

# Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



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## Conducting Successful Corporate Internal Investigations in Southeast Asia

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Employees, managers, and the companies they work for sometimes do bad things. Employees might embezzle money or sell trade secrets to competitors. Executives may authorize a bribe to win a contract, or tacitly approve accounting trickery to make finances appear better than they really are. From stealing petty cash out of a lockbox to multimillion dollar bribery scandals, there are innumerable ways for employees and companies to commit misdeeds. According to PwC's 2016 *Global Economic Crime Survey*, almost 80% of incidents of wrongdoing in Thailand occurred within organizations—this compares to 46% globally.

### Why Investigate?

If general counsel or management is confronted by suspicious circumstances, whether revealed by a whistleblower complaint or an audit, what should they do? The recommended first step is usually to investigate. The goal of any good internal corporate investigation is to determine the facts: what happened, who was involved, when did the events occur, and why.

Based on the answers to these questions, management can then decide how to respond. Perhaps the facts will exonerate an employee who was wrongfully accused by a colleague with a gripe. Or maybe the investigation will reveal a deep-rooted problem within the organization that has the potential to cause lasting legal, commercial, and reputational damage. Whatever the case may be, to address the problem, the company has to first learn about it.

Getting to the truth has many commercial and legal benefits. An investigation can help to excise wrongful conduct from an organization, weeding out the bad apples. Investigations will also help companies prepare for any potential governmental action. An organization would be far better equipped to deal with regulators if the facts are already known. The same applies for reputational damage. It is easier for a company to control the public narrative when it already knows what happened, instead of the facts being revealed by the media or government.

While thorough investigations are certainly advantageous, they can also be difficult, expensive, resource-intensive, and time-consuming. These challenges are magnified when the investigations take on an international character. Varied legal systems and cultural norms will always have to be considered. In Southeast Asia, for example, laws and cultures are extraordinarily diverse. Handling an employee interview in Thailand should be different than approaching a similar interview in Vietnam or Cambodia.

### The Investigation Plan

With these challenges in mind, each investigation should start with a carefully drafted plan. While the temptation to rush into the investigation may be strong, and time-sensitivity is certainly an issue, having a well-thought plan is critical. Advance planning will reduce the risks of mistakes that can sink the investigation. Such a plan also has the benefit of showing regulators, shareholders, and other stakeholders that the organization took the investigation seriously and was committed to reaching the truth. While the investigation plan should be flexible enough to consider changing circumstances, it should also be sufficiently defined to avoid unintentionally widening its scope.

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When crafting the plan, the nature of the wrongdoing must be considered. While all allegations or suspected misconduct should be evaluated on some level, generally, the more serious the issue, the more extensive the investigation. Matters relating to regulatory or reputational risks—such as corruption allegations—will warrant a more comprehensive investigation. Determining whether a low-level employee fudged a few dollars on an internal expense form would likely not involve a significant cross-border probe. The best practice would be for an organization to have policies and procedures in place that would help determine how an investigation should be conducted.

Another important planning issue is the investigation's scope. Will the investigation look to turn over every rock over the last decade? Or will the scope be narrow, and only extend to a particular action by one employee? The investigation's scope will also depend on the wrongdoing. For bribery and fraud cases that may have occurred over extended periods of time, the scope would be more extensive than one-off instances of employee misconduct. In many cases, an investigation's scope may widen as the search for facts proceeds.

Companies also must consider who will be the investigator. The investigator should be viewed as someone independent. At a minimum, the investigator should not report to the person or persons being investigated. Depending on the nature of the investigation, external counsel can be a good choice, especially when legal violations are involved. Of course, external counsel will increase the cost of the investigation, and may not be necessary for small-scale, low-risk matters. Other benefits of external counsel include a greater likelihood of examining a company objectively, without being hampered by an organization's internal politics.

### Planning Cross-Border Investigations

For cross-border investigations, the use of local external counsel is often necessary. In addition to being able to advise on the law, local counsel will know the language and cultural and business norms. These skills are crucial when handling witness interviews and dealing with local regulators and business partners. For cross-border investigations, it is recommended that local counsel assist with preparing the investigation plan.

Local law should be considered when planning a cross-border investigation. In Thailand and Vietnam, for example, employees have significant legal protections. If the investigation team does not tread carefully, they may cause the company to be on the receiving end of a civil, or even criminal, labor-related court case. Other important legal considerations include data privacy and legal privilege. And there are often additional jurisdiction-specific issues.

Another risk is for an employee (usually the investigation's target) to seek the intervention of local government officials. To deflect from the investigation, a targeted employee may submit allegations of a company's regulatory noncompliance to authorities in areas unrelated to the investigation. This tactic is common in Thailand and Vietnam. The end result is that the investigating company itself becomes a target of a government investigation.

Planners considering a cross-border investigation should also have complete knowledge of any targeted local subsidiary's business organization and partnership. In

Thailand, businesses in many sectors must be "locally owned," where a majority of shares are owned by a local Thai partner. The investigation planning team must consider any implications of the investigation on the joint venture relationship. For example, issues that should be considered include whether there is a shareholders' agreement or joint venture contract that is relevant to the investigation; and what the investigators should do if a joint venture partner blocks the investigation.

Another critical aspect to planning the investigation is identifying the witnesses/employees to be interviewed and gathering the relevant documents. These are ongoing processes. As more facts are uncovered, more names often appear. Investigators will have to meticulously compile and study all documents, continuously looking for evidence.

### Interviews

A central component of the investigation is the witness interview. Witness interviews should be done after all relevant documents have been compiled and thoroughly reviewed. Without preparation, the interview will be useless. An interview question outline should be prepared in advance, based on the evidence.

Just as important as the interview is the written interview report. Memories are not reliable, so the reports serve as the written record of the interview. And when the interview reports are examined in conjunction with each other, the facts often become clearer.

Part of the art of witness interviews involves understanding cultural nuances. This is especially important in cross-border investigations, where an overseas parent company (or law firm) investigates conduct in a local subsidiary. The parent entity may not fully understand issues unique to the local jurisdiction. This includes labor and employment law, privacy matters, and, of course, language. Understanding the local culture and how to effectively communicate with and question employees will also yield much more effective interviews. For these reasons, it is always recommended for local counsel to assist when conducting interviews with local employees.

### Closing the Investigation

The investigator should document each step of the investigation process. Documenting the investigation creates a permanent record of what is being uncovered, how the information is being unveiled, and who is revealing what. The end result is compiled into a report, which can either be written or presented verbally to the company's directors. Whether the report is written or verbal depends on the nature of the investigation. A written report, for example, can be used as evidence to discipline an employee, build a legal case, disclose to shareholders, or address systemic company shortcomings, among other things. But the risk is that the written report may become discoverable by opposing parties or regulators.

### Conclusion

In conclusion, investigations are a critical component of how a company uncovers wrongdoing. Investigations not only help eliminate wrongful behavior, but also show employees that the organization takes misconduct seriously. What is more, with an investigation a company can show the public at large that it will resolutely address allegations of misconduct. This can help the organization distance itself from the bad act. Most importantly, investigations encourage a culture of transparency and accountability, which not only limits liability but is ultimately beneficial for the long-term success of the business. 🏆