

New Regulation on Personal Liabilities of Directors and Commissioners in State-Owned Enterprises



After almost a two-decades-long wait, President Joko Widodo finally issued a government regulation on state-owned enterprises. Issued on 8 June 2022, Government Regulation No. 23 of 2022 on the Amendment of Government Regulation No. 45 of 2005 on the Establishment, Management, Supervision, and Dissolution of State-Owned Enterprises (“**Regulation**”) regulates, among others, the appointment and discharge of directors and commissioners in a state-owned enterprise (“**SOE**”). In addition, the Regulation also introduces detailed provisions on the personal liability of the board of directors and board of commissioners of SOE, which we will highlight below.

Liability of Directors and Commissioners

Previously, the directors and commissioners in an SOE could be held personally liable if they, with intent, failed to conduct their duties. However, the law did not further explain the scope of the liability of directors and commissioners.

Now, under Articles 27(2) and 59(2) of the Regulation, if the directors and commissioners of an SOE are proven to be guilty of not conducting their duties or were negligent in conducting their duties, they will be personally liable for the loss suffered by the SOE. Indeed, the Regulation now defines the scope of the liability of directors and commissioners explicitly.

Business Judgment Rule

Despite extending the reach of personal liability, Articles 27(5) and 59(2) of the Regulation allow directors or commissioners to be released from liability based on the business judgment rule. The criteria to invoke the business judgment rule are cumulative and are broadly similar apart from an additional criterion that applies only to the directors:

No.	Business Judgment Rule for Directors	Business Judgment Rule for Commissioners
1.	The loss suffered by the SOE is not caused by the directors' fault or negligence.	-
2.	The directors have performed their duties in good faith and with due care solely in the interests of the SOE and in accordance with the purposes and objectives of the SOE.	The commissioners have performed their duties in good faith and with due care solely in the interests of the SOE and in accordance with the purposes and objectives of the SOE.
3.	The directors have no conflict of interest, whether directly or indirectly, in the action that led to the SOE's loss.	The commissioners have no conflict of interest, whether directly or indirectly, in the board of directors' action that led to the SOE's loss.
4.	The directors have taken measures to prevent the onset and continuation of the loss.	The commissioners have given proper advice to the board of directors to prevent the onset and continuation of the loss.

Key Takeaway

All in all, the Regulation strikes the right balance. On the one hand, it extends the ground for personal liability to cover the negligence of the directors and commissioners. On the other, it also shielded directors and commissioners who have acted in good faith by introducing the business judgment rule. By doing so, the Regulation affirms just how crucial it is for directors and commissioners to act in good faith and with due care to fulfil their fiduciary and statutory duties.

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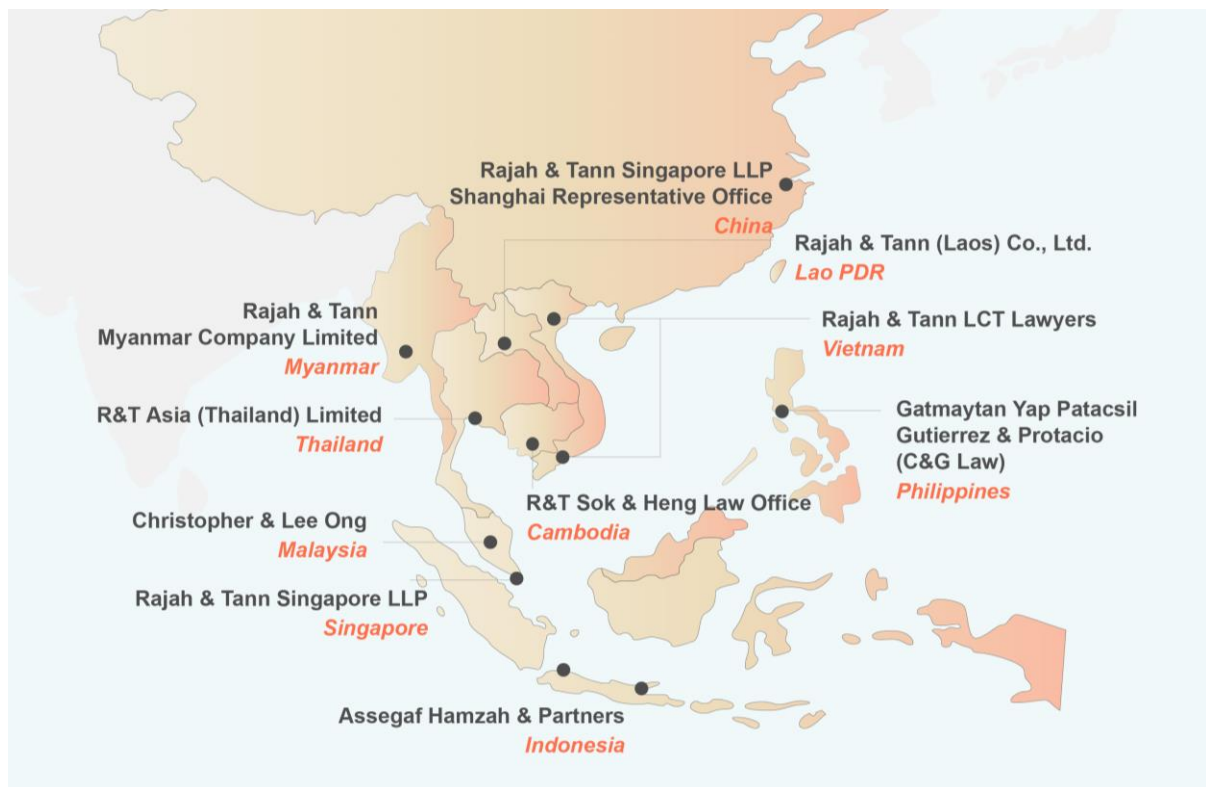
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