

NAVIGATING THE TREACHEROUS WATERS OF CRIMINAL LIABILITY

Acting as an officer or director for a Thai company can be an honour. It is a position that not only affirms a person's role in shaping company policy, but can also symbolise that person's place in the marketplace. In short, it is a title with responsibility.

Most officers and directors accept that they are charged with significant responsibility for the company's operations. Many also believe that they are shielded from personal liability for the firm's legal or regulatory violations, so long as such violations are not the result of their direct negligence or intentional wrongdoing.

Such thinking may be misguided.

Depending on the circumstances, officers and directors may be criminally liable for the offences committed by other officers or their subordinates. There are certain offences under Thai law for which there is an immediate presumption of management's individual criminal liability, regardless of whether the offence was committed by another officer, director or a subordinate. For example, violations of certain Customs Act provisions are among the offences for which an officer or director can be presumed criminally liable, a fact that has a potential impact on thousands of companies and their management and staff. Such violations can result in massive criminal fines, reputational damage and incarceration. In addition to Customs Act violations, there are more than 80 Thai statutes that expose corporate officers or directors to criminal liability.

Imagine the situation of an importer of goods into Thailand. The importer and its officers and directors act in ways they believe are responsible, although they are not involved in the day-to-day clearance of goods. Some of them may have little understanding of the formulas used to assess the value of goods for import duty purposes, as such responsibilities are delegated to their qualified subordinates. Furthermore, these officers and directors may be honest and reasonable people who have always run their companies in compliance with every law and regulation. Despite what the officers and directors may believe are their best efforts, they may nonetheless be faced with personally answering criminal charges, possible incarceration and deportation. This is not something that many officers or directors envision when they agree to accept a position of authority. Situations similar to this hypothetical scenario have been the unfortunate reality for officers and directors of some companies operating in Thailand.

These laws might come as a surprise to some people unfamiliar with the Thai civil law system. For example, they may be familiar with the law of certain foreign jurisdictions, in which an officer or

director generally cannot be held personally liable for the company's acts or omissions, aside from rare instances where the court "pierces the corporate veil", because it finds that the corporate structure is a "sham" being used to avoid personal responsibility. In Thailand, however, the amount of protection provided by the corporate structure is less, and violations of economic laws and regulations are more likely to be penalised with criminal sanctions. The rationale behind such an increased burden on corporate management is that the evidence to prove many economic crimes is usually in the possession of the offender, making it prohibitively difficult for the prosecution to prove its case beyond a reasonable doubt. This was particularly relevant following the 1997 economic crash, an era of numerous financial crimes.

While Thailand has been, and continues to be, a business-friendly country, officers and directors have a high degree of personal responsibility for their corporations' actions compared with counterparts in other jurisdictions. As a result, management should be particularly cautious in delegating certain responsibilities and should not generally agree to sit on the board of a company with which they do not plan to be actively involved. Officers and directors of Thai companies must take their oversight responsibilities seriously.

Directors can reduce their exposure to potential criminal sanctions by taking important protective measures. Purchasing high-quality directors and officers (D&O) insurance is one way to reduce personal exposure by guaranteeing that directors will not have to personally pay for their legal defence in the event that charges are brought. Indemnity clauses, which usually accompany D&O insurance, also reduce a director's exposure by ensuring that a third party, such as the corporate entity, ultimately pays for any legal damages. Finally, legal risks can also be reduced significantly by seeking the advice of competent legal counsel, who can identify areas of risk and prescribe courses of actions to avoid those risks.

TILLEKE & GIBBINS

By Michael Ramirez, Consultant, and David Sulzbacher, Summer Associate, Dispute Resolution Department, Tilleke & Gibbins International Ltd. Please send comments to Andrew Stoutley at andrew.s@tillekeandgibbins.com