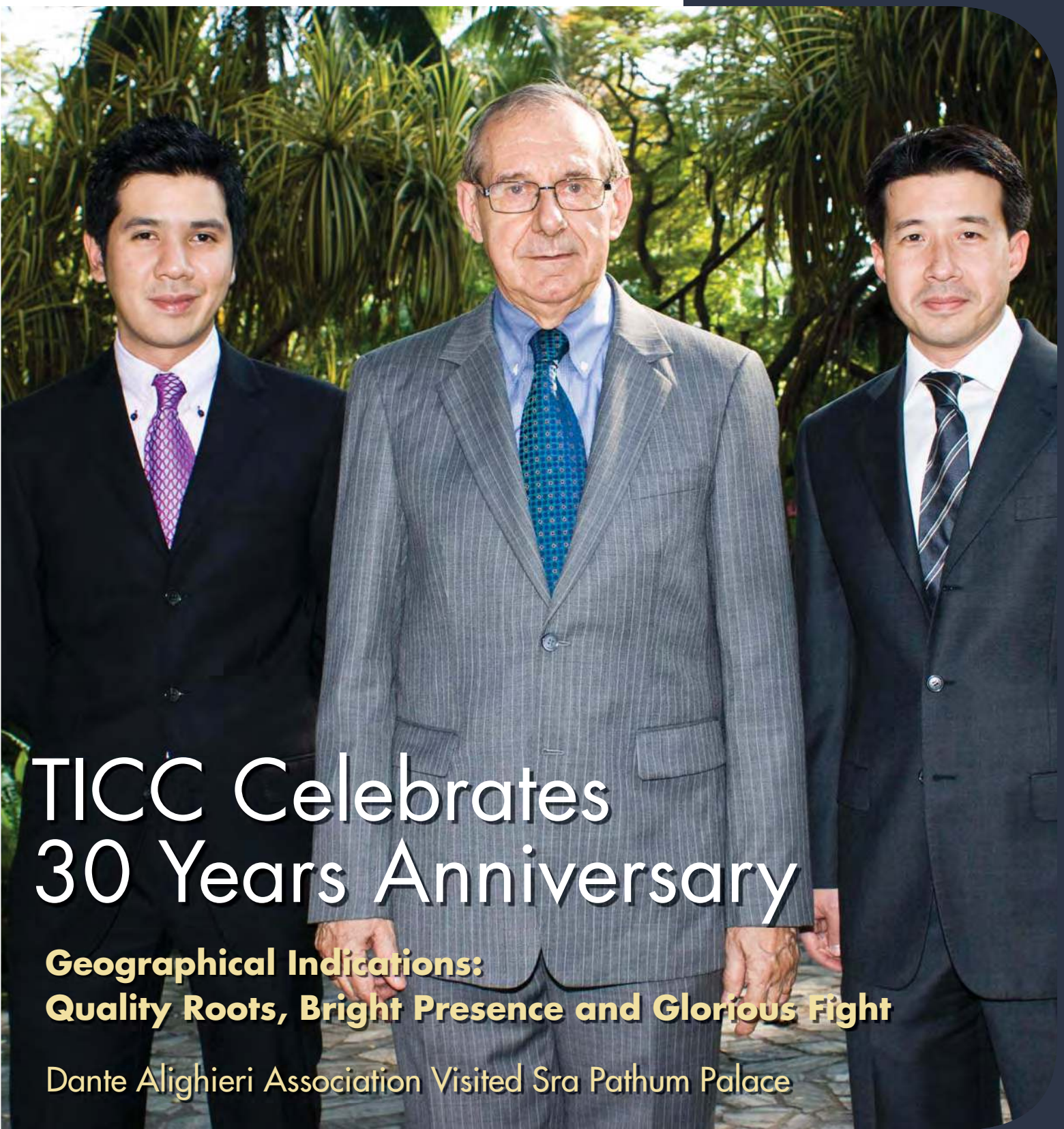


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Corporate Officers and Directors and Criminal Liability: Navigating Treacherous Waters

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

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Most officers and directors accept the fact that they are charged with significant responsibility for the company's operations. Many, however, believe that they are shielded from personal liability for legal or regulatory violations that the corporate entity commits, 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 offenses committed by other officers or their subordinates. There are certain offenses under Thai law for which there is an immediate presumption of management's individual criminal liability, regardless of whether the offense was committed by another officer, a director, or a subordinate. For example, violations of certain Customs Act provisions are among the offenses for which an officer or director can be presumed criminally liable, a fact that has a potential impact on literally thousands of companies, management, and their subordinate staff. Much publicized, such violations can result in massive criminal fines, reputational damage, and even incarceration for officers and directors. In addition to offenses under the Customs Act, there are over 80 Thai statutes that can potentially expose corporate officers or directors to criminal liability.

Imagine the situation of an importer of goods into Thailand. Its officers and directors act in ways they believe are responsible and are not involved in the day-to-day clearance of imported goods. In the case of some officers and directors, they may have little or no understanding of the formulas used to assess the value of goods for import duty purposes, since they have delegated all such responsibilities to their suitably qualified subordinates. Further, these officers and directors may be honest and reasonable men and women who focus on running their companies in compliance with Thai laws and regulations. Despite what the officers and directors may believe are their best efforts, they may nonetheless be faced with personally answering criminal charges, with penalties that include fines and/or incarceration. This is not something that many officers or directors envision when they agree to accept a position of authority within a company. 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 persons unfamiliar with the Thai civil law system. For example, they may be familiar with the law of certain 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," where 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 penalized with criminal sanctions. The public policy 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 polluted by numerous financial crimes of daunting scale.

While Thailand has been and continues to be a business-friendly country, officers and directors are charged with a high degree of personal responsibility for the actions of their corporations as compared to other jurisdictions. This being the case, 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 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 defense 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 action to avoid those risks.

About Tilleke & Gibbins International Ltd.

Tilleke & Gibbins International Ltd. is the oldest and one of the largest independent multiservice law firms in Thailand with offices in Bangkok and Phuket, as well as in Hanoi and Ho Chi Minh City, Vietnam. Founded in 1890, the firm takes great pride in its 119-year history of providing high-quality advice, knowledge, and judgment to best accomplish its clients' objectives.