LAW GAZETTE

FEATURE - October 2020

Liquidation of a Private Limited Company in Thailand

12 min read
by Dr Andreas Respondek, Sutthida Norasarn and Chonlita Saikandok

Introduction

Among the ASEAN countries, Thailand is one of Singapore's most important trading partners. As a consequence of the pandemic, Thailand's economy has been shrinking and company liquidations – both voluntary and involuntary – are clearly on the increase. Hence it may be advisable for Singapore investors and their legal advisors to familiarize themselves with the legal framework of liquidations in Thailand.

The most widely used corporate vehicle in Thailand is a limited liability company. According to the Thai Civil and Commercial Code (**CCC**), the company can be dissolved by law because of – inter alia – the expiration of a specific period (if the company is formed for a specific period of time), the company becoming insolvent etc. or it can also be dissolved by the courts in case that for instance the business of the company can only be carried on at a loss and there is no prospect of its fortunes being retrieved or the number of shareholders is reduced to less than three etc.

If the company does not want to carry on its business due to the economic conditions, low profits or any other reasons as per the wishes of its shareholders, the company can also be dissolved by having a shareholders' meeting convened in order to have the shareholders pass a "special resolution" to dissolve the company as prescribed in section 1236 CCC.

To dissolve the company by special resolution, during the liquidation process it is also required to pay off the company's debts, collect outstanding money from the company's debtors, distribute all of the company's assets and proportionately return the company's total remaining amount of money to the company's shareholders. The dissolution by the shareholders' special resolution and the liquidation shall be done together in accordance with the detailed steps further described below.

Steps to be Taken for the Dissolution and Liquidation of the Company

To facilitate the review of the liquidation steps, below is a brief summary of the – somewhat formalistic – 10 liquidation steps required:

No.	Detailed Action Steps

2.1 **STEP 1:** ***Holding a Board of Directors' Meeting (BOD Meeting) to convene a shareholders' meeting (e.g. Extraordinary General Meeting of Shareholders (EGM)) and holding a shareholders' meeting to pass a special resolution to dissolve the company***

First, a BOD Meeting needs to be convened to discuss the convening of a shareholders' meeting to pass a special resolution to execute the following agenda items:

- to dissolve the company;
- to appoint a liquidator(s) and/or to designate the liquidator(s)' authority (to be done in case the company would like a third party who is not any of the company's directors to be the liquidator(s). It should be noted that normally, the authority of the liquidator(s) will be automatically derived from the authority of the company's authorized directors stated in the latest affidavit of the company before the dissolution. If the appointment of the liquidator(s) causes any change in the a.m. authority, such change shall be considered and approved at the shareholders' meeting too (unless the Articles of Association (**AOA**) of the company state the appointment of the liquidator(s) otherwise).

> "
> For example, if the company has two directors that jointly sign and execute all of the company's matters before the dissolution, when dissolved, the authority of the liquidator(s) would automatically be by law be "two liquidators shall jointly sign to execute the dissolution and the liquidation of the company". In case the company would like to appoint only one third party as the liquidator, such appointment will require a change of the authority of the liquidator to be changed to *"[the name of the one liquidator specified]* shall sign to execute the dissolution and the liquidation of the company". Such change of the liquidator's authority shall be considered and approved at the shareholders' meeting; and

- to designate the liquidator(s)' office address (in case the liquidator(s)' office is not the company's head office as officially registered with the Department of Business Development, Ministry of Commerce (**DBD**) before the dissolution.

Second, the BOD Meeting shall be held to convene the shareholders' meeting to consider and approve (to pass the special resolution to execute) the above agenda items.

Third, the shareholders' meeting needs to be convened to discuss the above agenda items, the notice shall be announced in a local newspaper (at least 14 days prior to the date of the shareholders' meeting as required by law or as otherwise specified in the AOA of the company)

Fourth, the shareholders' meeting shall be held to consider and approve (to pass the special resolution to execute) all of the above agenda items.

It should be noted that by law – unless stated otherwise in the company's AOA -, all directors of the company shall be liquidators. In case the company still wishes to have all directors according to the authority given under the company's affidavit to be the liquidators, the company does not need to have

No.	Detailed Action Steps
	the appointment of the liquidator(s) and the designation of the liquidator(s)' authority on the agenda of the shareholders' meeting for consideration and approval. In case the company has several directors but would like to authorise only one or some directors to carry out the liquidation, then this specific authority also needs to be decided during the shareholders' meeting. It is important to note that the special resolution with regard to the liquidation requires votes of at least three-fourths of all shareholders who are present and eligible to vote at the shareholders' meeting.
2.2	**STEP 2:** ***Registering the dissolution of the company with the Department of Business Development (DBD), notifying the public of the dissolution of the company by announcing such dissolution at least once in a local newspaper and sending letters to the company's creditors informing them of the dissolution of the company within 14 days after the date of the dissolution (the date that the shareholders' meeting is convened to pass the special resolution to dissolve the company)***
2.3	**STEP 3:** ***Notifying the Revenue Department (RD) of the dissolution of the company and notifying the RD of the intention of de-registering the VAT due to the dissolution within 15 days from the registration date of the dissolution with the DBD*** As a general rule, it will take at least about six months for the VAT de-registration to be approved/completed by the RD.
2.4	**STEP 4:** ***Notifying the Social Security Office (SSO) of the dissolution of the company within the 15th day of the month following the month when the dissolution is registered with the DBD*** Prior to the above notification, to dissolve the company also means to terminate the employment contracts of the company's employees (see more details about the termination of employment below). This also requires the company to de-register all employees with the SSO as a consequence of the dissolution.

No.	Detailed Action Steps
2.5	**STEP 5:** ***Preparing the audited financial statement for the period ending on the registration date of the dissolution with the DBD within 150 days after the registration date of the dissolution with the DBD***
	Meanwhile, after all debts payable to the company's creditors have been cleared, the total amount of money owed by the company's debtors has been returned to the company, all of the company's assets have been distributed and the company's total remaining amount of money has been proportionately returned to the company's shareholders, the liquidator(s) can close the company's bank account(s) as there will be no money debited from or credited to the company's bank account(s) anymore. Nevertheless, the liquidator(s) still has the obligation to file a VAT return (P.P. 30) every month with the RD until the company receives a notification from the RD acknowledging that the VAT de-registration has been approved and completed. The liquidator(s) shall report to the DBD on the current status and progress of the liquidation process every three months after the registration date of the dissolution with the DBD, until such time that the VAT de-registration has been approved by the RD and the liquidation process in every item has been completed already. In case the VAT de-registration has not been approved and completed by the RD yet and/or the liquidation process has not been completed within one year after the registration date of the dissolution with the DBD, the liquidator(s) then shall convene another shareholders' meeting to report on the current status of the liquidation process, progress that has been made with the liquidation process and the status of the ongoing liquidation. Please note that after the above shareholders' meeting is called and held for the report, the shareholders' meeting still needs to be called and held on a yearly basis every year in case the liquidation process still has not been completed and/or the VAT de-registration has not been approved/completed by the RD yet within one year after the last shareholders' meeting called and held for the report.
2.6	**STEP 6:** ***Convening and holding a shareholders' meeting to discuss approving the audited financial statement for the period ending on the registration date of the dissolution with the DBD and announcing this notice in a local newspaper (at least seven days prior to the date of the shareholders' meeting as required by law or as otherwise specified in the AOA of the company)***
2.7	**STEP 7:** ***Filing a corporate income tax return (P.N.D. 50) and the approved audited financial statement for the period ending on the registration date of the dissolution with the DBD to the RD within 150 days from the registration date of the dissolution with the DBD***

No.	Detailed Action Steps
2.8	**STEP 8:** ***Convening and holding a shareholders' meeting to approve the completion of the liquidation process of the company and publishing this notice in a local newspaper (at least seven days prior to the date of the shareholders' meeting as required by law or as otherwise specified in the AOA of the company)*** This shareholders' meeting shall be convened when the liquidation process has been completed and the VAT de-registration has been approved and completed by the RD already. In case the liquidation process has been completed and the VAT de-registration has been approved/completed by the RD already, by the time the liquidator(s) is about to file the corporate income tax return (P.N.D. 50) and the approved audited financial statement with the RD, then the agenda item to approve the completion of the liquidation process at this shareholders' meeting can be included in the previous shareholders' meeting when there is the agenda item for the audited financial statement to be approved, meaning that both agenda items can be considered and approved together in one meeting, which results in this meeting being able to be disregarded and not needing to be separately called and held anymore.
2.9	**STEP: 9** ***Registering the completion of the liquidation process together with filing the approved audited financial statement with the DBD within 14 days after the date of the final shareholders' meeting has been convened to consider and approve the completion of the liquidation process of the company*** In case: i. the company obtained a promotion certificate from the Board of Investment of Thailand (BOI certificate), the company shall cancel the BOI certificate with the BOI first before the dissolution. ii. the company obtained a Foreign Business License (FBL) under the Foreign Business Act B.E. 2542 (FBA), the company needs to cancel the FBL with the Bureau of Foreign Business Administration of the DBD first before the dissolution. The deadline for the cancellation of the FBL is within 15 days after the company stops business operations. iii. the company received a Foreign Business Certificate (FBC) (under the FBA) issued pursuant to the above BOI certificate, after such BOI certificate is cancelled, the company needs to cancel the FBC with the Bureau of Foreign Business Administration of the DBD also within 15 days after the BOI certificate is already cancelled.

No.	Detailed Action Steps
2.10	**STEP 10:** ***Returning the company's tax indentification number (TIN) to the RD within 60 days from the registration date of the completion of the liquidation process with the DBD***

Normally, companies that received the TIN from the RD are companies which were registered with the DBD before 2011 (B.E. 2554). The TIN that such companies received from the RD would be a different number from the company registration number (CRN) that such companies received from the DBD. So once the completion of the liquidation process of such companies is registered with the DBD, it means that such companies are no longer valid, then the TIN of such companies will be void. As a result, such TIN shall be returned to the RD as it cannot be used anymore.

However, in 2011 (B.E. 2554), the law regarding the TIN and the CRN was changed allowing companies to use the CRN received from the DBD as the TIN without having to apply for the TIN separately with the RD. As a result, the companies which were registered with the DBD from 2011 (B.E. 2554) onwards can use their CRN as their TIN for executing any tax-related matters with the RD without having to apply for the TIN separately. Therefore, such companies will not receive a separate TIN.

Termination of Employment

In practice the termination of the employees on the occasion of the liquidation is a very important point to take into consideration. Companies sometimes tend to overlook the extended details of the financial implications, especially in view of the Thai Labour Protection Act B.E. 2541 (A.D. 1998) (**LPA**). In the case of open-ended employment contracts, the company is required to give advance notice of the termination to the employees in accordance with the contractual or statutory notice periods.

In case the employment contract is a fixed-term contract it usually automatically terminates at the end of the term specified in the contract. If, on the other hand, the company wishes to terminate it prematurely, it is obliged to provide advance notice of the termination to the employees at least one full payment period.

If the company terminates the fixed-term contract before the agreed termination date, it means that the company is in breach of the contract. In cases of any damages caused by such breach, the employees may additionally claim damages from the company.

The advance notice of termination should be declared in written form. This serves as physical evidence regarding the date of notice and also the termination date. Besides, it helps proving the legality of the advance notice according to its date and its termination specified in the written notice. Further, the company should clearly state the reasons for the termination in the advance notice so that the employees are aware of the situation and understand why they are terminated so that they are less likely to raise any claims against the company for wrongful dismissal. However, if the company would like to terminate the employment contract (of any kind i.e. the open-ended contract or the fixed-term contract terminated before the agreed termination date) with immediate effect without any advance notice, a payment in lieu of notice must be made to the employees.

The amount of the payment required in lieu of notice is determined by the length of the notice period. For example, if today is July 25th and the company normally pays employees their salary on every 30th of each month, if the advance notice to the employees is given on July 25th, the termination will normally take effect on August 30th by law. However, in case the company wishes the termination to take effect immediately as of July 25th without having to give advance notice as required by law, the company must provide payment in lieu of notice calculated for the period from July 25th to August 30th to the employee. However, assuming today is July 31st and the company gives the advance notice today, the termination will normally take effect on September 30th. Therefore, if the company would like the termination to take effect immediately as of today (July 31st), the company must provide a payment in lieu of notice (calculated from July 31st to September 30th) to the employee.

In addition to the advance notice, upon termination of employment (whether open-ended contracts or fixed-term contracts before the agreed termination date), the employees can be entitled to receive severance pay based on the length of the employees' employment period according to Section 118 LPA as follows:

Length of Employment	Severance Pay
120 days or more but less than 1 year	Not less than the latest salary rate for 30 days
1 year or more but less than 3 years	Not less than the latest salary rate for 90 days
3 years or more but less than 6 years	Not less than the latest salary rate for 180 days
6 years or more but less than 10 years	Not less than the salary wage rate for 240 days
10 years or more but less than 20 years	Not less than the latest salary rate for 300 days
20 years or more	Not less than the latest salary rate for 400 days

Furthermore, if the employees have not yet exercised their right to take annual leave, they shall be entitled to receive remuneration in lieu for all unused annual leave.

Under section 119 LPA advance notice of termination and severance payment are not required in exceptional cases only, involving dishonest acts, causing intentional damage, criminal acts etc.

Although the company can terminate the employment contract immediately without having to give prior notice and pay the statutory severance payment to the employee, if the employee commits any acts of misconduct as described above, the company should still provide the employee with clear reasons for the termination and details of such unacceptable behavior in the termination letter, to avoid having to pay severance payment. Otherwise if such reasons are not clearly specified in the termination letter, the employee may sue the company for severance payment on the understanding that they are still entitled to it (because no reasons disallowing them to receive severance payment are clarified for them). Once the case is filed, the company will be barred to claim that the employee is not entitled to severance payment because he/she committed an act of misconduct under section 119 LPA. In most types of such cases, if the company did not state the reasons of the termination and the details of such unacceptable behavior from the beginning, the court normally passes judgment that the company must make severance payment to the employee.

Pitfalls and Things to Watch Out for

Involvement of the RD

The most time sensitive factor during the liquidation process is the involvement of the RD. Normally, the company is obliged to file an annual income tax return within 150 days from the end of an accounting period and a half-year income tax return within two months after the end of the first six months of its accounting period. However, when the company is dissolved, accounting records and other relevant documents must still be kept for at least five years from the date of the account closure as stipulated in section 14 Thai Accounting Act B.E. 2543 (A.D. 2000). In general, if the RD has reason to believe that the company has filed an incorrect or incomplete corporate income tax return, the RD has the right to issue a summons for tax investigation within two years from the date of tax return filing and the investigations can go back up to two years. For instance, if the current year is 2020, the RD can examine and assess taxes as far back as 2018. Furthermore, if there is evidence or reasonable assumption that the company intends to evade taxes, the period for the tax investigation and assessment can be extended for up to five years from the date of tax return filing.

Termination of the Legal Entity of the Company

Once the completion of the liquidation process is registered, the company will cease to exist as a legal entity. This means that it is unable to perform any further acts. Therefore, in the event that the debtors of the company have not paid before the completion of the company's liquidation process has been successfully registered, the company has no longer the right to claim such debts.

Similarly, there was a case where the company filed a VAT return (P.P.30) to claim a VAT refund to the RD and the company was subsequently dissolved. Until the completion of the liquidation, the liquidator was notified by the officer that the tax refund was approved but the company was unable to receive the refund on the grounds that the company was not considered as a juristic person anymore. Therefore, in order to avoid such situations, the liquidator(s) has to settle all affairs of the company prior to the completion of the liquidation process.

Nevertheless, the company can still be sued even without a legal entity status. Section 1272 CCC sets out that the creditors can file a claim for the outstanding debts against the company, the shareholders or the liquidator(s) within two years after the date that the completion of the liquidation process is registered with the DBD. As a result, the completion of the liquidation process may not completely release the company from its debts due, as the company still has the opportunity to be sued within two years after the termination of the company's existence as a legal entity (after the date that the completion of the liquidation process is registered with the DBD).

Tags: LIQUIDATION, PRIVATE LIMITED COMPANY, RESTRUCTURING AND DISSOLUTION, THAILAND

Dr Andreas Respondek

Rechtsanwalt (D), Attorney at Law (USA), Chartered Arbitrator (FCIArb)

Respondek & Fan Pte Ltd

E-mail: respondek@rflegal.com

Sutthida Norasarn

Respondek & Fan Ltd

Chonlita Saikandok

Respondek & Fan Ltd