

**A REVISIT OF LEGAL PROBLEMS CONCERNING CAPITAL CONTRIBUTION  
IN KIND IN THAI PRIVATE COMPANIES\***

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**Abstract**

Instead of cash, any other form of money's worth or "contribution in kind" may also be contributed to private companies. As the key difference between contribution in cash and in kind is that the latter is subject to valuation, laws and regulations in each jurisdiction are therefore differently legislated through the integration of legal theories to preserve the interests of company's stakeholders, particularly on the legal framework of characteristics and specific requirements of contribution in kind including additional liabilities to mitigate potential risks when there is an unlawful or fraudulent valuation. This article discovers that Thailand encounters the problems of legal uncertainty of characteristics of contribution in kind, valuation and law enforcement as a result of the lack of specific and sufficient provisions to stipulate statutory characteristics, requirements, duties,

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responsibilities, civil and criminal liabilities including administrative order to the persons directly involving with contribution in kind.

In contrast, the study through the lens of comparative analysis from the Federal Republic of Germany (“Germany”) and the People’s Republic of China (“China”) indicates that they have prioritized to resolve the aforesaid problems by stipulating specific provisions into legislation and regulatory framework in order to impose general characteristics, statutory obligations, specific requirements, restrictions, prohibitions, and additional liabilities of both civil and criminal to preserve interests of company’s stakeholders. This article consequently suggests legislative and regulatory reform by adopting some of the findings that could cope with the existing problems that current Thai laws and regulations are unable to resolve.

**Keywords:** Contribution in Kind, Private Companies, Overvaluation

## **1. Introduction**

Instead of cash, shareholders may also contribute their other assets to private companies in exchange for shares or so-called “contribution in kind”, for instance, a plot of land, machinery, equipment, materials and buildings. Contribution in kind is beneficial to both company and investors in many aspects but it can also adversely affect company’s stakeholders upon valuation. Once a company accepts a contribution in kind, there is a process of valuation to exchange it into the amount of new shares. If contribution in kind is worth “more than” the nominal value of new shares, such shares are considered being issued at a premium. Conversely, if it is worth “less than” the nominal value of the shares, or there is an overvaluation, the new shares are practically issued at a discount, which may be contrary to law.<sup>1</sup>

Overvaluation of contribution in kind causes mismatching between the registered capital and the actual value of the contributed asset, and if the asset is overvalued in a significant amount, it dramatically harms the company’s stakeholders: from existing shareholders, creditors, to third parties. For existing shareholders, the shareholder who contributes overvalued contribution in kind claims a larger portion of control of shareholder’s rights and ownership of the company although she is contributing less than others, therefore the rights of other shareholders, e.g., right to receive dividend and right to vote, will be diluted, while creditors in the insolvency proceedings will suffer a shortfall of their repayments as the proceeds of in-kind contribution are significantly lower than the specified amount in the company’s registered capital. Lastly, third parties desiring to trade or engage with the company would be misled by the misrepresentation through the

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<sup>1</sup> Sarah Worthington, Sealy and Worthington's Text, Cases, and Materials in Company Law (11th edn, Oxford University Press 2016) 529.

mismatching amount of registered capital shown in the company's documents.

To solve these problematic issues, as a result, company laws in many jurisdictions have been developed to devise tools to prohibit the danger that the share may be undervalued based on their concerned theories, case law, and company law's historical developments. For Thailand, it appears to the author that Thai laws and regulations together with its practices applied to private companies remain unclear, outdated, and contain legal deficiencies. As a result, this article aims to study laws and regulations from the Federal Republic of Germany ("Germany") and the People's Republic of China ("China") and adopt some of the results as guidelines in order to provide effective recommendations for resolving the current problems in Thailand.

## **2. Statement of problems of laws and regulations on contribution in kind in Thai private companies**

### **2.1 Problem of legal uncertainty of characteristics of contribution in kind**

Since the general provisions of equity capital contribution in private companies under Thai Civil and Commercial Code ("TCCC") mainly focus on "cash contribution",<sup>2</sup> consequently there is no specific provision directly regulating contribution in kind. The lack of specific provisions causes controversial issues in practice regarding the uncertainty of characteristics of contribution in kind because investors always find challenges and experience bars regarding inconsistency of interpretations. These challenges include whether or not the disputed contribution in kind can be registrable upon the

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<sup>2</sup> Thai Civil and Commercial Code, s 1119.

stability of value and, if so, to what extent that the Department of Business Development (“DBD”), the Thai government agency controlling and regulating the registration of business in Thailand, will register such contribution in kind without delay or hesitation. Furthermore, the existing DBD’s interpretations and practices concerning some forms of contribution in kind, e.g., intellectual properties, are unable to catch up with the rise and diversity of modern forms of capital contribution since DBD unreasonably rejects them upon DBD’s orthodox interpretation that they contain instability of value. As a result, these practices create less investment choices to investors as they have indirectly limited the types of contribution in kind only to those traditional and tangible forms which have official prices, e.g., a plot of land, machinery, and gold.

## **2.2 Problem of valuation**

TCCC lacks the standard of valuation process to deliver transparency, accuracy, and creditworthiness for the fair valuation. It merely controls the access of contribution in kind with minimum statutory requirements (an approval from the company’s statutory meeting,<sup>3</sup> and a special resolution from the shareholders’ meeting for the increase of capital<sup>4</sup>). In practice, DBD also considers the valuation as the business judgment of the company’s internal affairs with its investors or shareholders. These roots of problem create the loophole on the possibility that contribution in kind may be overvalued upon the absence of valuation standard and expose the company’s stakeholders to risks. Save for the exception under the Bankruptcy Act, furthermore, debt to equity swap is strictly prohibited under TCCC’s

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<sup>3</sup> Thai Civil and Commercial Code, s 1108 (5).

<sup>4</sup> Thai Civil and Commercial Code, s 1221.

provision<sup>5</sup> and DBD's opinion<sup>6</sup> since it poses risks to the company's capital due to the instability of value and the difficulty of assessing how many shares should be issued to fully satisfy a debt obligation.

## **2.3 Problems of law enforcement**

Once there is an overvaluation of contribution in kind, Thai laws and regulations fail to control this corporate misconduct because they provide very limited access for civil liability, insufficient criminal liability, and ineffective administrative order.

### **2.3.1 Civil liability**

There is no specific provision to impose civil liability, especially for shortfall liability, on the wrongdoers when there is an overvaluation of contribution in kind, and the question of who shall bear this responsibility (e.g., in-kind contributing shareholder, existing shareholders, directors, or promoters) remains unclear. Although the author applies the most nearly applicable provisions under TCCC, i.e., tort,<sup>7</sup> breach of company's statutory contract,<sup>8</sup> and breach of director's duties<sup>9</sup> to link this civil liability to the wrongdoers, the study shows that they remain unenforceable since Thai court

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<sup>5</sup> Thai Civil and Commercial Code, s 1119 para 2.

<sup>6</sup> The Opinion of the Department of Business Development of Thailand, Por Nor 0805.04/3832 dated 4 November 2553 (2010).

<sup>7</sup> Thai Civil and Commercial Code, s 420.

<sup>8</sup> Thipchanok Ratnosot, *Explanation of the Principles of Partnerships and Company Law by Sections* (6th edn, Thammasat Printing House, 2013) 7. (ทิพย์ชนก รัตโนสถ, คำอธิบายเรียงมาตรา กฎหมายลักษณะห้างหุ้นส่วนและบริษัท (พิมพ์ครั้งที่ 6, โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2556) 7).

<sup>9</sup> Thai Civil and Commercial Code, s 1168.

rarely construes the aforesaid provisions to impose civil liability on the wrongdoers. As a result, the injured parties lose the rights to restitution, compensation, and rehabilitation for recovering their losses upon overvaluation, entitling them less opportunity to claim for compensation and to increase the possibility of their repayments.

### **2.3.2 Criminal liability**

There is only one criminal punishment<sup>10</sup> of fine payment with a maximum of 50,000 Baht to be imposed on any person who dishonestly overvalues contribution in kind. This function addresses the problem of law enforcement because the punishment is prescribed at low level, which is not proportional to the seriousness of the crime and is unable to raise awareness and fear among the public. Furthermore, the litigation of this criminal liability is problematic in practice since the injured party always encounters difficulty in finding evidence to testify the offender's guilty mind upon the lack of documents of valuation.

### **2.3.3 Administrative order**

Under the Order of the Central Partnership and Company Registration Office No. 66/2558 dated 24 March B.E. 2558 (2015 A.D.) ("Order 66/2015"), during the incorporation process, DBD is entitled to embed the warning statement(s) in the company's certificate of registration to keep the public informed of an incomplete capital contribution if the company with the initial registered capital of more than 5 million Baht fails to submit supporting documents to evidence that the ownership of contribution in kind is legally

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<sup>10</sup> The Act Prescribing Offences Related to Registered Partnerships, Limited Partnership, Limited Companies, Associations and Foundations B.E. 2499 (1956), s 48.

transferred to the company for its free disposal within 90 days after the registration is completed. In addition, if no evidence is received after DBD's several calls to perform further clarification for the failure of submission, DBD is entitled to issue an order of revocation of business registration to the company.

The provided functions of administrative order are ineffective since the issuance of administrative orders to embed the warning statement(s) in the company's certificate of registration is not forceful enough to prohibit the overvaluation from the company and to refrain the public from engaging business with such a company because the orders do not constitute a compulsory action to provide the accurate valuation, but they are just warning and informing messages, in which the public may ignore the statement(s) and still engage in businesses with the company. Furthermore, the order to revoke a registration application is rarely issued upon the lack of DBD's procedural measures.

### **3. Foreign laws and regulations on contribution in kind in private companies**

The author examines laws and regulations from Germany and China in order to find out how they regulate contribution in kind and resolve legal problems that are currently existing in Thai private companies. To effectively present the different levels of legal framework, the author classifies their laws and regulations into certain issues, i.e., characteristics of contribution in kind, general requirements, civil and criminal liabilities, and administrative or judicial order.

### **3.1 The Federal Republic of Germany**

Germany has prescribed duties, responsibilities, and liabilities in connection with limited liability companies under the Limited Liability Companies Act 1892 A.D. (“GmbH Act”). In General, a limited liability company (“GmbH”), which in comparison is similar to Thai private companies incorporated under TCCC, is liable for its debts alone to its assets,<sup>11</sup> and the liability of subscribers or shareholders is limited to the amount of their subscription to the share capital. At a time of incorporation, a notary is mandatory to examine and notarize the accuracy and the validity of the articles of association, the company statutory agreement, and other required founding documents. Such a notary will complete the registry of GmbH by submitting the application to the competent register court. If the court finds no bar, it grants the incorporation status to GmbH in writing.

#### **3.1.1 Characteristics of contribution in kind**

The GmbH Act contains various provisions to set out the statutory characteristics of contribution in kind that it must be 1) able for an economic valuation, 2) having a certain period of usability under a balance sheet, and 3) transferable. There are specific provisions applying to specific types of contribution, e.g., enterprise as on-going business.<sup>12</sup> Furthermore, the GmbH Acts also defines “hidden capital contribution”<sup>13</sup> to avoid any inconsistency

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<sup>11</sup> The Limited Liability Companies Act of Germany, s 13(2).

<sup>12</sup> The Limited Liability Companies Act of Germany, 5(4).

<sup>13</sup> The Limited Liability Companies Act of Germany, s 19(4) and s 56(2).

“A hybrid capital rule preventing the circumvention of the valuation of contribution in kind that is artificially splitting an arrangement involving that contribution in kind into two or more parts, and then taking them into cash contribution transaction”

of the court's interpretation. These increase investors' confidence and raise investors' perception that the equity capital market in GmbH is steady as there are various provisions concerning characteristics applied.

### **3.1.2 General requirements**

The GmbH Act regulates contribution in kind with strength requirements at the time of company's incorporation and increase of capital. First, Documentation: corporate documents, e.g., articles of association, shareholders' report and resolution,<sup>14</sup> related agreements,<sup>15</sup> and the statement of the needs of contribution in kind,<sup>16</sup> are mandatory to specify in-depth details of contribution. This requirement is not only for the purpose of capital verification for the registrar but also the evidence for the public examination. Second, Valuation Report: the GmbH Act further controls the accuracy of valuation by requiring a valuation report<sup>17</sup> from external experts to deliver a fair market value, and the competent register court is also entitled to examine the method of valuation upon the statements of additionally appointed experts.<sup>18</sup> As a result, there is less possibility of mismatching between the registered capital and the actual value of the contributed asset. Last, Debt to Equity Swap: Germany extends its flexibility to allow debt to equity conversion along with the valuation report to benefit a company in

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<sup>14</sup> The Limited Liability Companies Act of Germany, 5(4).

<sup>15</sup> The Limited Liability Companies Act of Germany, 8(1) 4.

<sup>16</sup> The Limited Liability Companies Act of Germany, s 56(1).

<sup>17</sup> The Limited Liability Companies Act of Germany, 8(1) 5.

<sup>18</sup> Marco Ardizzoni, *German Tax and Business Law* (1st edn, Sweet & Maxwell Ltd 2005) 7-051.

raising its finance and restructuring debts when the company suffers a business downturn.

### **3.1.3 Civil liability**

When there is an overvaluation, the GmbH Act contains a set of civil liability provisions to be imposed on the individuals essentially linked to the valuation of contribution kind as follows: (1) During the early period of GmbH's incorporation, a pre-entry liability<sup>19</sup> will be imposed on the initial director and forming shareholders to mark up any deficiency of the assured contribution in kind if there is a misuse or a shortfall of value at the time of registration; (2) Shareholder with overvaluation of contribution in kind is subject to a shortfall liability<sup>20</sup> to mark up any differences upon the overvaluation; and (3) The injured parties, especially corporate creditors, are entitled to claim joint and several liability<sup>21</sup> from existing shareholders and managing directors once the shortfall amount cannot be obtained from the defective shareholder. These civil liabilities can be raised by the company itself, the creditors, or the insolvency administrator within 10 years<sup>22</sup> after the registration or the transfer of the assets.

### **3.1.4 Criminal liability<sup>23</sup>**

The GmbH Act contains both fine payment and criminal punishment of imprisonment with a maximum period of 3 years for whoever makes false

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<sup>19</sup> The Limited Liability Companies Act of Germany, s 11(2).

<sup>20</sup> The Limited Liability Companies Act of Germany, s 9(1).

<sup>21</sup> The Limited Liability Companies Act of Germany, s 9a.

<sup>22</sup> The Limited Liability Companies Act of Germany, s 9(2).

<sup>23</sup> The Limited Liability Companies Act of Germany, s 82(1).

statements of contribution in kind. False statements can be in any form of corporate misconduct, such as false report, and false amount of contribution through overvaluation. Also, this provision expressly stipulates the specific terms of shareholder and director to be criminally liable for their misconducts.

### **3.1.5 Judicial order<sup>24</sup>**

The GmbH Act deals with the violation to issue a judicial order at first place in the process of registration. If the competent register court still finds any discrepancy of the valuation after it has severally investigated the valuation report on whether or not contribution in kind is accurately appraised into fair market value, the court is entitled to grant a judicial order to refuse registering to make entry to the commercial register.

## **3.2 The People's Republic of China**

Certain characteristics of limited liability company (“LLC”) under the Chinese Company Law 2018 (“PRC Company Law”) are mostly similar to private companies of Thailand and Germany. LLC is liable for its debts to the extent of its assets, while the shareholders’ liability is limited to the amount of their respective capital contributions stated in the articles of association.<sup>25</sup> In general, LLC is legally incorporated by way of registration of application form to obtain a business license and approval from the competent State Administration for Market Regulation (“SAMR”) or so-called China’s business registration authority.

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<sup>24</sup> The Limited Liability Companies Act of Germany, 9c(1) and s 57a.

<sup>25</sup> The PRC Company Law (2018 Revision) (Official Translation), art 3.

### **3.2.1 Characteristics of contribution in kind**

The PRC Company Law illustrates that the two statutory characteristics of contribution in kind, i.e., assessability and transferability,<sup>26</sup> must be met, and further exemplifies some contribution in kind in the provision to avoid any inconsistency of interpretation. There are specific regulations<sup>27</sup> to exclude what is not eligible as equity capital, e.g., franchise and goodwill. In addition, instead of total rejection, China relatively welcomes new forms of contribution in kind by imposing additional requirements to confirm the legality if they meet these additional requirements.

### **3.2.2 General requirements**

First, Documentation: The articles of association are mandatory to specify the method, amount, percentage, time of contribution, including contribution period to set out the time limit for shareholder's obligation to complete the whole contribution.<sup>28</sup> Second, Valuation Report: Although the valuation report is no longer required, the PRC Company Law sets the corporate governance provision that the internal valuation must not be overvalued or undervalued.<sup>29</sup> This internal valuation may also be challenged in court by a request from the company, other shareholders, or creditors for a professional valuation to be performed by a legally qualified appraisal

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<sup>26</sup> The PRC Company Law, art 27.

<sup>27</sup> The Administrative Regulations on Administration of Company's Registration, effective date 6 February 2016 art 14 <<https://wfyaulawyers.com.au/2020/08/12/regulation-of-the-peoples-republic-of-china-on-the-administration-of-company-registration/>> accessed 15 June 2020 (Unofficial Translation).

<sup>28</sup> The PRC Company Law, art 25.

<sup>29</sup> The PRC Company Law, art 27 para 2.

agency.<sup>30</sup> Last, Debt to Equity Swap: China also accepts debt-to-equity conversion under certain circumstances<sup>31</sup> to benefit a company to survive by way of restructuring its outstanding debts rather than prohibiting debt-to-equity swap and letting the company goes bankrupt.

### **3.2.3 Civil liability**

The PRC Company Law and its regulations facilitate the affected parties with various legal principles to litigate a claim of civil liability when there is an overvaluation of contribution in kind: (1) Shareholder with significant overvaluation of contribution in kind is subject to shortfall liability,<sup>32</sup> and directors and senior managers<sup>33</sup> will also be subject to this shortfall liability as it is deemed that they fail to preserve their duty of care to the company's capital;<sup>34</sup> (2) Creditors can further pursue the shortfall payment from other shareholders who established the company and promoters based on joint and several liability;<sup>35</sup> and (3) Other existing shareholders, who have paid their capital contributions within the contribution period stated in the articles of association, are entitled to claim

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<sup>30</sup> The Judicial Interpretation of the Company Law (3), effective date 1 January 2020 art 9 <<https://baike.baidu.com/item/中华人民共和国公司法司法解释三/9561359>> accessed 15 June 2020 (Unofficial Translation).

<sup>31</sup> The Regulations on the Administration of Registered Capital Registration of Companies No. 64, effective date 1 March 2014 art 7 <[http://www.gov.cn/zhengce/2014-03/03/content\\_2627034.htm](http://www.gov.cn/zhengce/2014-03/03/content_2627034.htm)> accessed 15 June 2020 (Unofficial Translation).

<sup>32</sup> The PRC Company Law, art 30.

<sup>33</sup> The Judicial Interpretation of the Company Law (3), art 13 para 4.

<sup>34</sup> The PRC Company Law, art 147.

<sup>35</sup> The PRC Company Law, art 30.

for compensation from the defective shareholder on the basis of a breach of contractual obligation.<sup>36</sup>

### **3.2.4 Criminal liability<sup>37</sup>**

Making a false capital contribution through significant overvaluation of contribution in kind that causes serious damage to the public is subject to severe punishments of fine payment and imprisonment with a maximum of 5 years under the PRC Criminal Law. Interestingly, the terms “shareholders and promoters” are additionally worded in the provision in order to raise their awareness of severe sanction of imprisonment.

### **3.2.5 Administrative order**

The PRC Company Law<sup>38</sup> and its regulations<sup>39</sup> contain general to severe sanctions of administrative orders to prohibit the violation of overvaluation. The company registration authority may issue (1) an order to make a shortfall payment, (2) a fine payment, and (3) fine penalties. In addition, if the public is adversely impacted by the significant overvaluation, severe orders to cease the business operations, i.e., (4) an order to revoke the company registration, and/or (5) an order to cancel the business license may be granted.

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<sup>36</sup> The PRC Company Law, art 28 para 2.

<sup>37</sup> The PRC Criminal Law 1997, art 159.

<sup>38</sup> The PRC Company Law, art 198.

<sup>39</sup> The Administrative Regulations on Administration of Company’s Registration, arts 64-65.

#### **4. Conclusions and recommendations**

The findings of this comparative study show that legal frameworks of contribution in kind in Germany and China with respect to private companies are more strikingly vivid to preserve the stakeholders' interest by containing more distinctive and complex features to stipulate statutory characteristics, mandatory requirements, including additional liabilities, and judicial or administrative orders. By contrast, the existing laws and regulations of Thailand remain unclear and provide ineffective and insufficient legal measures, resulting from the lack of specific and insufficient provisions to regulate contribution in kind. As a result, the author suggests the following legislative and regulatory reform in order to diminish the underlying problems and improve the legal framework of contribution in kind in Thai private companies:

First, the problem of legal uncertainty of characteristics of contribution in kind: the author proposes legislation that includes a specific provision in TCCC outlining general characteristics of contribution in kind as being capitalizable, accessible, and transferable with open-ended approach, a ministerial regulation prohibiting certain types of contributions in kind that pose risks to the company's capital, and additional regulations imposing more requirements for qualifying some types of contribution in kind to welcome more forms of contribution. These would provide legal certainty and reduce controversies of investors and DBD's interpretations.

Second, problem of valuation: TCCC should establish strength requirements into the security system of valuation. The author proposes that TCCC imposes an additional statutory requirement requiring mandatory disclosure of details of contribution in kind in main public documents for public examination. In terms of accuracy and creditworthiness, a valuation

report by experts appointed by the company's statutory meeting or the shareholders' meeting is suggested to deliver a fair and accurate market value, with the exception for certain types of contribution in kind. It is also recommended that certain individuals should be granted the right to contest the report if they discover any inaccuracy in the valuation. Furthermore, when viewing debt-to-equity swap as contribution in kind, the valuation report can relax the prohibition of this conversion because the professional valuation of indebtedness confirms the legality and the instability of its actual value against DBD's current opinions.

Third, problems of law enforcement when there is an overvaluation of contribution in kind: for the lack of specific provisions of civil liability, the author suggests that TCCC includes strict liability provisions of shortfall liability and joint and several liability (with the right to recourse) to be imposed on individuals who directly control the valuation of contribution in kind in order to establish the rights to restitution and compensation to the injured parties. In term of insufficient criminal punishment, the author suggests imposing additional criminal punishment of imprisonment with a maximum of three years and including specific terms of "shareholders and directors" in the provision of relevant law in order to create more efficiency and enforceability of this criminal liability. Lastly, for the ineffective administrative order, the author suggests abolishing the condition concerning the amount of registered capital and implementing DBD's additional severe administrative order of temporary revocation of business license requiring the company's compulsory action for re-valuation of contribution in kind with additional promulgation of ministerial regulations concerning DBD's procedural guidelines from the Ministry of Commerce.

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