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New Law on Criminal Liabilities for Directors: Elimination of Strict Liability Presumption

Moving to a senior position within an organization always comes with added responsibilities. As a company director in Thailand, not only are you expected to manage the smooth operation of your business, but you must also ensure that your company does not commit any offenses or you do not omit to give instruction or take action under various laws that could result in you, as the director, being held separately liable for the offenses along with your company.

Many laws in Thailand contain a provision stating that, in the event an entity commits an offense, its directors, manager, or the person responsible for the business operations of that entity (collectively referred to here as the “director” or “you”) will be criminally and personally liable on the same grounds (or will receive a fine or imprisonment term at a different level, as the case may be). Examples of such legislation include the Act Prescribing Offenses Relating to Registered Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations B.E. 2499 (1956); the Immigration Act B.E. 2522 (1979); and the Consumer Protection Act B.E. 2522 (1979).

If you are the director of a company that commits a crime, these laws—and others like them that include a similar provision—establish a strict liability presumption that you are automatically presumed guilty along with your company, unless you can prove to the court that you did not take part in the offense, or you undertook reasonable measures to prevent your company from committing the offense. This means the burden of proof lies with you, as the defendant.

This strict liability presumption has been established in Thailand for decades, and it exists in various pieces of legislation. However, this principle came under challenge in a Constitutional Court decision in 2012.

This 2012 landmark case was initiated by a complainant who petitioned to the Thai Constitutional Court, specifically challenging Section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002), under which he was convicted on the basis that he was a director of a company that committed wrongdoing, in accordance with the strict liability presumption. The Constitutional Court ruled that this was contrary to the principle, under the Constitution of Thailand B.E. 2550 (1997), that a person is presumed innocent until otherwise proven guilty by a court of law at its final proceedings. Based on this, the Court held that Section 54 was unconstitutional and thus void.

Following this landmark decision, several petitions challenging similar strict liability provisions under different statutes have been brought before the Constitutional Court, and the Court has ruled in the same manner each time by declaring these provisions to be unconstitutional and void.

The Constitutional Court’s decisions have followed a clear pattern. But the court can only rule on one statute at a time, and only when it receives a petition. Importantly, Thailand does not have a common-law system, in which court decisions establish a precedent that bind subsequent cases, and may even overturn legislation.

Recognizing the large number of statutes that contain strict liability provisions, the Thai government decided not to wait for the judicial branch to amend those statutes individually, but instead, it adopted a more proactive solution to address them. On February 12, 2017, a new Act on the Amendment to Legal Provisions Related to Criminal Liability of Representatives of Legal Entities B.E. 2560 (2017) (the “Act”) was implemented by the National Legislative Assembly with immediate effect. The Act effectively repealed the strict-liability-presumption clause existing in 76 separate laws and replaced them with a revised concept of non-presumption, which is:

The director, manager, or person responsible for the business operations will be liable for the same offense committed by the company if the offense results from the instructions or actions of the director, or the director, manager, or the person responsible for the business operations has a duty to give instructions or take action, but omits to do so, which results in such legal entity committing an offense.

The 76 affected acts include, for example, the Revenue Code, the Act Prescribing Offenses Relating to Private and Public Companies, the Consumer Protection Act, the Telecommunications Act, and the Anti-Money Laundering Act.

With the passage of this new Act, if you are a director, you will no longer be subject to the strict liability presumption, meaning that you will no longer bear the burden of proof to show that you did not conspire, nor were you involved, in the offense committed by your company (guilty by presumption). Instead, the burden of proof is shifted to the public prosecutor, or the complainant, who must prove that you instructed, acted, or omitted to act, in a manner that resulted in your company’s offense (guilty by action or omission).

One consequence of this change is that directors who have management responsibilities (and thus have “a duty to give instructions or take action”) are most likely to be exposed to criminal offenses under these 76 laws. Non-executive directors, such as independent directors and audit committee members, may face reduced risk of being personally exposed to these criminal liability offenses, as their authorities are not involved with the day-to-day management of business operations.

At the same time, all directors will benefit from not automatically being presumed guilty with their companies. Rather, they will only face criminal sanctions if it is proven that they instructed, acted, or omitted to act, in a manner that resulted in their company’s offense.

This new legal development does not actually increase or decrease the level of a director’s criminal liability for wrongdoing. But if you serve as a director of a company or other entity in Thailand, you should pay close attention to this change in order to understand the new burden of proof, which will now be based on the scope of your duties, responsibilities, and authority to give instructions. In addition, you should be sure to understand which of the 76 laws apply to your company and continually assess your level of risk. 🐼