

EXPOSURE OF DIRECTORS:
TRADITIONAL RISKS AND SOME SURPRISES
- A BRIEF OVERVIEW -

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I. INTRODUCTION

- A. General corporate responsibilities: private, public and listed companies
- B. Other general responsibilities: Alien Business Law, fiscal and labor/immigration obligations
- C. Responsibilities under specific legislation: e.g. industry, environment; labor, health and safety; quality and price controls; and consumer protection; and many other particular activities
- D. Sanctions: civil (damages) and criminal (fines, jail and disqualification)
- E. Mitigation Measures

II. CORPORATE RESPONSIBILITIES

A. Private Companies

- Obligations of companies, directors established under Thai civil and commercial code (CCC), the law against offences involving private companies and various regulations of the Minister of Commerce
- Generally, texts apply to directors and their agents (officers). Also, directors liable if they act beyond their authority (concept of ultra vires)
- Generally, only the standard of a prudent businessmen and not compete with company (unless shareholders approve) (CCC section 1168)
- Joint obligations as to company to establish, maintain records, prepare, audit, approve and file accounts and other records

- Sanctions: mostly fines (usually nominal); shareholder and third-party recourse limited; plus striking company from Ministry of Commerce rolls (de facto liquidation)
- B. Public Companies
- Public Limited Companies Act of 1992
 - Duties: honest compliance with law, company's constituting documents (MOA/AOA) and shareholders resolutions
 - Qualifications: no imprisonment under final judgement for an offence related to property committed with dishonest intent
 - Act imposes greater disclosure and operational obligations and regulatory formalities; also, higher standard of care than CCC

- Sanctions: civil (shareholders actions) and criminal (severe fines and jail: section 216 on fraud up to one million baht and/or up to 5 years)
- C. Listed companies
- Securities and Exchange Act (through No. 4 in 2008) and SEC and SET regulations impose still greater administrative, operational and disclosure formalities and limitations
 - Obligations higher: responsibilities of due care, loyalty, full disclosure; avoiding connected transactions; no self dealing, but OK with shareholder approval, except for dishonesty or gross negligence
 - SET Code of Best Practices for Directors of Listed Companies (based on OECD model) is not law, but recommended to encourage transparency

- Sanctions: also civil (shareholders actions) and criminal severe fines and jail:
Section 306 of SEC Act on fraud: 500,000 to 1,000,000 Baht and/or 5 to 10 years jail

D. Bankruptcy Act of 1940

- Liability for self dealing or fraud: section 164: fine up to 1,000 Baht and/or jail up to 2 year; also, revocation of fraudulent transactions during last 12 months or if undue preference to a creditor, during last 3 months

III. GENERAL ACTIVITIES

A. Alien Business Law

- General compliance obligation for majority foreign-owned entities, either actually or beneficially.

- Variety of activities covered: including farming, forestry, fisheries, transportation, mining, wholesale and retail <100 million Baht, hotel business, tour agency, advertising and most services, including loans.
- Actors may include shareholders, directors, officers and nominees
- Sanctions: criminal fines (100,000 to 1,000,000 Baht; continuing fine per day 10,000 to 50,000 Baht after court order and/or jail up to 3 years) and closure of business

B. Fiscal Obligations

- Under Revenue Code, Excise Tax Code, Customs Code and accounting regulations
- Sanctions: criminal penalties for inaccurate, late or non-filing of declarations

- Lack of knowledge or negligence, whether management or subordinates, or other action or inaction theoretically no defense

C. Labor/Immigration Obligations

- Failure to comply with formalities relating to work permits and annual non-immigrant visas may subject directors, officers and individuals concerned to criminal sanctions
- Theoretically, anyone working in Thailand, regardless of duration, requires work permit and business visa: examples re temporary visitors and working outside stated employment location

D. Intellectual Property Infringements

- Copyright Act section 74: burden of proof on director or officer to show lack of knowledge or consent
- Trademark Act section 114: plaintiff must show knowledge or consent of directors or officers

E. Liability in Tort

Generally, based on the obligations provisions under CCC, but may be law-specific, e.g. Consumer Protection Act (Act on Liability for Damages Arising from Unsafe Goods of 2008)

IV. SPECIFIC ACTIVITIES

A. Broad Activities

- Broad activities such as industrial and environmental and labor, product liability, health and safety matters, also price controls and consumer protection which relate to a number of activities, and quality controls relating to pharmaceuticals, foodstuffs and other products for public consumption or use (industrial norms, specifications and control) and trade competition

B. Particular Activities

- Licensing and regulation of very specific activities. See, for example, Tilleke & Gibbins website which lists scores of particular activities or items which are subject to criminal sanctions for non - compliance

V. NON-COMPLIANCE IMPLICATIONS AND MITIGATION MEASURES

A. Civil Sanctions

- Civil sanctions - damages to shareholders, company or public have financial impact and may have probative influence, i.e. fact determination under Consumer Case Procedure Act may be used in other suits filed on same basis

B. Criminal Sanctions

- Criminal sanctions involve fines, jail or disqualification for positions. Also, company closure (e.g. Alien Business Law) and striking company from Ministry of Commerce rolls. Suspended sentence may have same impact

C. Burden of Proof

- Law often presumes guilt, and accused must demonstrate innocence, as in other Civil Code systems
- strict liability – law presumes liability (operating without a license) – accused has burden to refute
- liability presumed & burden on accused
- other behavior – burden on claimant or regulator

D. Mitigation

- Other measures: knowledge of business and its obligations; knowledge of law (e.g., SEC/SET regulations), seek good governance and transparency; internal financial systems and disclosure; education of subordinates and quality control of declarations and other filings on timely basis
- For civil sanctions, directors and officers (D&O) liability insurance coverage; issues on scope of coverage, exclusions (fraud, dishonesty, personal gain; injury or property damage) and limitations (as to amount). Generally, coverage is for (mostly unintentional) wrongful acts; and may include affiliates or subsidiaries

- No class actions permitted, yet in Thailand, but they may be coming. See Consumers Case Procedure Act. Same goes generally for punitive damages except for CCPA
- Other measures: Ultimately, termination of activity if its conduct is not worth risk exposure which results

VI. CONCLUSIONS

- In Thailand as elsewhere, growing increase of civil litigation by private claimants, thus more litigious behavior. Also, greater involvement of NGOs
- In some sectors, particularly fiscal, environmental and consumer protection matters, growing increase of administrative scrutiny and claims
- This more contentious environment requires far greater attention to preventive and defensive measures than previously
