

**COMPANY DIRECTORS' OBLIGATIONS AND LIABILITIES IN
RELATION TO INSOLVENT TRADING IN THAILAND: A
COMPARATIVE PERSPECTIVE**

by

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CANDIDATES DECLARATION

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I declare that to the best of my knowledge and belief the law as stated in this thesis is current until 23 March 2016.

A solid black rectangular box used to redact the candidate's signature.

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ABSTRACT

Inadequate provisions for dealing with corporate insolvency are a significant obstacle in the economic development of Thailand. Companies which continue to trade even after they are unable to pay their debts (insolvent trading), often experience meltdowns that result in deep insolvencies that severely impact their creditors. In the Asian Financial Crisis in 1997, the Thai economy was significantly impacted by the insolvent trading practices of Thai companies. The Pin Chakkaphak case, in which the Thai government unsuccessfully sought a UK court to extradite Pin Chakkaphak, the then CEO of Fin One, for providing uncommercial loans to insolvent subsidiary companies, is a leading example of how Thai laws are neither effective nor adequate to deal with the problem of insolvent trading. Nevertheless, in spite of the known problems, current Thai corporate and insolvency laws still do not provide specific provisions or measures to regulate insolvent trading.

Developed countries, such as the United Kingdom, Australia, the United States and Germany, have specific statutory or common law provisions to control insolvent trading. In addition, the United Nations Commission on International Trade Law (UNCITRAL), provides the *Legislative Guide on Insolvency Law* by recommending the imposition of specific obligations on company directors to take appropriate action in order to minimise potential losses in the period approaching insolvency. An essential component of good corporate governance frameworks, whether at the domestic or international level, is the specification of the director's obligations and liabilities with respect to insolvent trading.

Under current Thai laws, company directors are required to exercise their broad powers for the best interests of the company as a whole. Directors have a duty to protect the interests of the company and shareholders. By implication, company directors are not required to protect the interests of creditors because directors do not have a duty to third parties. Moreover, under Thai laws, company directors do not have a specific duty to protect creditors' legitimate interests when a company is insolvent. This means that when a company approaches insolvency, directors can continue as normal even if they are aware or have a reasonable suspicion that the company may be insolvent or is

on the brink of insolvency. In other words, directors, under Thai laws, have no duty to prevent insolvent trading and are not personally liable for their company's debts. Without appropriate rules and the imposition of directors' liabilities, the likelihood is that there will be no change in the behaviour of companies with regard to insolvent trading and the interests of creditors will continue to be ignored.

This thesis argues that current Thai laws do not adequately protect creditors' interests by creating a duty for company directors when a company is nearing insolvency or becomes insolvent. In order to maintain Thailand's financial stability and promote economic growth, it is necessary for Thailand to reform corporate and insolvency laws and establish an effective regulatory framework that imposes duties and liabilities on company directors to protect the interests of creditors and other stakeholders by requiring their company to cease trading when it is insolvent.

This study discusses the current status of company directors' duties and personal liabilities with regard to insolvent trading in Thailand. The thesis also compares and critiques the *UNCITRAL Legislative Guides* and the laws of selected developed countries to determine the key elements necessary for establishing an appropriate model law for the Thai jurisdiction. Finally, the thesis makes recommendations on a model law for reforming the Thai bankruptcy law.

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The Act Amending Ministry, Sub-Ministry and Department BE 2545 (2002)

The Bankruptcy Act BE 2483 (1940)

The Business Registration Act BE 2499 (1956)

The Civil and Commercial Code BE 2468 (1925) ('CCC')

The Criminal Code BE 2499 (1956)

The Criminal Procedure Code BE 2477 (1934)

The Organization of State Administration Act (5th Amendment) BE 2545 (2002)

The Public Limited Companies Act BE 2521 (1978) ('PLC (1978)')

The Public Limited Companies Act BE 2535 (1992) ('PLC (1992)')

The Securities and Exchange Act BE 2535 (1992) ('SEA')

The United Kingdom

The Companies Act 1963 (Ireland)

The Company Act 1948

The Company Act 2006

The Cork Committee Report 1982

The Insolvency Act 1986

Australia

The Companies Act 1961 (NSW)

The Companies (Amendment) Act 1964 (NSW)

The Companies Act 1981 (Cth)

The Corporation Act 2001 (Cth)

The Corporate Law Reform Act 1992 (Cth)

The Companies (Amendment) Act 1971 (Cth)

The General Insolvency Inquiry Report 1988 No 45

The Uniform Companies Act 1961 (Cth)

The United States

The Model Corporation Act 2005

Title 11 of the United States Code ('US Bankruptcy Code')

The Delaware Code

Germany

The German Civil Code ('GBG')

The German Stock Corporation Act 2010 ('AktG')

The Insolvency Statute 1994 ('InsO')

The Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse 2008 ('MoMiG')

The Private Limited Companies Act 1892 ('GmbHG')

Other

The Companies Act 1990 (Singapore)

LIST OF ABBREVIATIONS

ASIC	The Australian Securities and Investment Committee
AktG	The German Stock Corporation Act 2010
CCC	The Civil and Commercial Code
GBG	The German Civil Code
GmbHG	The Private Limited Companies Act 1892
IA	The Insolvency Act 1986
InsO	The Insolvency Statute 1994
MoMiG	The Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse
PLC	The Public Limited Companies Act B.E.2535
SEA	The Securities and Exchange Act B.E.2535
SEC	The Securities and Exchange Commission
SET	The Stock Exchange of Thailand
UK	United Kingdom
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
US	United States