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## THAILAND'S CRIMINAL BAD CHECK LAWS

According to recent statistics from the Bank of Thailand, there are more than 20 million checks returned for insufficient funds each year in Thailand. This is an extraordinary number in a country of approximately 66 million people, equating to nearly one returned check for every three people. Given these numbers, there is a strong possibility that those doing business in Thailand will, at some point in time, be confronted with a bank refusing to honor a check due to insufficient funds. It is therefore important to understand a party's rights and potential liabilities under Thailand's bad check laws.

When it comes to bad check legislation, Thailand is unique. In addition to civil remedies available under the Civil and Commercial Code against those who pass bad checks, Thailand is one of the few jurisdictions in the world in which there can also extend criminal liability. Criminal liability is evaluated under the Act Governing Offenses Arising from the Use of Checks B.E. 2534 (1991) (the Act). Under the Act, a criminal conviction may give rise to imprisonment of up to one year and/or a fine of up to THB 60,000. Needless to say, the potential for such criminal punishment can have a significant impact on business and personal freedoms, a point that has led to considerable debate on the need for such laws.

### Statutory prerequisites

To provide context for this debate, it is helpful to first review the statutory prerequisites for filing a criminal claim under the Act. Assuming there has been a check returned for insufficient funds, the aggrieved person (payee) has the right to file criminal charges if three prerequisites are satisfied. These are as follows:

1. The drawer issued the check for settlement of an existing debt or obligation;
2. The debt or obligation is enforceable under Thai law; and
3. The drawer had a dishonest intent as described or implied by any one of the following:
  - 3.1 The drawer acted with the intention that no payment be made to the recipient under the check;
  - 3.2 At the time of check issuance, there were no funds in the checking account for payment to the recipient;
  - 3.3 The drawer ordered payment of money in an amount that was higher than the amount deposited in the checking account at the time of check issuance;
  - 3.4 The drawer withdrew money wholly or partially from the checking account, leaving an amount insufficient for payment under the check; or
  - 3.5 The drawer instructed the bank not to honor the check.

If these three prerequisites are not satisfied, then there is no basis for conviction under the Act and any claims filed by the payee will be unsuccessful. To understand the scope

and limitations of these prerequisites, what follows are several examples of Supreme Court rulings in which criminal convictions under the Act have been unsuccessful.

- » Issuance of the check was for the purpose of a guarantee and not for payment of a direct debt or obligation. (Supreme Court Case 988/1970)
- » Issuance of the check was for payment of a gambling debt, which is an unenforceable debt under Thai law. (Supreme Court Case 2493/1984, 1052/1986)
- » Issuance of the check was for payment of a loan unsupported by a loan agreement. (Supreme Court Case 862/1969)
- » The check was issued without properly dating the check, thereby making a determination of the date of payment uncertain. (Supreme Court Case 2039/1980, 1934/1984)

As in the above Supreme Court examples, if the payee is not entitled to pursue a criminal conviction against the drawer due to the failure to satisfy prerequisites under the Act, he or she may still have the right to pursue a civil claim against the drawer.

### Civil or criminal claims

Once a payee learns that the bank has refused to honor a check, he or she needs to quickly evaluate whether to pursue civil and/or criminal action. This is because the prescription period (statute of limitations) for the lodging of a criminal charge against the drawer of a bad check is three months from the date that the bank first refused to honor the check, regardless of the number of subsequent refusals by the bank. One reason for this short prescription period is that a criminal offense under the Act is compoundable, which provides the payee with the right to withdraw the claim anytime before issuance of final judgment. But this also means that the payee must act quickly and prudently in evaluating whether to proceed with a criminal claim, since failure to do so could give rise to criminal charges against the payee for the filing of false charges.

In contrast to criminal claims under the Act, the prescription period for submission of a civil claim against the drawer is one year from the date of check issuance. As supported by Supreme Court precedent, the issuance date for purposes of calculating the prescription period for a civil case is the date that the drawer writes into the check. For example, if the drawer signs the check on August 14, 2010, but fills in a date on the check of August 31, 2010, the issuance date would be August 31, 2010.

Once it has been determined that there is cause to file action against the drawer, the payee must consider whether the best option is to file a civil claim or to initiate a criminal complaint. Submitting a civil claim against the drawer with the appropriate civil court is straightforward and would likely lead to a judgment of civil liability. Unfortunately, a civil claim can take some time and the drawer is unlikely to be motivated to repay the debt quickly. In contrast, there is the potential for more immediate results from filing a criminal complaint.

### Filing a criminal complaint

When filing a criminal complaint under the Act, the payee has the choice of lodging the charge with a police inquiry officer within the relevant jurisdiction or, in cases where the payee wants more control over the preliminary review, he or she may choose to file the charge directly with the Criminal Court in which jurisdiction lies.

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If the charge is lodged with the police, they will conduct an investigation, question witnesses, and will summons the accused to appear to acknowledge the charge. Once they have concluded their review, they will issue a recommendation on whether to prosecute, which is then subject to further review by the public prosecutor. If the public prosecutor agrees with a police recommendation to prosecute, then the matter will proceed to criminal trial.

If, however, the payee submits a criminal case against the drawer to the court directly, the police will not be involved in the review. Instead, the court will conduct a preliminary trial to review whether there is a reasonable basis for conducting a full criminal trial against the drawer. During the court's preliminary review of the viability of the criminal charge, the court will conduct hearings, at which the plaintiff (payee) has the right to present witnesses and evidence to support his or her argument that the case should proceed to trial. At this stage, the drawer, as the alleged person, is entitled to appoint an attorney to cross-

examine the witnesses and challenge evidence, but has no right to present evidence or witnesses. If, after presentation of the payee's case, the court believes that there is a prima facie case worthy of a full criminal trial, the court will issue an order to accept the charge. Thereafter, the drawer would have to submit an answer to the complaint and defend the case at trial.

Given the short prescription period and the greater potential to motivate the drawer to repay the payee, it is no surprise that payees frequently make the choice to file criminal charges under the Act, rather than seeking recovery through available civil remedies. While there is justifiable debate about whether there should even exist criminal liability for issuance of bad checks under Thai law, the fact remains that as long as such criminal liability is available, parties will continue to utilize criminal complaints and prosecutions in an effort to maximize leverage and increase the likelihood of recovery. Given this reality, it is vital that parties to economic transactions be fully aware of their rights and liabilities under Thailand's bad check laws. 