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The International Comparative Legal Guide to: Business Crime 2012

A practical cross-border insight
into business crime

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Thailand

Michael Ramirez



Poomjai Kudidthaler



Tilleke & Gibbins

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Office of the Attorney General is an independent organisation, as provided for in the Constitution of the Kingdom of Thailand. The Office's public prosecutors have the power to prosecute all criminal matters, including business-related crimes. This is the only organisation with a general criminal enforcement authority on both a national and regional level. However, some specialised crimes may involve other enforcement agencies, such as the Department of Special Investigation (DSI) and the Securities & Exchange Commission of Thailand (SEC). In addition, Section 28 of the Criminal Procedure Code allows criminal charges to be filed privately by aggrieved individuals.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made?

The process begins with an investigation by an inquiry official who collects evidence to establish: the facts related to the alleged offence; the identity of the offender; and the guilt of the offender. Then, the inquiry official forwards the file and opinion to the public prosecutor. The public prosecutor has the power to independently determine whether to prosecute or request an additional inquiry into the matter. The Office of the Attorney General is the only enforcement agency with the power to criminally prosecute, unless another agency is given exclusive jurisdiction by statute.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

The Office of the Attorney General can also civilly enforce business crimes on behalf of injured persons. The injured person must have a right to claim restitution for being deprived by the alleged offence, or have the power to apply for restitution of property/value in any of the following cases: theft; robbery; piracy; extortion; cheating and fraud; criminal appropriation; and receiving stolen property. In addition, in a case where the public prosecutor is the plaintiff, the entitled injured person may make a claim for indemnification to the court hearing the criminal case, as a result of having sustained danger to their life, body, mind, physical freedom, reputation, or damage to their property as a result of the commission of an offence

by the defendant. Some organisations have the power to administratively enforce business crimes if the matter is sufficiently relevant to the organisation's authority. For example, the Trade Competition Commission has the power to administratively enforce against business crimes relating to unfair competition. Other organisations with such power include the Revenue Department, in tax cases, and the National Anti-Corruption Commission, in government-contracting fraud cases.

2 Organisation of the Courts

2.1 How are the criminal courts in Thailand structured? Are there specialised criminal courts for particular crimes?

The Thai judiciary has a three-tier system: the Court of First Instance; followed by the Appeals Court; and then the Supreme Court (Dika). The Criminal First Instance Courts are divided into District Courts and Provincial Courts. The District Courts have a power to adjudicate criminal cases where the maximum punishment by law does not exceed three years' imprisonment and/or a 60,000 baht fine, while the Provincial Courts have unlimited original jurisdiction in all criminal matters within their own districts. The Intellectual Property and International Trade court is a specialised court with exclusive jurisdiction to adjudicate criminal matters involving intellectual property.

2.2 Is there a right to a jury in business-crime trials?

There is no right to a jury trial in the Thai law system. Cases are adjudicated by judges.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Thailand to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

Sections 238 through to 244 of the Securities and Exchange Act B.E. 2535 (1992) provide general protection against fraud and misrepresentation in connection with the sale of securities. Section 238 provides that "[no] person having an interest in securities shall impart any false statement or any other statement with the intention to mislead any person concerning the facts relating to the financial

condition, the business operation or the trading prices of securities of a company”. The alleged offender must have intentionally misled the victim with the statement. Under Section 296, violators potentially face a maximum of two years in prison or a fine not exceeding two times the benefit received or should have been received as a result of the offence. Furthermore, the fine will not be less than 500,000 baht.

o Accounting fraud

Under Section 39 of the Accounting Act B.E. 2543 (2000), a person who makes a false entry or alters or neglects to make an accounting entry is criminally liable. An offender potentially faces a maximum of two years in prison and/or maximum fine of 40,000 baht. If the offender had a duty to keep accounts, he or she potentially faces a maximum of 3 years imprisonment and/or maximum fine of 60,000 baht. The requisite *mens rea* can be satisfied by showing negligence or intent to make, alter or falsify an accounting entry.

o Insider trading

Section 241 of the Securities and Exchange Act B.E. 2535 (1992) provides protection against the use of insider information in the sale or purchase of securities. The elements in Section 241 require that no person (directly or indirectly) can purchase or sell securities in such a way as to take advantage of other persons by using undisclosed information material to changes in securities prices. Furthermore, the person must have accessed the information by virtue of his office or position. Alleged offenders face the same potential liability as listed in Section 296 (*see* fraud and misrepresentation in connection with sales of securities).

o Embezzlement

Sections 352 and 353 of the Criminal Code of Thailand provide for general protection against misappropriation. Misappropriation is being in possession of a property belonging to another person, or of which another person is a co-owner, and having a dishonest intention to convert such property to himself or a third person. More specifically, Section 3(4) of the Anti-Money Laundering Act B.E. 2542 (1999) lists embezzlement offences in its definition of “predicate offences”.

o Bribery of government officials

Section 144 of the Criminal Code of Thailand protects against the bribery of public administration officials. The section requires the alleged offender to induce a government official to act, fail to act, or to delay an act, which is contrary to his or her functions, by giving or offering to give property or any other benefit. Alleged offenders potentially face a maximum of five years’ imprisonment and/or a maximum fine of 10,000 baht. Government officials also face liability for malfeasance in office under the Criminal Code.

Section 167 of the Criminal Code of Thailand protects against the bribery of judicial officials. The section requires the alleged offender to induce an official in a judicial post to act, fail to act, or to delay an act, which is contrary to his or her function, by giving or offering to give property or any other benefit. Alleged offenders potentially face a maximum of seven years’ imprisonment and/or a maximum fine of 14,000 baht. Judicial officials also face liability for malfeasance in office under the Criminal Code.

o Criminal anti-competition

The Trade Competition Act B.E. 2542 (1999) provides general protections against anti-competitive behaviour by business operators. The Act protects against both unilateral conduct and collusion including price-fixing, geographic market allocation and other anti-competitive behaviour. The Competition Commission monitors and investigates potential anti-competitive behaviour and refers matters to the Attorney General who may proceed with a criminal case. The public prosecutor must show substantive

violations of any provision in Sections 25-29 of the Trade Competition Act.

o Tax crimes

Under Section 37 of the Tax Revenue Code of Thailand, tax evasion is a fraudulent crime. Anyone who evades or attempts to evade payment of the tax and duty by falsehood, fraud, or who knowingly or wilfully furnishes false information, makes false statements, gives false answers or produces false evidence to evade taxes is liable. Tax evaders face sentences of imprisonment ranging from three months to a maximum of seven years and fines ranging from 2,000 baht to 200,000 baht.

o Government-contracting fraud

The Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) is the key statute regarding government-contracting fraud. The Act has the capability of punishing either corrupt government officials or wrongful parties. The Act covers wrongful actions including avoiding fair price competition through collaboration and by depriving other parties from submitting fair bids.

o Computer crime

The Computer Crime Act B.E. 2550 (2007) provides criminal liability for computer-related crimes. The Act protects against a wide variety of computer crimes including: unauthorised access; preventing access; forging computer data; damaging the computer data of a third party; etc.

o Copyright infringement

The Copyright Act B.E. 2537 (1994) provides criminal liability for copyright infringement. Sections 27 to 31 of the Act provide a list of copyright infringement offences, but the Act also provides exceptions for personal use, news-related use, and non-profit research.

o Money laundering

The Anti-Money Laundering Act B.E. 2542 (1999) provides criminal liability for money laundering. Section 5 of the Act criminalises transfers or the receipt of transfers for the purpose of “concealing or disguising the original source or asset”. Under Section 60 of the Act, an alleged offender potentially faces between one and ten years in prison and/or a fine ranging from 20,000 to 200,000 baht.

3.2 Is there liability for inchoate crimes in Thailand? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, there is liability for inchoate crimes when the commission of an offence would be likely to cause damage or injury. A person can be liable for attempt regardless of whether the attempted crime is completed under Section 80 to 82 of the Criminal Code of Thailand.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee’s conduct be imputed to the entity?

Yes, there is entity liability for criminal offences. There are several corporate criminal liabilities, which deem the managing partners, president, directors, manager, or person empowered to run the business of the company to be a co-principal in the commission of the offence, unless it can be proven that they took no part in the commission of such offence (i.e. acted within the scope of their authority).

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

Several corporate criminal liability laws presume that the managing partners, president, directors, manager, or empowered persons shall be a co-principal in the commission of the offence. If the entity becomes liable for a crime or the employee acted on his or her personal behalf, without authority or beyond the scope of his or her authority, this individual will be personally liable.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

There is no clearly stated policy. In practice, the authorities commonly pursue both the entity and the authorised person of such an entity. In the case of corporate criminal liabilities, the managing partners, the president, directors, manager, or a person empowered to run the business of the company are deemed to be co-principals. Depending on the particular facts, they may also be pursued for individual criminal liability.

5 Statutes of Limitation

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

In a criminal case, the enforcement period begins from the date of commission of the offence. The limitation periods range from one year up to twenty years. In case of a compoundable offence, the injured person must make a complaint within three months from the date that the offence and the person responsible for such offence became or should have become known.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No. The limitations period begins from the date that the offence and person responsible for such an offence became or should have become known. Proceedings must be initiated within the specified limitations period.

5.3 Can the limitations period be tolled? If so, how?

Proceedings must be initiated within the specified limitations period, and they may not generally be tolled. However, the limitations period may be tolled when a person convicted by the final judgment has not yet undergone punishment, or has not completely undergone punishment on account of having escaped, and such person is not brought to undergo the punishment until after the time of reckoning from the day of the final judgment, or the day on which the offender has made the escape. In such circumstances, the execution of punishment shall be precluded by prescription, and the punishment shall not be inflicted. The limitations period ranges from five years up to twenty years.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

In the case of a criminal offence, initial investigations are started by an inquiry official, but in the case of a compoundable offence, the inquiry will begin when a regular complaint has been made. The inquiry official can collect any kind of evidence to determine the facts and circumstances relating to the alleged offence, to ascertain the offender and to prove the offender's guilt.

The Criminal Procedure Code provides the rules and guidelines on inquiry proceedings. Some acts, such as the Trade Competition Act provide inquiry powers to a committee or to sub-committees to investigate the commission of listed offences.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

Yes, law enforcement authorities have both formal and informal mechanisms for cooperation with foreign law enforcement authorities, including public prosecutors. Typically, this is through treaty or by the concept of reciprocity. For example, the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992) provides support for cooperation in extraterritorial investigations. A foreign law enforcement authority may request an authorised local Thai law enforcement coordinator to take various assistance actions, including but not limited to the taking of witness statements, providing documents and evidence out of court, serving documents, conducting searches or seizures, providing assistance in locating persons, making requests for forfeiture or seizure of properties, transferring persons in custody for testimonial purposes, and initiating criminal proceedings.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The government has general power to gather information, issue written orders, summon witnesses to provide statements, request documents and may enter buildings to examine or seize documents involved in the commission of the offence. However, a search warrant must be issued for the seizure of any documents.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Under law, competent government officials can issue written orders or summon persons to provide statements or deliver documents. Government officials also have the power to seize documents with a proper search warrant.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Thailand recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Thailand's labour laws protect personal documents of employees, even if located in company files?

Thailand has protections against the production of confidential documents or facts with regard to professional obligations or duties. An example would be the privilege protecting documents as prepared by attorneys, or the privilege protecting documents of employees, or any process, design or other work protected from the public by law.

However, these are not absolute privileges. The court can order the authority or person requesting privilege to explain the need for the privilege. Afterwards, the court may decide whether there is a sufficient basis to refuse the production of documents. If the court finds that the refusal is groundless, then the court can order a party to produce such evidence.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

A government official can demand that a company's employee produce documents under the circumstances of an investigation and raid the home or office of an employee to seize documents with a proper search warrant.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The government can require any person to produce documents or raid the home or office of any person and seize documents, with a search warrant, as part of an investigation.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The government can demand that an employee, officer, director of a company, or any other responsible person submit to questioning in order to ascertain the circumstances of the alleged offence. However, the questioned person has a constitutional right not to make self-incriminating statements.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The government can demand that a third person submit to questioning in order to ascertain the circumstances of the alleged offence. However, the person has a right not to make self-incriminating statements.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

In a criminal case, a person has the right to legal counsel. During an inquiry or preliminary examination, a person has a constitutional right not to make self-incriminating statements. Furthermore, the questioned person is allowed to have legal counsel present at this time.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated when an injured person or a person other than the injured person makes an allegation to the authorities. Upon completion of an investigation, an inquiry official will refer the case file and provide an opinion on whether to prosecute to the public prosecutor. At this point, the public prosecutor has independent discretion in deciding whether to prosecute.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

The Regulation of the Office of Attorney General on Criminal Procedure provides guidelines to aid public prosecutors in the investigation and execution of a criminal charge. It also provides guidelines on procedures in the court. For example, it provides guidelines on conduct of additional enquiry and on the consideration of a non-prosecution order.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

In the Thai legal system, a criminal offence cannot be resolved through pre-trial diversion or an agreement to defer prosecution. However, the offence may be settled if it is one which is allowed to be settled, such as in the case of some misdemeanours. For example, if the public prosecutor issues a prosecution order he may, in some cases, order an inquiry official to settle the case, requiring the alleged offender to pay a fine set by the inquiry official.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

A defendant can also be subject to civil penalties or remedies. A public prosecutor may apply for restitution of property or of the deprived value on behalf of the injured person. The injured person must have been deprived through the offence of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation, or receiving stolen property. In addition, in a case where the public prosecutor is the plaintiff, the

entitled injured person may make a claim for indemnification to the court hearing the criminal case, as a result of having sustained danger to their life, body, mind, physical freedom, reputation, or damage to the property as a result of the commission of an offence by the defendant.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In general, the burden of proof is on the prosecutor in a criminal case unless stated otherwise in the law.

9.2 What is the standard of proof that the party with the burden must satisfy?

The prosecutor has the burden of proof to prove the crime beyond a reasonable doubt.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The judge is the arbiter of facts and determines whether a party has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Under Section 83 of the Criminal Code of Thailand, a person can be liable for conspiring or assisting another with a crime. If a person is a participant or conspired in the commission of the offence, he or she is considered a principal and will be subject to the full punishment for the offence.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Section 59 of the Criminal Code of Thailand requires intent for criminal liability unless the law provides for negligence or strict liability. The prosecutor has the burden of proof to prove intent beyond a reasonable doubt.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Under Section 64 of the Criminal Code of Thailand, ignorance of the law is not an excuse for criminal liability. However, the court may take it into account and provide lighter punishment.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Under Section 62 of the Criminal Code of Thailand, ignorance of facts may be a defence. If the defendant mistakenly believed a fact existed, then the defendant may not be guilty, may be exempt from punishment, or may receive a lighter punishment. However, the defendant may still be liable if the mistake of fact was due to the defendant's negligence.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

There is no obligation to report a crime to the government and a person will not be liable for failing to report the crime.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

The government cannot offer leniency in exchange for voluntary disclosure of criminal conduct or cooperation. Only the court may consider reducing the punishment of an offender.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Thailand, and describe the favourable treatment generally received.

The court may consider reducing the punishment of an offender during the inquiry proceeding, preliminary examination or during trial. The court may also consider extenuating circumstances in determining punishment if the offender has shown repentance and has made an effort to minimise the injurious consequences of the offence or has given information for the benefit of trial. However, if the entity is a juristic person, it cannot be liable for imprisonment, and shall be liable for only a fine.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

The defendant cannot voluntarily decline to contest criminal charges in exchange for reduced charges or an agreed-upon sentence.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Once the case begins court proceedings, the government has no ability to plea bargain with a defendant. During the inquiry proceeding, the offence may be settled if it is one for which settlement is possible, such as misdemeanours. If the public prosecutor issues a prosecution order and sees fit, he may order the inquiry official to settle the case, and the alleged offender shall pay a fine set by the inquiry official.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

The judge has independent discretion in sentencing the defendant. However, the judge must not go beyond the maximum punishment prescribed in relevant statutes used in prosecution.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The court may exercise its discretion in considering and weighing all the evidence taken, until the court is fully satisfied that an offence has actually been perpetrated and that the corporation committed the offence. The court may decide whether it should reduce the sentence. In addition, the entity shall be liable when it commits an act intentionally, except in the case where the law clearly provides that it must be liable for an act through negligence or acts committed unintentionally.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Generally, with few exceptions, criminal appeals can be made only on issues of law. If an appeal is based on an issue of law, both parties can appeal. Despite the broad right for parties to appeal criminal judgments, the Criminal Procedure Code of Thailand does not allow some appeals in cases where the defendant is found guilty with a small term of imprisonment.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The guilty party can appeal a criminal sentence. If needed, the Appellate Court has the power to reduce or quash the criminal sentence.

16.3 What is the appellate court's standard of review?

The Appellate Court will review the summary of the facts or the points of law relied upon in the appeal. All points of law relied upon by the parties lodging the appeal must have been raised in the Court of First Instance. The Appellate Court can consider additional evidence that it may consider itself or direct the Court of First Instance to consider if the decision is remanded.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The Appellate Court can order the Court of First Instance to carry out a new trial and give a new judgment or order according to the merits of the case.

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