ANTI-CORRUPTION LEGISLATION IN THAILAND: AN OVERVIEW FOR FOREIGN INVESTORS

SYNOPSIS

This chapter presents an overview of anti-corruption legislation in Thailand and relevant considerations for foreign investors. Since many laws and regulations address various aspects of corruption, the following presentation will necessarily focus only on the key instruments that are relevant to foreign investors. We first introduce some background information on the issue of corruption, its definition, and general facts on anti-corruption legislation. We then describe the key legislative instruments applicable to foreigners in some detail, namely the relevant provisions of the Thai Penal Code, procurement regulations, and international conventions, followed by reference to laws that contain regulations concerning corporate governance. The impressive number of anti-corruption laws designed to govern the ethical conduct of government employees and political appointees is then listed for the reader's information.

Despite the fact that most of the anti-corruption laws are not relevant to foreign investors, the reader is nonetheless advised to familiarize himself/herself with or seek legal guidance in relation to all aspects of anti-corruption legislation in Thailand.

Readers should also note that this chapter does not address any applicable domestic legislation in a foreign investor's home jurisdiction, which may govern such investor's or trader's practices abroad. An example of this would be the US Foreign Corrupt Practices Act or other domestic legislation, especially in countries that have signed and ratified the OECD Convention prohibiting the bribing of foreign public officials.

THE ISSUE

Given the recent numerous corruption scandals in the political as well as the business world, we consider it more important than ever to raise awareness among our readers about what acts are considered corrupt under Thai law, along with the legal consequences imposed for any wrongdoing.

In this chapter, only regulations concerning corrupt practices as such will be discussed. For questions relating to corporate governance, we have provided only a very brief overview herein and would like to refer the reader to related website chapters that specifically deal with the responsibilities of directors and other company officers.

As lawyers, we are aware that corruption is as old as antiquity. It is as rampant in many parts of Asia as elsewhere in the world. However, such is not the rule. Business in this region can be done without resorting to the insidiousness of corruption, thereby risking criminal convictions or civil liabilities as well as damage to reputation. Still, in the clash of cultures as experienced in international business, one must always remember that what is repugnant to one society may be an accepted business practice in another. Furthermore, it is often difficult to differentiate between corruption on the one hand and tips and rewards and other non-criminal actions on the other. Those who contemplate trade with or investment in Thailand or

other countries in Asia do so at their peril if they fail to learn the ground rules of identifying and dealing with corruption. In order to succeed, one must recognize and understand not only the economic realities but also conflicting ethical considerations and moralities, knowing where to draw the line between the acceptable and the intolerable. Even though corruption is criminalized in all Asian jurisdictions, the rules are different from one country to another.

As legal advisers, we are interested in helping our clients to efficiently operate in the Thai business environment. We are aiming to assist you in finding your own way through cultural diversities and the corresponding legal environment.

Definition

Controversy over corruption begins with its definition. The term "corruption" has been used to refer to a wide range of illicit or illegal activities. Although there is no universal or comprehensive definition of what constitutes corrupt behavior, the most prominent definitions emphasize the abuse of public power or public position for personal benefit.

These definitions, placing the public sector at the center of the phenomenon, do not cover private-to-private corruption. This is because the discussion of the negative impacts of corruption in the private sector is of only recent vintage, even though it has long existed.

The Thai Organic Act on Counter Corruption, which contains a definition, follows these general guidelines, but also includes fraud in the definition.

Anti-Corruption Legislation in General

When talking about anti-corruption laws, we do not refer only to the criminal law and the laws of evidence. They are doubtless important, but to focus on these elements alone is to ignore a much wider range of necessary laws. Such laws include legislation that cover, for example, access to information, conflict of interest, public procurement, freedom of expression and the press, protection of whistle blowers and complainants, gifts and hospitality, judicial review of the legality of administrative actions, money laundering, and others.

Interestingly, in Thailand, the laws dealing with corruption to some extent reflect the character of each of the previously short-lived administrations. As a consequence of different priorities of respective governments, the Thai anti-corruption legislation framework is not totally homogeneous and fails to reflect an unequivocal national approach with regard to curbing corruption. In particular, some administrations allowed for more discretion than others in the determination of corrupt practices by making extensive use of unclear expressions or allowing for vaguely defined exceptions from the rule.

Nevertheless, it should be recognized that Thailand has enacted an impressive number of laws dealing with corruption and ethical standards in the public sector.

Anti-Corruption Legislation in Thailand Relevant to Foreigners and Foreign Investors

The laws applicable to foreigners, foreign entities, or other corporate vehicles with a foreign shareholding include the Thai Penal Code, the regulations concerning public procurement, corporate governance rules as far as they relate to corruption, and the respective domestic legislation. In addition, foreigners should familiarize themselves with the Anti-Money Laundering Act, which is dealt with in a separate section of this website.

The legislation designed to manage the conduct of public employees is of interest for more in-depth study.

From 1932 to 1975, corruption and bribery were regulated through the respective Criminal Codes only. In 1975, Thailand passed its first Anti-Corruption Act and established the Counter Corruption Commission (CCC) to deal with the problem of corruption in the public sector. However, for a number of reasons, mainly a lack of investigative powers, the CCC remained a paper tiger. The vested interests in the Parliament ensured that the law as well as the commission remained weak. In addition, in 1992, Thailand promulgated the Civil Service Act, which organizes the conduct of government employees in office.

In October 1997, Thailand promulgated its latest constitution, the fifteenth in 65 years. This charter, for the first time in Thai history, establishes a constitutional mechanism in an attempt to secure accountability of politicians and bureaucrats to the public. Under the 1997 Constitution, Thailand seeks to curb corruption through a system for the declaration of assets and liabilities, and through the creation of an independent and stronger counter-corruption agency.

Subsequently, a number of laws have been enacted to give substance to the provisions in the charter. Most of them deal with curbing corrupt practices within the public sector and will be discussed later herein.

The Penal Code B.E. 2499 (A.D. 1956)

Effective criminal laws should provide for the six basic offenses which are:

- Bribery of public servants.
- Soliciting or the acceptance of gifts by public servants.
- Abuse of political positions for personal advantage.
- Possession of unexplained wealth by a public servant.
- Secret commissions made by agents or employees in the case of private sector corruption.
- Cases of bribes and gifts to voters.

In Thailand these offenses, except for private sector corruption, are dealt with by different laws.

The Thai Penal Code deals with different types of corrupt behavior, including bribery. However, the regulations on bribery are limited to private to public underhandedness or other types of abuse of public office for personal gain. Still, the law distinguishes between a number of scenarios, including active (offering) as well as passive (accepting) bribery, as well as interference by intermediaries, and even penalizes the promise to bestow a benefit.

In Title II, "Offenses Relating to Public Administration", the Penal Code contains several regulations that deal with bribery of officials, members of the State Legislative Assembly, members of the Changwat Assembly (at the provincial level), or members of the Municipal Assembly.

The relevant regulations are contained in Sections 143, 144 (Offenses Against Officials), 148, 149, and 150 (Malfeasance in Office).

The English translation of Section 143 may sound somewhat unclear with regard to who is subject to penalty. Based on the Thai version of the provision, we understand that Section 143 attempts to cover cases in which an intermediary accepts a benefit in compensation for influencing a public official or a member of any of the Assemblies named above to perform or omit any of his/her functions, resulting in an advantage or disadvantage. The intermediary must act unlawfully of dishonestly. Also, the mere demand of or agreement to accept a benefit is penalized. It is certainly noteworthy that there is no regulation in the Penal Code that fines the giving of a benefit to a broker, letting the person making use of a middleman go penalty free. The penalty is imprisonment not exceeding five years or a fine not exceeding Baht 10,000, or both.

Section 144 punishes the bribing of a public official or Assembly member to incite him/her to undertake, avoid, or delay an act. The law requires that the desired act must be contradictory to the functions of the official, with the result that bribing with the intention to induce an official to act in accordance with his functions goes penalty free. It is unclear whether this result was intended by the legislators.

Again, the mere offer or agreement to give a benefit is punishable under Section 144 regardless of whether an advantage or disadvantage was established. The penalty is imprisonment not exceeding five years or a fine not exceeding Baht 10,000, or both.

The following Sections concern "Malfeasance in Office".

Section 148 punishes the abuse of public power through coercion or inducing in order to procure a benefit. The members of the different assemblies are not included in this section. The penalty is imprisonment of 5 to 20 years or imprisonment for life, and a fine of Baht 2,000 to 40,000, or death.

Section 149 prohibits public officials and assembly members from the acceptance of a benefit as a compensation for their exercising or avoiding any of their functions. Again, the demanding or agreeing to accept a benefit is treated equally by the law. It is not of importance if such act or the avoidance of it is wrongful, nor is it necessary that an advantage or disadvantage result from the officials' behavior. The penalty is imprisonment of 5 to 20 years or imprisonment for life, and a fine of Baht 2,000 to 40,000, or death.

Section 150 extends the penalization to situations where an official exercises or avoids any of his/her duties in return for a benefit that he/she accepted, demanded, or agreed to accept prior to his/her appointment as an official. The penalty is imprisonment of 5 to 20 years or imprisonment for life, and a fine of Baht 2,000 to 40,000, or death.

Sections 151 through 154 deal with other abuses of authority for personal gain.

In Title III of the Penal Code, "Offenses Relating to Justice" are dealt with. "Offenses Against Judicial Officials" are stipulated in Sections 167 to 199. Judicial officials, for the purpose of this law, are persons holding judicial posts, public prosecutors, officials conducting official cases, or inquiry officials.

Section 167 imposes a penalty on anyone who gives or agrees to give a benefit to a judicial official in order to induce him wrongfully to do, not do, or delay an act. Again, the question arises whether it is penalty free if the benefit or property is given with the intention to ensure

the exercising of a rightful act (e.g., paying a bribe to induce a judge to pass a judgment that is in accordance with the facts and the law). The penalty is imprisonment not exceeding 7 years and a fine not exceeding Baht 14,000.

"Malfeasance in Judicial Office" is penalized in Sections 200 to 205. Section 201 provides for the punishment of any official holding a judicial post who wrongfully demands, accepts, or agrees to accept a benefit for himself or another person in order to exercise or not exercise any of his functions. It is not important whether the performance or non-performance of such act is wrongful. The simple fact that an official accepts benefits for exercising his duty is considered punishable. The penalty is imprisonment of 5 to 20 years or imprisonment for life and a fine of Baht 2,000 to 40,000, or death.

Implications

Despite heavy sentences that include the death penalty, the Penal Code remains a rather ineffective tool against corruption. This is because the direct evidence required to prosecute under the Criminal Procedure Code, requiring a paper trail (invoices and receipts), is difficult to collect. Therefore, not many cases have been prosecuted in the past. Also, those offenders who were tried before the criminal court were often confronted with penalties that were out of proportion to the damage incurred. Consequently, the impression emerged that the criminal law had been applied on a very ad hoc basis.

Furthermore, if corrupt practices are defined in a Penal Code, it is impossible to prosecute new, innovative methods of corruption without incorporating them into the Penal Code or other legislation. The Penal Code only deals with the offering, acceptance, or demand of property and/or other benefits, in short, bribery only. It therefore doesn't penalize other methods of corruption. As a practical result, the Penal Code often fails to cover the large-scale, more sophisticated types of corruption. In order to overcome such obstacles as in the Criminal Procedure Code, Thailand has adopted the concept of unusual wealth in its new constitution. In simple terms under this premise, if an official displays an "unusual increase" in cash or assets, the official will be obliged to demonstrate the origin of his or her assets. If sufficient evidence for the legal acquisition cannot be brought forward, the law allows for the presumption that the "unusual wealth" was procured through corrupt practices.

Regulations of the Office of the Prime Minister on Procurement as Amended to No. 5 B.E. 2542 (A.D. 1999)

Few activities create greater temptation or offer more opportunities for corruption than public sector procurement. Every level of government and every kind of governmental organization purchases goods and services from domestic as well as international suppliers, often in quantities and monetary amounts that defy comprehension. So do the bribes paid by businessmen in order to be awarded the contract. In Thailand, the going rate for kickbacks to government officials is reported to have increased from 25% to 40% of the value of the contract.

To the non-specialist, the procurement procedures appear complicated. Often they are, and so they may be manipulated in a variety of ways without great risk of casual detection. The same applies to the way corruption is practiced. When talking about procurement and

corruption, most outsiders simply imagine the payment of kickbacks. However, there are many ways to corrupt the procurement process at any stage.

Before contracts are awarded, the purchaser can:

- Tailor specifications to favor particular suppliers.
- Restrict information about contracting opportunities.
- Claim urgency as an excuse to award to a single contractor without competition.
- Breach the confidentiality of suppliers' offers.
- Disqualify potential suppliers through improper pre-qualifications.
- Take bribes.

At the same time, suppliers can collude to:

- Fix prices.
- Promote discriminatory technical standards.
- Create improper interference in evaluators' work.
- Offer bribes.

The most common approach is to try to engage in direct negotiations without any competition.

For the purpose of this document, we will only touch upon the regulations that directly deal with unethical behavior on either side of the contract and leave aside regulations that indirectly try to provide for a transparent procurement process.

It is important to note that the procurement regulations do not explicitly prohibit bribery nor the offering or acceptance of benefits.

Clause 15 bis of Part 1 of Chapter 2 requires an open and transparent process that allows for fair competition by taking into account the qualifications and capabilities of the tenderers or bidders. However, the section further states that these principles shall not apply in specific cases, constituting an exception under these regulations, thereby giving great latitude to the person in charge to sidestep the requisite for transparency and fair competition.

In order to provide for fair competition, the legislators also included the concept of the "jointly interested bidder" that constitutes a conflict of interest. A jointly interested bidder is defined in Chapter 1, Part 1, as a natural or juristic person who also has an interest, directly or indirectly, in the business of another natural or juristic person who tenders a bid for work for the same project. An interest is assumed in cases of various management or capital relationships. In cases of capital relationships, a conflict is presumed if the person is a major shareholder in "the other" company bidding for the same work. A major shareholder is a party that holds more than 25% of the shares of that other business or, in exceptional cases, at a ratio that is deemed appropriate by the procurement committee. Again, such vague provision is prone to an abuse of discretion.

A jointly interested bidder is also assumed if the spouse or minor of a tenderer holds a position (partner or shareholder) in another business which is tendering a bid at the same time.

Clause 15 ter provides that only one of the jointly interested bidders shall be entitled to tender a bid. Therefore, the officer in charge of the evaluation of bidders (evaluation officer) is required to examine the qualifications of each bidder with regard to any possible joint interest.

Clause 15 quinque requires the deletion of the name of such an apparent jointly interested bidder before the opening of the offer.

The Thai procurement regulations prohibit collusion among bidders. The "obstruction of fair price competition" is defined in Chapter 1, Part 1. In case of suspicion of collusion, Clause 15 sex, Chapter 2, Part 1, stipulates that the evaluating officer has to conduct an investigation. Should an examination confirm allegations or suspicions of collusion among bidders, the names of those applicants have to be removed from the list of competitors.

Again, however, Clause 15 sex provides for an exception from that undesired outcome. If the responsible evaluation officer determines that a bidder or tenderer has cooperated with the government in discovering or revealing the attempted obstruction (e.g., a whistle blower) and in addition has not initiated the plot, the officer may decide to reward such cooperation by not deleting this bidder's or tenderer's name from the list.

With regard to misconduct of the involved government officers, Clause 10 of Part 3, Chapter 1, provides penal provisions for a willful or negligent infringement of the procurement regulations by the official in charge of the procurement process. Most importantly, Clause 10 punishes an official that assists a tenderer or bidder in an attempt to obstruct a fair price competition.

The imposed penalties are divided into three levels depending on the seriousness of the damage incurred and the intention of the government officer. The level of damage is not further defined, leaving it up to the discretion of the person entrusted with the case to decide on the seriousness of the violation.

The provisions above can be considered the core measures to prevent corruption in procurement. For bidders, infringement of these provisions results in an exemption from the bidding process. As mentioned above, there are numerous other provisions that are designed to serve as an impediment. However, since they mostly concern the actual bidding process and are therefore of a rather technical nature, we refrain from discussing them herein.

Finally, the regulators certainly anticipated most of the ways in which the procurement process can be corrupted and tried to incorporate preventive measures (especially in the course of the fourth and fifth amendments). However, the preventive as well as the suppressive measures often provide for unfortunately very discretionary and only vaguely defined exceptions.

INTERNATIONAL CONVENTIONS

There are numerous international agreements in place that aim at reducing corruption. Thailand is not yet a party to any international anti-corruption covenant, but foreigners have to be aware of them nonetheless, as we will see below.

Once ratified and implemented, the conventions usually require the state parties to implement a broad range of anti-corruption measures in their domestic laws.

The most important conventions include:

- The OECD Convention on Combating Bribery.
- The OAS Inter-American Convention.
- The Council of Europe Criminal Law Convention (COE Convention).
- The Council of Europe Civil Law Convention.

These conventions are similar in their content. The differences lie mainly in the scope of application and the types of bribery covered. For example, state parties to both the OECD Convention as well as the COE Convention are required to criminalize the active and passive bribery of domestic and foreign government officials.

While the bribery of domestic public officials is prohibited in most countries, the prohibition against the bribery of other states' officials is a new development for most countries. To the extent that national anti-corruption laws are non-existent, inconsistent, or inconsistently enforced, the creation of international treaty obligations is an important means of preventing and reducing cross-border corruption.

Since Thailand is not a party to any of the conventions, the country has no obligation to criminalize bribery committed by Thai nationals abroad. The practical implication is that Thailand will not hold its nationals liable for bribery committed outside of Thailand. If they are not held responsible in the country where the act was committed, they escape prosecution and penalties.

The situation may be different for foreigners whose countries punish bribery or other corrupt practices perpetrated outside of their home countries.

For example, the German Law on Combating International Corruption (IntBestG) gives equal status to a number of foreign and national officials in the event of corrupt practices, and punishes bribery of foreign officials in accordance with the German Criminal Code (StGB).

Article 2, Section 1 of IntBestG extends the punishment of bribery pursuant to Section 334 StGB to foreign judges or judges who serve at international courts, a number of state officials, foreign soldiers, and other members of international organizations.

The provision, however, does not apply to the receiving end of the bribe.

Similar provisions are provided for in a number of domestic laws, e.g., the U.S. Foreign Corrupt Practices Act.

Therefore, even though certain actions might not be considered criminal in Thailand or the regulations regarding bribery may not be enforced, foreign nationals could still be liable under their own domestic legislation.

Therefore, foreign parties should check whether their country is a party to any of these international agreements, along with the status of the domestic legislation.

CORPORATE GOVERNANCE

Company laws in Thailand include:

- The Public Limited Company Act B.E. 2535 (A.D. 1992) as amended up to No. 2 B.E. 2544 (A.D. 2001).
- The Security Act and respective regulations in the Thai Civil and Commercial Code as amended up to No. 13 B.E. 2541 (A.D. 1998).

Financial authorities plan to restructure Thailand's corporate legal framework in a bid to boost good governance. The national Good Governance Committee has suggested tightening regulations regarding company directors, particularly their financial transactions, and also eliminating loopholes that stand in the way of accountability. The Committee furthermore recommended to design regulations that render the punishment for fraud and other wrongdoing more "flexible" to allow legal channels to claim compensation under civil law instead of having to resort to criminal proceedings.

Also, it has been suggested to include provisions that give shareholders the right to initiate a class action against the management if individual directors fail to fulfil their obligations.

For more information, please refer to the related website sections that specifically deal with different company laws.

Anti-Corruption Legislation Applicable to Thai Nationals

As mentioned earlier, under the Constitution of Thailand B.E. 2540 (A.D. 1997), Thailand seeks to curb corruption through a system for the declaration of assets and liabilities and through the creation of an independent counter-corruption agency with considerable powers. Relevant regulations are contained in Chapter 10 of the Constitution.

Organic Act on Counter Corruption B.E. 2542 (A.D. 1999)

The Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (A.D. 1999) describes the procedures for those officials that are subjected to follow-up before a special commission of the Criminal Court. This Act's promulgation was required by the Constitution and established the National Counter Corruption Commission (NCCC) to regulate the powers and duties of its members as well as different procedures for the investigation and punishment of corrupt officials.

However, the administration recently disregarded a decision by the NCCC to dismiss a senior civil servant from office for corruption and reinstated him in the same position. The NCCC now plans to seek a ruling from the Constitutional Court, and its effectiveness as an institution will depend heavily on the Court's decision.

Other Anti-Corruption Laws and Regulations

There are numerous laws in place that regulate the conduct of public employees including the procedures for investigations into allegations of corrupt practices, liabilities, and penalties. They include:

- The Civil Service Act B.E. 2535 (A.D. 1992).
- The Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (A.D. 1996).
- The Act Regulating the Offense Relating to the Submission of Bids or Tender Offers to Government Agencies.
- The Act on the Management of Partnerships and Securities Owned by Ministers B.E. 2543 (A.D. 2000).
- The Thai Official Information Act (OIA) B.E. 2540 (A.D. 1997).

In addition, the Organic Law on the Election of Members of the House of Representatives and Senators B.E. 2541 (A.D. 1999) as amended up to No. 3 B.E. 2543 (A.D. 2000) contains regulations on electoral fraud and corruption. A Whistle Blower Protection Bill is currently being drafted.

Conclusion

Foreign investors wishing to do business in Thailand should take into consideration the relevant Thai and international laws on anti-corruption. Failure to do so, even inadvertently, may have highly negative consequences, both in terms of reputational damage as well as possible criminal charges. We therefore recommend that investors inform themselves and seek experienced local legal counsel whenever doubt arises about how to draw the line between permissible business customs and prohibited attempts to influence decisions.

ACCOUNTING ACT

In B.E. 2543 (A.D. 2000) Thailand passed the Accounts Act (the Act) to update the 1972 Announcement of the National Executive Council in a move to make the country's private business bookkeeping practices more in line with international accounting standards. The Act increases company accountability regarding bookkeeping but relaxes some previous obligations such as reducing the period for which a company must retain its books from ten years to five years.

The Act requires that registered partnerships, joint ventures established under the Revenue Code, foreign juristic persons operating businesses in Thailand, limited and public limited companies established under Thai law (companies), business offices with regular business operations, and ordinary persons and unregistered partnerships prescribed by the Minister of Commerce keep annual accounts beginning from when they first conduct business in Thailand.

Companies must submit financial statements detailing operation results and financial position to the Commercial Registration Department (CRD) under the Ministry of Commerce within one month from the date such financial statements have been approved by the general meeting. Registered partnerships, joint ventures established under the Revenue Code, and foreign juristic persons operating businesses in Thailand must submit financial statements to the CRD within five months from the date of closing the accounts. Extensions of the time limit for submission are allowed at the Director-General's discretion. These accounts are available for examination by the public upon request.

The financial statements must be certified and opined by a certified public accountant. Exemptions are provided for financial statements of registered partnerships that meet the conditions prescribed in the Ministerial Regulations.

Under the Act, each company must retain accounts from the previous five years on-site or on a computer network with on-site access to these accounts. The Director-General can extend this requirement on an individual basis by up to two more years. If a company loses or accidentally damages account documents, it must notify the CRD of the incident within 15 days. If inspectors find that documents are missing or damaged and not reported to the CRD, they make a rebuttable assumption that such damage or loss was intentional.

Each company must either have a full-time bookkeeper or use an accounting service to prepare its financial statements who must be qualified according to standards set forth in the Ministerial Regulations. Companies must provide the bookkeeper with accurate information sufficient to prepare financial statements according to accounting standards. Until such standards are provided by law, those prescribed by the Certified Accountants and Auditors Association of Thailand will govern financial statement preparation.

Inspectors from the CRD may enter a company or bookkeeper's office during working hours to examine accounts and documents to ensure compliance with the Act. If the CRD believes a company is in violation of the Act, an inspector may enter a company or bookkeeper's office at any time to seize any documents necessary to prepare a financial statement. Such seizure may take place without a warrant if the CRD believes the delay in obtaining a warrant may result in destruction, removal, or alteration of evidence. An inspector may also issue written orders summoning any concerned party to give statements regarding a company's accounts or may request that a bookkeeper or company send documents for examination.

Punishment for non-compliance with the Act ranges from relatively small fines to up to three years' imprisonment. In the event that punishment is placed on a juristic person, natural persons responsible for such offenses are punished as well, except if it can be proven that such person has no knowledge of or has not assented to such juristic person committing the offenses.