negligence and failure to comply with Building Control Act
 - Even if name not listed as a director, he is the de facto manager of the pub
- 7th defendant (Managing director of Focus Light Sound System Ltd.) sentence for 3 years imprisonment for negligence and failure to observe safety.
- 6th defendant (Focus Light Sound System Ltd.) liable to pay fine at THB 20,000 for negligence causing fire, death and grievous bodily harm. The fireworks were not supposed to be used indoors.
- 6th and 7th defendant jointly liable to reimburse the joint plaintiff – THB 5,120,000

Case Study: M-150 Energy Drink

▶ Case Summary

- During 2011 – 2012, M-150 energy drink instructs all its dealers not to sell competing brands of energy drinks, otherwise they will lose supply of M-150.
- During that time, M-150 has annual sale of over Baht 1 billion and market share in energy drinks of over 50%, therefore M-150 was a '**Market Dominant Operator**' according to Trade Competition Act A.D. 1999.
- Setting such condition by a Market Dominant Operator was a violation under the 1999 Act, subject to criminal penalty (fines and imprisonment). The company and its responsible director were prosecuted in February, 2019.
- On August 1, 2019, the Trade Competition Commission allowed M-150 company and director to settle the case by paying fine at Baht 6 million each. The case is deemed concluded by the new Trade Competition Act A.D. 2017.





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