

Corporate Governance 2021

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Corporate Governance 2021

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Australia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly J Gregory, for her continued assistance with this volume.



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SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

- 1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

Private limited companies

The primary source of law for a private limited company is the Civil and Commercial Code.

Public limited companies

The primary source of law for a non-listed public limited company is the Public Limited Company Act, BE 2535 (1992) (PLCA).

Listed companies

Listed companies are also governed by the PLCA, along with the Securities and Exchange Act, BE 2535 (1992). In addition to the PLCA, it is mandatory for listed companies to comply with rules and regulations issued by the Stock Exchange of Thailand (SET), the Securities and Exchange Commission of Thailand (SEC) and the Capital Market Supervisory Board.

According to the latest Corporate Governance Code (CG Code) issued by the SET in 2017, Thailand uses the concept of 'apply or explain', which is more flexible than 'comply or explain' and allows for the application of eight good governance concepts. The lack of application of these principles must be explained in the annual report and annual information form.

Responsible entities

- 2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

Private limited companies

Many authorities are empowered to make these rules. All types of companies must comply with the rules prescribed by the Department of Business Development of the Ministry of Commerce (DBD). For example, all companies are required to submit their financial statements and other corporate documents (eg, list of shareholders) to the DBD. The DBD is also the authority responsible for enforcing these rules.

Public limited companies

The central authority for a public limited company is also the DBD, the same as a private limited company.

Listed companies

The SEC and SET are the authorities responsible for making subordinated rules and regulations and are the authorities responsible for enforcing them.

The SEC and SET have never officially announced that the views of any outside groups affect their decisions. In practice, however, views expressed by various chambers of commerce (eg, the chambers of commerce of America, Japan and China) or other independent associations are often taken into consideration.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

- 3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

Shareholders can appoint and remove directors. If not provided otherwise in the company's articles of association, the appointment or removal of a director in a private limited company only requires a simple majority of the shareholders' votes. However, the removal of a director in a public limited company requires the votes of not less than three-quarters of the number of shareholders attending the meeting with the right to vote if the total number of shares is not less than half of the number of shares held by the shareholders attending the meeting that has the right to vote.

Generally, the board of directors is responsible for day-to-day business operation, while certain issues can only be decided by the shareholders; for example, electing new directors to replace those who retire by rotation, appointing auditors, fixing the remuneration of directors and auditors, approving annual balance sheets, declaring dividends (except interim dividends, which can be declared by the board), amending the articles or memorandum of association, removing existing directors, increasing capital, issuing new shares in any form other than cash, reducing capital, amalgamating the company and dissolving the company.

In addition, other matters can be agreed upon among shareholders to be listed in a list of 'reserved matters' (ie, matters that can only be decided by shareholders). If a matter does not fall into any mentioned category, then the shareholders can require the board to act.

Shareholder decisions

- 4 | What decisions must be reserved to the shareholders?
What matters are required to be subject to a non-binding shareholder vote?

Generally, the board of directors is responsible for day-to-day business operation, while certain issues can only be decided by the shareholders; for example, electing new directors to replace those who retire by rotation, appointing auditors, fixing the remuneration of directors and auditors, approving annual balance sheets, declaring dividends (except interim dividends, which can be declared by the board), amending articles or memorandum of association, removing existing directors, increasing capital, issuing new shares in any form other than cash, reducing capital, amalgamating the company and dissolving the company.

In addition, other matters can be agreed upon among shareholders to be listed in a list of 'reserved matters' (ie, matters that can only be decided by shareholders). If a matter does not fall into any mentioned category, then the shareholders can require the board to act.

There is no concept of non-binding shareholder votes under Thai law.

Disproportionate voting rights

- 5 | To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

In principle, one share equals one vote. However, the preference share scheme may be adopted to differ its rights from an ordinary share; for example, fixing voting rights (limited, reduced or enhanced voting rights) and fixing or limiting the priority and rights to receive the dividends. Both preference shareholders and ordinary shareholders must have the right to vote in the meeting regardless of the rights they are entitled to. The prohibition of a vote agreed among shareholders is void under Thai law.

Note that the preference shares can only be issued upon the company's incorporation and the increase of capital. Ordinary shares cannot be converted into preference shares. However, preference shares can be converted into ordinary shares in the case of public limited companies.

The preference share scheme is available for private companies as well as public limited companies and listed companies.

Shareholders' meetings and voting

- 6 | Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote?
Can shareholders act by written consent without a meeting?
Are virtual meetings of shareholders permitted?

Shareholders have the right to attend shareholders' meetings. They can also have a proxy attends the meetings on their behalf. However, shareholders who have a special conflict of interest in any matter are not entitled to vote on this matter.

A circular meeting is not allowed. Virtual meetings are allowed under Emergency Decree re: Teleconference through Electronic Media, BE 2563 (2020), provided that the meeting follows the criteria set forth in the Notification re: Standards for Electronic Conferencing Security, BE 2563 (2020) to be lawful.

Public limited companies and listed companies

In addition, for public limited companies and listed companies, voting restrictions for a shareholder with a special conflict of interest do not apply to the matter for the appointment of a company's directors in public and listed companies. Nevertheless, from our experience, this exemption also applies to limited companies, although the law is silent on this matter.

Shareholders and the board

- 7 | Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Private limited companies

The board of directors can convene the shareholders' meeting whenever they see fit. However, the meeting must be convened if the company suffers a loss amounting to half of its registered capital. In addition, one or more shareholders with combined shares of not less than one-fifth of all shares of the company can request the board of directors to convene an extraordinary shareholders' meeting. The request must specify the matter to be considered at the meeting. The board must hold the meeting as requested as soon as possible but no later than 30 days upon receipt of the request. Failure to do so in the given time grants shareholders the authority to convene the meeting.

Public limited companies and listed companies

The board of directors can also convene the shareholders' meeting at any time. In addition, one or more shareholders with combined shares of not less than one-tenth of sold shares can request the board of directors to hold an extraordinary meeting. The request must specify the matter to be considered at the meeting. The board must hold the meeting as requested within 45 days upon receiving the written request. Failure to do so in the given time grants shareholders the authority to convene the meeting.

Controlling shareholders' duties

- 8 | Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

Private limited companies

Unless the shareholders agree otherwise in the shareholders' agreement (as contractual obligations between the parties) or the articles of association, there is no distinction between controlling shareholders and non-controlling shareholders. Nevertheless, pursuant to the Civil and Commercial Code, the shareholders are only responsible to the company for the amount of the unpaid share prices. Therefore, unless the shareholders also hold other positions (eg, director) in the company, the shareholders should not face any enforcement action.

Public limited companies and listed companies

There is no provision in the Public Limited Company Act, BE 2535 (1992) that imposes specific duties on controlling shareholders.

For a listed company, a person, either by himself or herself or acting in concert with others, who acquires or disposes securities (including shares in a listed company) and thereby increases or decreases the number of securities held by him or her or other persons to a number that aggregately reaches any multiple of 5 per cent of the total number of voting rights in this listed company must report to the Securities and Exchange Commission of Thailand (SEC) Office.

Shareholder responsibility

- 9 | Can shareholders ever be held responsible for the acts or omissions of the company?

In general, shareholders will only be responsible for the unpaid value of shares. However, the concept of piercing the corporate veil is uniquely present in the Consumer Case Procedure Act, BE 2551 (2008), in which the shareholders may be held responsible for the amount unable to be

paid by the company's assets in the consumer protection case if the court finds that the company is involved in consumer fraud or transferred its assets to any person.

Employees

10 | What role do employees have in corporate governance?

Private limited companies and public limited companies

Employees of private limited companies and public limited companies do not have any role in corporate governance. The law does not require any employee representation in the management bodies.

Listed companies

The Securities and Exchange Act, BE 2535 (1992) (SEA) applies the whistle-blower concept. The SEC also encourages the employees of a company to report any suspicious activity in the company regarding compliance with the SEA. In addition, the SEA protects whistle-blowers who are employees of the company reporting to the SEC that there has been a contravention or failure to comply with the SEA.

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

There is no specific provision in the Civil and Commercial Code, Public Limited Company Act, BE 2535 (1992) (PLCA) or the Securities and Exchange Act, BE 2535 (1992) (SEA) that generally permits or forbids the use of anti-takeover devices. However, some of the anti-takeover devices in place are in the form of contractual obligations (eg, rights of first refusal, share transfer restrictions and golden parachute).

For listed companies, there are statutory duties to protect minority shareholders in the event of takeovers; the acquirer (in both hostile and friendly takeovers) will be obliged by law to make a tender offer once his or her shareholding in a listed company crosses the threshold of shareholding specified in the relevant laws and regulations (ie, 25 per cent, 50 per cent and 75 per cent).

Issuance of new shares

12 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Private limited companies

Issuing new shares can only be completed by special resolution from the shareholders' meeting (requiring at least 75 per cent of the voting rights). New shares can be acquired only by existing shareholders according to the proportion of originally owned shares pursuant to the Civil and Commercial Code.

Public limited companies and listed companies

Similar to the private limited companies, issuing new shares must be approved by a resolution of the shareholders' meeting with the votes of not less than three-fourths of the total number of votes of the shareholders present and entitled to vote. However, new shares can be offered to original shareholders or other persons, subject to the resolution of the shareholders' meeting.

Restrictions on the transfer of fully paid shares

13 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Private limited companies

Pursuant to the Civil and Commercial Code, shares can be transferred without the approval of the company unless these shares are named shares and the company's articles of association stipulated otherwise. In practice, rights of first refusal and pre-emptive strike are among the most common clauses in a joint venture company.

Public limited companies and listed companies

Unless the restrictions are for preserving rights and benefits to which the public limited company is lawfully entitled to, or for maintaining the ratio of shareholding between Thai and foreign shareholders, the public limited company must not make any restrictions on the transfer of shares.

Compulsory repurchase rules

14 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Private limited companies

As private limited companies are strictly restricted from holding their own shares, share repurchase is not permissible.

Public limited companies and listed companies

There is no specific provision in the PLCA or SEA that allows compulsory share repurchases. However, voluntary share repurchases are permitted in the following circumstances:

- the public limited company may buy shares back from the shareholders who vote against the resolution of the shareholders' meeting to amend its articles of association concerning the right to vote and the right to receive dividends, whereby the shareholders consider it to be unfair to them; or
- the public limited company may buy shares back for financial management purposes after the company has retained earnings and surplus liquidity, and the buy-back does not cause financial difficulties to the company.

The approval process is dependent on the number of shares to be repurchased by the company.

Dissenters' rights

15 | Do shareholders have appraisal rights?

All types of company

As private limited companies are strictly restricted from holding their own shares, share repurchase is not permissible.

Public limited companies and listed companies

In the case where there is a resolution for an amalgamation, but a shareholder raises an objection to the amalgamation, the public limited company must arrange for the purchase of shares belonging to this shareholder at the price last traded on the Stock Exchange of Thailand (SET) prior to the date on which the resolution of the amalgamation is passed. If there is no traded price on the SET, the price determined by an independent appraiser appointed by both parties is adopted. If the shareholder does not agree to sell his or her shares within 14 days of the date of receipt of the purchase offer, the public limited company will proceed with the amalgamation, and the shareholder will be deemed to be a shareholder of the public limited company formed by the amalgamation.

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

16 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The board structure for a listed company in Thailand is a one-tier or unitary board.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

Private limited companies

Generally, the Civil and Commercial Code provides the scope of the legal responsibilities of directors. The Code puts the duties of directors in private limited companies into two main categories: duty of care and duty of loyalty.

Duty of care

The Civil and Commercial Code stipulates that directors must apply care and prudence as business people for the operation of a company's business. In particular, directors are jointly responsible for the:

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

Duty of loyalty

In the case of a private limited company, the Civil and Commercial Code stipulates the forbearance of competing for commercial transactions in two cases. A director must not undertake commercial transactions of the same nature as and competing with that of the company, either on his or her own account or that of a third person, or be a partner with unlimited liability in another concern carrying on business of the same nature as and competing with that of the company, in each case, without the consent of the general meeting of shareholders.

Public limited companies

Duty of care

The Public Limited Company Act, BE 2535 (1992) (PLCA) stipulates that the directors must act in compliance with the law, the company's objectives, the company's articles of association, and the resolution of the shareholders' meetings in good faith and with care to preserve the interests of the company. If any director performs any act that fails to comply with these duties or does not perform any act to comply with these duties, the company or the shareholders may, among other things, claim compensation from these directors.

Furthermore, the directors are jointly responsible for any damage to the company in the following cases:

- if subscribers are called to make a payment on a share subscription or to transfer the ownership of the property to the company in a manner that does not comply with the law;
- if spending money for the payment on a share subscription or the disposal of property received in a payment for shares of the company in a manner that does not comply with the law;
- performing any act in contravention of directors' duties;
- granting a loan in contravention of the law;
- paying money or giving other property to a director that does not comply with the law;
- paying dividends to shareholders that contravenes the law, or being liable for causing a disadvantage to the creditors of the

company unless it can be proven that the act was performed in good faith and based on evidence or financial reports that were certified to be accurate by the chair of the board or the financial officer of the company or an auditor; and

- failing to prepare or keep accounts, registers or documents of the company, unless it can be proven that they have taken reasonable action to avoid this failure.

Duty of loyalty

The PLCA generally provides that a director cannot operate a business or be a partner with management power or a director in an entity-operating business that is of the same nature and is in competition with the business of a company unless the director notifies the meeting of shareholders prior to appointment.

Listed companies

Duty of care

Similar to the duty of care as stipulated under the Civil and Commercial Code and the PLCA, the Securities and Exchange Act, BE 2535 (1992) (SEA) requires that directors, in conducting the business of the company, perform their duties with responsibility, due care and loyalty, and comply with all laws, objectives of the company, the articles of association of the company, the resolutions of the board of directors and the resolutions of the shareholders' meeting. In this regard, in performing duties with responsibility and due care, a director and an executive must act in a similar manner to an ordinary person undertaking a like business under similar circumstances.

The SEA also provides a list of factors for considering whether a director has performed his or her duties with responsibility, due care and loyalty. For instance, in considering whether each director or executive has performed his or her duty with responsibility and due care, the following factors must be taken into consideration:

- the position in the company held by this person at the time;
- the scope of responsibility of the said position in accordance with the laws or as assigned by the board of directors; and
- the qualifications, knowledge, capability and experience, including the purposes of the appointment.

Duty of loyalty

General principles under the PLCA also apply to listed companies. In addition, the SEA specifies that board members must act in good faith for the best interest of the listed company, act with proper purpose and avoid acting in ways that significantly conflict with the interests of the listed company.

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

The board of directors is under the control of the shareholders, and the directors owe legal duties to the company.

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgement rule?

All types of company

A company may initiate litigation against its directors owing to actions or inaction during their terms. However, in regard to a claim made by any third party, directors are generally protected by law for their authorised actions within the scope of the objectives of the company.

Listed companies

The business judgement rule has been literally stipulated in the SEA. A director or executive will be deemed to have performed his or her duty with responsibility and due care if he or she can prove that, at the time of considering this matter, he or she met the following requirements:

- the decision was made with honest belief and reasonable ground that it was in the best interest of the company;
- the decision was made by relying on information honestly believed to be sufficient; and
- the decision was made without his or her involvement, whether directly or indirectly, in the matter.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

Private limited companies

Duty of care

For private limited companies, the Civil and Commercial Code stipulates that directors must apply care and prudence as business people for the operation of a company's business. In particular, directors are jointly responsible for the:

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

Public limited companies

Duty of care

The PLCA stipulates that the directors must act in compliance with the law, the company's objectives, the company's articles of association, and the resolution of the shareholders' meetings in good faith and with care to preserve the interests of the company. If any director performs any act that fails to comply with these duties or does not perform any act to comply with these duties, the company or the shareholders may, among other things, claim compensation from these directors.

Furthermore, the directors are jointly responsible for any damage to the company in the following cases:

- if subscribers are called to make a payment on a share subscription or to transfer the ownership of the property to the company in a manner that does not comply with the law;
- if spending money for the payment on a share subscription or the disposal of property received in a payment for shares of the company in a manner that does not comply with the law;
- performing any act in contravention of directors' duties;
- granting a loan in contravention of the law;
- paying money or giving other property to a director that does not comply with the law;
- paying dividends to shareholders that contravenes the law, or being liable for causing a disadvantage to the creditors of the company unless it can be proven that the act was performed in good faith and based on the evidence or financial reports that were certified to be accurate by the chair of the board or the financial officer of the company or an auditor; and
- failing to prepare or keep accounts, registers or documents of the company, unless it can be proven that they have taken reasonable action to avoid this failure.

Listed companies

Duty of care

Similar to the duty of care as stipulated under the Civil and Commercial Code and the PLCA, the SEA requires that directors, in conducting the

business of the company, perform their duties with responsibility, due care and loyalty, and comply with all laws, objectives of the company, the articles of association of the company, the resolutions of the board of directors and the resolutions of the shareholders' meeting. In this regard, in performing duties with responsibility and due care, a director and an executive must act in a similar manner to an ordinary person undertaking a like business under similar circumstances.

The SEA also provides a list of factors for considering whether a director has performed his or her duties with responsibility, due care and loyalty. For instance, in considering whether each director or executive has performed his or her duty with responsibility and due care, the following factors must be taken into consideration:

- the position in the company held by this person at the time;
- the scope of responsibility in the position of this person in accordance with the laws or as assigned by the board of directors; and
- the qualifications, knowledge, capability and experience, including the purposes of the appointment.

Board member duties

21 | To what extent do the duties of individual members of the board differ?

All types of company

The applicable law does not differentiate the duties of each member of the board. However, for internal purposes, the board may delegate their responsibilities to directors. Without proper delegation of powers (eg, a power of attorney signed by the authorised directors), the company may not be bound by the actions performed by the board members.

Listed companies

An audit committee, which comprises at least three independent directors, is required. At least one member of the audit committee must have knowledge and experience sufficient for reviewing the reliability of the financial statements. The audit committee has duties to, among other things, review the financial reporting process and monitor compliance with laws and regulations, as well as ensure that the company has appropriate and efficient internal control and internal audit systems, in each case in accordance with the rules of the Stock Exchange of Thailand.

Delegation of board responsibilities

22 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The board can delegate any internal responsibilities to any persons. However, the statutory responsibilities (eg, the call for the annual shareholders' meeting, attendance of the board of directors' meeting, and appointing a temporary director to fill a vacancy) that require the resolution of the board cannot be delegated.

Non-executive and independent directors

23 | Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Private limited companies and public limited companies

There are no requirements on 'non-executive' or 'independent' directors for private limited companies and public limited companies.

Listed companies

The board of directors of a listed company comprises of executive directors who are in the management team of the company, non-executive directors who are not in the management team of the company and independent directors who are non-executive directors that have the qualifications as prescribed by law.

Pursuant to the Notification of the Capital Market Supervisory Board No. Tor Jor 39/2559 (as amended) (the Notification), the structure of the board of directors and the management of the listed company is as follows:

- at least one-third of the board members must be independent directors and, in any case, the number must not be less than three;
- there must be an audit committee with at least three members appointed by the resolution of the board or shareholders' meeting; and
- if the board of directors appoints a manager or another person to act on the board's behalf in any matter, this appointment must be made in writing or clearly recorded in the resolution of the board of directors' meeting, and the scope of power and duties of the authorised person must be specified clearly.

The independent directors must have the qualifications as stated in the Notification, such as holding less than 1 per cent of all voting rights of the company, not being related with the management of the company by blood and having no commercial relationship with the company. The independent directors must perform their duties and express their opinions or report the operating results assigned by the board of directors independently without being controlled by the board or majority shareholders.

Board size and composition

- 24 | How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

Private limited companies

There is no minimum or maximum number of directors. With respect to the criteria, a director of a private limited company must be a natural person who is an adult who has reached the age of maturity and is not bankrupt or incompetent.

Public limited companies

Public limited companies have a minimum requirement of five directors, half of which must reside in Thailand. A director in a public limited company must be a natural person who:

- is an adult who has reached the age of maturity;
- is not bankrupt, incompetent or quasi-incompetent;
- has never been sentenced by final judgment to imprisonment for a case against property with dishonest intent; and
- has never been expelled or removed from an official service, a state organisation or a state agency on the grounds of dishonest performance of duties.

The number and power of directors of private limited companies and public limited companies is designated by the shareholders' meeting. A list of directors and signing powers of the company must be registered with the Department of Business Development of the Ministry of Commerce and publicly disclosed. In the case of a vacancy of the board for reasons other than retirement, the board may elect a new director as

a substitute director (unless the remaining term of the retiring directors is less than two months for public limited companies).

Listed companies

In addition to the requirements of public limited companies specified above, a director in a listed company must not have characteristics indicating a lack of trustworthiness in managing businesses whose shares are held by public shareholders as specified in the notification of the Securities and Exchange Commission of Thailand (SEC). For example, a director must not be sentenced under the specified regulations (such as insider trading or money laundering) within the period specified in the SEC regulation.

The information regarding new directors of listed companies must be filed with the Stock Exchange of Thailand within three business days from the date of appointment and the SEC as soon as possible and no later than seven business days from the date of appointment. Moreover, the information regarding the remuneration of directors must be disclosed to the authority in the annual report and annual information form.

Board leadership

- 25 | Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

All types of company

There is no requirement to separate the functions of the board chair and the chief executive as the chief executive is not a statutory position under the law as Thailand applies the one-tier board system. However, one of the functions of the board is to monitor and control the operation of the management, including the performance of the CEO. If the CEO also acts as the board chair, it may impair the function of the board as the board chair may, to a certain extent, control the directions of the board (eg, he or she may hold a casting vote (unless otherwise specified in the articles of association)). As a result, it may risk the good governance of the company. Thus, the best practice is to separate the functions of the board chair and CEO.

Listed companies

While not strictly statutory, the separation of the functions of the board chair and the CEO is advised by the Corporate Governance Code issued by the Stock Exchange of Thailand.

Board committees

- 26 | What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Private limited companies and public limited companies

Board committees are not mandatory in a private limited company and a public limited company.

Listed companies

The appointment of an audit committee is mandatory. However, the Corporate Governance Code issued by the Stock Exchange of Thailand recommends that a listed company should arrange board committees for specific matters. For example, a nomination and remuneration committee, a corporate governance committee and a risk management committee for risk management are common and recommended in the Corporate Governance Code.

Board meetings

27 | Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Private limited companies

The Civil and Commercial Code does not impose how often the board of directors should meet in one year. However, in practice, the board meetings must be held at least once annually to summon the annual shareholders' meetings.

Public limited companies and listed companies

The PLCA stipulates that the directors must have a meeting at least once every three months. The purpose of this stipulation is to ensure that the directors will be able to discuss and consider matters important to the company.

Board practices

28 | Is disclosure of board practices required by law, regulation or listing requirement?

Private limited companies

The Civil and Commercial Code provides that the board of directors must preserve all minutes and resolutions of the board of directors' meetings and shareholders' meetings and make them available to all shareholders during working hours. There is no requirement to provide these to the public.

Public limited companies

While there is no requirement to disclose the minutes for all the directors' meetings, all minutes of the shareholders' meetings relating to the approval of the balance sheet, profit allocation and dividend allocation must be signed by the authorised director and submitted to the registrar.

The balance sheet of a public limited company must be advertised in a local newspaper for at least one day within one month of the approval of the shareholders.

Listed companies

While the relevant laws and regulations do not directly require a listed company to disclose all of its information related to the meetings, certain material information must be disclosed to the public and the Stock Exchange of Thailand or the SEC, or both, within an appropriate time frame.

Board and director evaluations

29 | Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

There is no requirement under Thai law to evaluate the board of directors. However, owing to the good governance of the companies, some companies, especially listed companies, commence the internal evaluation of the board, committee or individual directors using their internal procedures and policies. Practically, these evaluations are conducted annually. As these are internal procedures, the evaluation results are not publicly disclosed. They are used for the companies' internal management purposes only.

REMUNERATION

Remuneration of directors

30 | How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

Private limited companies

The Civil and Commercial Code provides that the remuneration of directors must be fixed by a general meeting. The Civil and Commercial Code does not contain provisions in relation to the determination of directors' service contracts, loans to directors, transactions or compensatory arrangements between the company and any director.

Public limited companies

Generally, the PLCA provides that remuneration to directors must be in accordance with the articles of association of the company. If there is no such article in the articles of association, remuneration must be in accordance with the resolution of the shareholders' meeting based on a vote of not less than two-thirds of the total number of votes of the shareholders attending the meeting.

In relation to the provision of loans to directors, the PLCA clearly specifies that a company must not grant a loan to any director unless certain conditions provided in the PLCA are met. For instance, the provision of a loan to a director is in accordance with the regulations on the welfare of the staff and employees. In this regard, the provision of a loan to a spouse or child of a director, or to a juristic entity that meets certain conditions provided in the PLCA, are also considered as a provision of a loan to a director. The PLCA does not contain any provision in relation to the determination of directors' service contracts, transactions or compensatory arrangements between the company and any director.

Listed companies

The SEA does not contain a provision governing the determination of directors' remuneration in addition to the requirements for public limited companies. However, the Corporate Governance Code issued by the Stock Exchange of Thailand provides that the remuneration of directors must be in accordance with their accountability and responsibility. For the determination of the remuneration, it must be approved at the shareholders' meeting.

The SEA, as well as the relevant Stock Exchange of Thailand and Capital Market Supervisory Board regulations, requires that a listed company take actions prior to entering into any transaction with its connected person (including directors). The actions required range from the Stock Exchange of Thailand disclosure to board or shareholders' approvals.

Remuneration of senior management

31 | How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

Private limited companies and public limited companies

There is no provision governing the determination of remuneration of management.

Listed companies

There are no rules or regulations requiring the approval of remuneration of the executive by the shareholders' meeting. However, according to the Corporate Governance Code issued by the Stock Exchange of Thailand, the board of directors must determine the remuneration (either in the form of money (wages or bonus) or in the form of other assets (stock option plan)) of executives in a way that encourages the executives to run the company in accordance with its main objectives and would create long-term benefits. There is no distinction or rules for the determination of the remuneration of the most senior executive.

Say-on-pay

32 | Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

Private limited companies

Remuneration of directors replacing the retiring directors is determined in the annual shareholders' meeting, which must be held once a year. There are no other requirements for an advisory or remuneration of senior management.

Public limited companies

Any payment to directors is prohibited unless stipulated as such under the articles of association. Remuneration other than those specified in the articles of association must be approved by the shareholders' meeting with at least two-thirds of the votes of the shareholders present. Generally, this vote is conducted in the annual general meeting of the company.

Listed companies

In addition to the requirement for public limited companies, according to the Corporate Governance Code issued by the Stock Exchange of Thailand, the amount of remuneration of directors is likely to be advised by the remuneration committee appointed by the board. However, it is not a legal requirement.

DIRECTOR PROTECTIONS

D&O liability insurance

33 | Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is common practice. The insurance premiums paid by the company are not prohibited.

Indemnification of directors and officers

34 | Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

There is no constraint on the company indemnifying directors. These indemnities are rather common in some industries.

Advancement of expenses to directors and officers

35 | To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

If directors and officers have been involved in litigation in relation to the business operations of the company, directors and officers shall be deemed as the agent of the company under agency law. Therefore, under agency law, the company is liable for the actions of directors and officers performed within the scope of their authority. In addition, as directors and

officers act on behalf of the company, the company shall be bound to third parties for the acts of directors and officers that are under the scope of their authority. As a result, directors and officers shall be released from any personal liabilities to third parties. Thus, the companies may advance expenses to directors and officers for litigation proceedings.

Exculpation of directors and officers

36 | To what extent may companies or shareholders preclude or limit the liability of directors and officers?

There is no constraint on the company limiting the liability of directors and officers internally, but this does not apply to third parties. For example, a director in a private limited company will no longer be liable to the company for the actions that have been approved by the shareholders' meeting. A similar concept also applies to public limited companies and listed companies.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

37 | Are the corporate charter and by-laws of companies publicly available? If so, where?

They are publicly available. Any interested person can physically request copies of these charters at the Department of Business Development of the Ministry of Commerce (DBD) or request electronic copies online. There are also official fees for issuing these documents.

Company information

38 | What information must companies publicly disclose? How often must disclosure be made?

All types of company

All types of company are required to submit their financial statements to the DBD on an annual basis. The financial statements should show the companies' general financial standing (eg, statement of profit and loss). Nevertheless, this is also subject to accounting rules and auditing rules. Separately, general corporate documents, including the articles of association, memorandum of association, list of shareholders and annual shareholders' resolution, must be submitted to the DBD as well.

Listed companies

Regulations of the Stock Exchange of Thailand and Securities and Exchange Commission of Thailand (SEC) also apply. Basically, there are two primary types of disclosures.

Periodic disclosure

This includes the following.

- The annual information form (Form 56-1) must be submitted within three months of the end of the accounting period. Form 56-1 should contain information regarding important developments of the listed company during the past year and, among other things, a summary of the financial condition and performance and business risk factors.
- The annual report is to be submitted within four months from the end of the accounting period and, at the same time, distributed to the shareholders for the annual general meeting.

According to a guideline issued by the SEC, information to be reported in these forms includes, for example, the company's policy and business overview, risks of the company's business and investors, assets used for the business operation, corporate information, registered capital, the number of shares and the management structure.

Ad hoc disclosures

Under the relevant Stock Exchange of Thailand's regulations, a listed company must disclose, for example, the following information:

- the date of the shareholders' meeting;
- the shareholders' record date (14 days prior to the record date);
- the acquisition and disposal of assets, and connected transactions;
- the acquisition or disposition of an investment in another company that results in that other company becoming or ceasing to be a subsidiary company;
- an increase or decrease of capital, and new securities issuance;
- the repurchase or resale of shares;
- the payment or non-payment of dividends;
- significant commercial contract gain or loss;
- financial assistance provided to other persons or juristic persons;
- debt payment default; and
- resignation of a managing director or all the board members or audit committee.

The listed company must disclose this information to the Stock Exchange of Thailand within the period specified in the relevant regulations (three to 14 business days).

HOT TOPICS

Shareholder-nominated directors

- 39 | Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

All types of company

The 'proxy access' rule has not been adopted in Thailand.

Listed companies

According to the Corporate Governance Code issued by the Stock Exchange of Thailand, the board should encourage the shareholders to nominate qualified candidates for directorship.

Shareholder engagement

- 40 | Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

There is no statutory engagement. Generally, the engagement between the company and shareholders will happen during an ordinary general shareholders' meeting, which usually takes place annually. However, extraordinary general meetings can also be called if there is an urgent matter to consider under special circumstances.

Sustainability disclosure

- 41 | Are companies required to provide disclosure with respect to corporate social responsibility matters?

All types of company

No, even though some may choose to do so on a voluntary basis.

Listed companies

A listed company is required to disclose its corporate social responsibility in its annual report and annual information form.

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CEO pay ratio disclosure

- 42 | Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

There is no requirement to disclose the pay ratio between the chief executive's annual total compensation and that of other employees.

Gender pay gap disclosure

- 43 | Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

There is no requirement for a Thai company to report information about the gender pay gap. Legally, the Labour Protection Act, BE 2541 (1998) (as amended) provides that male and female employees must be treated equally in employment, provided that the nature of their work does not prevent them from being treated as such. However, the criteria that constitute different nature of work is not given. There is no legal index on how a gender pay gap is measured.

UPDATE AND TRENDS

Recent developments

- 44 | Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The cabinet has approved the amendment to the Civil and Commercial Code to reduce legal requirements which may not be suitable for the modern situation and to facilitate business. In this regard, the changes in the proposed amendment include:

- abolishing the local newspaper publication requirement when summoning a general meeting of shareholders;
- reducing the minimum shareholder requirement from three to two persons; and

- allowing the merger of companies (two companies merging resulting in one company surviving and one ceasing to exist) in addition to the consolidation of companies (two companies join together to become a new entity).

In May 2021, the cabinet approved an amendment to the Public Limited Company Act, BE 2535 (1992). In addition to other changes, such as providing additional methods for calling meetings of boards of directors, the amendment permits meetings to be held by electronic means.

However, the amendments are still in the process of being proposed to the house of representatives for consideration and may be subject to change.

Coronavirus

45 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Although the law regarding electronic meetings has been enacted in Thailand since 2014, it has not been a practical and popular means to conduct board of directors and shareholders' meetings due to various requirements including all attendees being present in Thailand. To prevent the spread of covid-19, Thailand has adopted the Emergency Decree re: Teleconference through Electronic Media, BE 2563 (2020) (effective on 19 April 2020) which allow meeting attendees to attend board of directors and shareholders' meetings electronically from anywhere, provided that such meetings are conducted in accordance with the criteria set forth in the Notification re: Standards for Electronic Conferencing Security, BE 2563 (2020).

In addition, the Department of Business Development of the Ministry of Commerce also issued a notification to revoke the previous restriction requiring the companies to have a specific provision in its articles of association permitting the convocation of electronic meetings.

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