

CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES IN THAILAND

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I. INTRODUCTION

As advancement in information and communication technologies has made the world borderless, corporate activities have become global through network systems, thus making commission of corporate crime more sophisticated and complicated. Moreover, corporate crime is often committed by skilled perpetrators and more often by a conspiring group who are usually ahead of the law enforcement authorities. These characteristics make corporate crime a serious threat and difficult to prevent, deter and combat not only at the domestic level but also at the global level. Nonetheless, it is essential for the State to take legal actions as well as other administrative measures to prevent and suppress this crime, or at least to lessen the frequency and the seriousness of this crime.

The most serious corporate crime in Thailand is financial and banking crime. In 1997, Thailand faced a critical financial crisis which caused serious damage to the country. Its impact was far greater than that of ordinary crimes. Thailand's economy and financial system was undermined. Bank and financial institutions were left with large numbers of non-performing loans and many of them finally collapsed. Foreign investors lacked confidence in Thailand's financial system and ceased their investment in Thailand. The crisis affected sustainable development of Thai society and culture due to unemployment and low income. Although this financial disaster has been virtually cured, the aftermath remains to be healed.

This paper examines the current situation of corporate crime in Thailand, and problems and challenges in the investigation, prosecution and trial of corporate crime in Thailand. Following this introduction, it is divided into five parts. Firstly, I will explain the criminal liability of legal persons and persons responsible for the operation of such legal persons and criminalization in relation to corporate crime in Thailand. The following part analyses the current situation and issues concerning corporate crime in Thailand, especially financial and banking crimes. Thirdly I will address the enforcement authorities in relation to corporate crime in Thailand. Fourthly, I will briefly and generally describe international co-operation in criminal matters between Thailand and other States. The final part is the conclusion.

II. THE LIABILITY OF LEGAL PERSONS AND CRIMINALIZATION IN RELATION TO CORPORATE CRIME IN THAILAND

A. Criminal Liability of Legal Persons in Thailand

The Thai civil and commercial law recognizes that a corporation enjoys rights and duties as a natural person does and such rights and duties are distinguished from those of its shareholders.¹ A corporation's will is declared through its representatives and its business is carried out through its representatives.² Regarding criminal liability of a legal person, although the Supreme Court has decided that a legal person can be a subject of and be punished for a criminal offence, there is still controversy as to the scope of punishment. The controversy is whether a legal person can be punished for any act which is by law a criminal offence when committed by a natural person, or should a legal person be punished only when there is a statutory provision specifying so? This is because provisions on criminal liability of a legal person are stipulated only in some Acts, whilst the Penal Code, which is the major criminal law in Thailand, is silent on this matter.

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¹ The Civil and Commercial Code, Section 66 and Section 67.

² The Civil and Commercial Code, Section 70 paragraph 2.

Presently there are two opinions regarding the scope of criminal liability for a legal person. The first is that of legal scholars which is that a legal person cannot be punished for a criminal offence unless there is a statutory provision specifying so. This means that what is deemed to be an offence when committed by a natural person is not always considered a criminal offence when carried out by a legal person. A legal person should be criminally punished only when it commits an act which is a statutory offence. The second is that of the Supreme Court which has continuously held that a legal person can be criminally punished. However, before further discussion on this matter, it should be noted that the Thai legal system is based on the civil law system, with influences of common law. Legislation is seen as the primary source of law. Courts thus base their judgments on the provisions of codes and statutes. In the case where there is no legislation applicable to a certain case, courts may draw analogies from statutory provisions to fill lacunae and to achieve coherence.

To understand the scope of criminal liability on legal persons, the author will divide criminal legislation into three types.

1. Statutory Provisions Imposing Criminal Liability on a Legal Person

Examples include:

- The Commercial Banking Act B.E. 2505 (1962);³
- The Anti-Money Laundering Act B.E. 2542 (1999).⁴

This type of legislation does not raise any argument about whether a legal person is accountable for a criminal offence since the statutory provision clearly states that a legal person is the subject of an offence.

2. Statutory Provisions Imposing Criminal Liability on Persons of Certain Status

Examples include:

- The Mining Act B.E. 2461(1918): imposes criminal liability on “a mining concessionaire”;⁵
- The Measurements Act B.E. 2466 (1923): imposes criminal liability on “the principal” or “employer”;⁶
- The Act on the Standard of Export Goods B.E. 2503 (1959): imposes criminal liability on “any person who inspects the standard of goods”;
- The Factory Act B.E. 2512 (1969) imposes criminal liability on “any person who has been granted a license to operate a factory”;
- The Act on the Transportation by Land B.E. 2522 (1979) imposes criminal liability on “any person who has been granted a license to operate transportation”;
- The Supreme Court also decided that this type of statutory provision can be applied to a legal person.⁷

3. Statutory Provisions Specifying the Subject of the Offence by Using the Terms “Anyone” or “Whoever”

The Penal Code and other criminal legislation stipulate “anyone” or “whoever” as the subject of an offence without providing definition of such terms. Thus a question arises as to whether such terms include legal persons. However, the Supreme Court in many cases has construed these terms to include a legal person. In Supreme Court Decisions Nos. 787-788/2506, the Court laid down a precedent where the representative of a legal person acted in the scope of his authority and in accordance with the objectives of such a legal person

³ Section 41: Any commercial bank which fails to examine its register of shareholders or to notify its shareholders in violation of the provisions of Section 5 septem or makes a false statement or conceals facts which must be revealed in the confidential statements or explanatory notes submitted in accordance with Section 23 shall be liable to a fine not exceeding one hundred thousand Baht. This Act will later refer to as the Commercial Banking Act.

⁴ Section 61: Any legal person who commits offences under Section 5, Section 7, Section 8 or Section 9 shall be liable to a fine of two hundred thousand Baht to one million Baht. This Act will later be referred to as the AMLA.

⁵ In Supreme Court Decisions Nos. 841-842/2469 and No. 185/2489, the Court decided that a legal person as a mining concessionaire was liable for an offence.

⁶ A legal person can also be held liable as an employer for an act committed by its employees in the course of doing business for such legal person.

⁷ In Supreme Court Decision No. 480/2524, the Court decided that a legal person committed a criminal offence and therefore was liable to the fine according to the Factory Act B.E. 2512 Section 50 and Section 50 bis.

in a manner that such legal person benefited from such an act, and such legal person was accountable and held criminally liable for such an act. This interpretation shows that the Supreme Court applied Section 70 paragraph 2 of the Civil and Commercial Code to the case and deemed that the will of representatives of a legal person was the will of such legal person. Therefore an act committed by its representatives in the name of such legal person was an act of such legal person. The Court finally held that such legal person was accountable for an offence relating to imitation of trademark. The precedent from this case has been applied to many subsequent cases adjudicated by the Supreme Court, namely Decision No. 1737/2506 and Decision No. 1669/2506, where the Supreme Court respectively held that a legal person was liable for an offence relating to counterfeiting of a trademark and an offence relating to forgery. These cases are examples of offences under the Penal Code committed by a legal person. The Supreme Court also decided that a legal person can be held liable for a criminal offence under other criminal statutes. Example of this case can be found in Supreme Court Decision No. 59/2507 in which the Court held that a legal person could commit a crime under the Act on the Misuse of Cheques B.E. 2497(1954).

In conclusion, although it has been long recognized that a legal person should be held accountable for a criminal offence, and in practice a legal person can be held criminally liable in the same manner as a natural person, there is still an argument as to whether the imposition of criminal liability upon a legal person where there is no statutory provision specifying so is against the principle of due process of law.

B. Criminal Liability of Executives or Persons Responsible for the Activities of a Legal Person in Thailand

It is widely recognized that the notion of a legal person is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.⁸ Therefore, in order to prevent a legal person from committing a criminal offence, the imposition of criminal liability upon executives or persons responsible for the activities⁹ of a legal person is necessary. The first Thai legislation which stipulated criminal liability for executives of a corporation was the Act on the Prevention on Profiteering B.E. 2480(1937).¹⁰ This Act has the objective of preventing any wrongdoing which causes disorder of the market mechanism. Later on, the State promulgated various Acts which contain provisions on the criminal liability of executives of a legal person. Examples of these Acts include the Commercial Banking Act and the Act on Securities Exchange and Stock Market B.E. 2535 (1992).

Criminal liability attached to a legal person usually has linkage to criminal liability of its executives. This means that when it is prescribed by law that wrongdoing committed by a legal person is a criminal offence and such legal person shall be punished according to such law, it is usually presumed by such law that its executives commit the same offence and shall be punished accordingly. The rationale behind this is that the evidence to prove that the offender is guilty is usually in the possession of the offender, especially in the case of economic crime; thus making it difficult for the public prosecutor to reach a “proof beyond reasonable doubt” standard resulting in dismissal of the case. It has been argued that this is immoral and inconsistent with the principle of presumption of innocence. However, that argument has been quieted by the Constitutional Tribunal. In its verdict, the Tribunal stated that the Tribunal has thoroughly considered this matter and agreed that in criminal cases, an accused or offender is presumed innocent unless the plaintiff has successfully proved otherwise. Therefore, any legislation which prescribes that an accused or offender is criminally liable without such proof of the plaintiff certainly violates the Constitution and can not be enforced. However, Section 6 of the Gambling Act B.E. 2478 (1935) does not state this. On the contrary, it states that an accused or offender is presumed innocent unless the plaintiff has successfully proved that the accused or offender was found in the gambling place. Therefore such presumption does not apply primarily. It applies only when the plaintiff

⁸ <http://www.icclr.law.ubc.ca/Publications/Reports?FergusonsG.PDF>

Viscount Haldane cited in Gerry Ferguson, Corruption and Corporate Criminal Liability.

⁹ In this paper, executives of a legal person means representatives, directors, managers or any persons who are responsible for the operation or the business of a legal person or entitled to declare the will or decision of such legal person.

¹⁰ Section 18 of this Act states that in cases where a legal person commits an offence under the Act, its representative shall be liable according to Section 15, Section 16 or Section 17, unless he can prove that he had no part in the commission of such offence.

has successfully proved so. The Tribunal finally concluded that such presumption is not inconsistent with the Constitution.

Criminal liability of executives of a legal person has been stipulated in many pieces of legislation. Most of them are laws on economics. The liability imposed can be categorized into two types; conclusive or irrebuttal presumption and rebuttal presumption.

1. Conclusive or Irrebuttal Presumption

Examples of Acts which stipulate conclusive presumption of liability are the Act in Relation to the Fault of Registered Partnership, Limited Partnership, Associations and Foundations B.E. 2499 (1956)¹¹ and the Act on Places of Service B.E. 2509 (1966).¹² The rationale behind this conclusive presumption is that the act of a legal person is the act of an executive. Therefore, it is justified to deem that such act is committed within the knowledge of its executives.

In this case, the punishment imposed upon an accused is usually a fine. Under the Criminal Procedure Code Section 37(1), where the punishment is a fine and an accused has paid the fine as fixed, the case is settled. Therefore this presumption does not seriously affect the rights and liberty of such executives.

2. Rebuttal Presumption

Rebuttal presumption of criminal liability is mostly found in laws on economics. Examples include the AMLA¹³ and the Act on Offer of Sale to the State Agencies B.E. 2542 (1999).¹⁴ Although the Constitutional Tribunal, as mentioned earlier, held that this presumption is not inconsistent with the constitution, it should be noted that this presumption may have tremendous impact on the rights and liberty of such an executive. As an offender, such an executive has the burden of proving that he or she is innocent. Although he or she is successful in proving so, he or she may lose his or her credibility and trustworthiness. Despite this fact, in order to supervise and control the operation of a legal person, this presumption outweighs such loss.

C. Legal Framework of Criminal, Civil and Administrative Sanctions in Thailand

Criminal, civil and administrative sanctions are as follows.

1. Criminal Sanctions

The allowable criminal punishments stipulated in Section 18 of the Penal Code are the following:

- death (capital sentence)
- imprisonment
- confinement
- fine
- forfeiture of property.

However, there is argument about whether these criminal punishments are appropriate for a legal person. This is because it is not possible to inflict the death penalty, imprisonment or confinement upon a legal person, while fine, although perhaps of a large amount for natural persons, can still be a minimal amount compared to the large sums of pecuniary benefit a legal person may have acquired through the commission of an offence, and thus a fine penalty may not be a proper sanction to prevent a company from committing criminal acts. Forfeiture of properties can be done only to properties used to commit a crime or properties obtained from the commission of such crime. Considering these two remaining penalties, it is doubtful whether they are sufficient and appropriate. If these two penalties are insufficient or inappropriate, what punishments are appropriate?

2. Civil Sanctions

Civil sanctions are in the form of compensation for damages. A legal person as an employer or a principal is

¹¹ Section 25.

¹² Section 26.

¹³ Section 61.

¹⁴ Section 9.

liable for compensation for any damage done to other persons by its representatives or a person empowered to act on behalf of such legal person in the exercise of its functions, saving its rights of recourse against those who caused the damage. However, if the act is not within the scope of that legal person's objective or beyond the power or duties of such representatives or person empowered to act on behalf of such legal person, these said persons alone are liable for compensation.¹⁵

3. Administrative Sanctions

At present, legal drafting style in Thailand is to incorporate administrative sanctions into the legislation to make law enforcement more effective and to respond more rapidly to the crime. The legislation generally stipulates what a legal person or its executives or management persons must do and must refrain from doing. However, the conditions are normally provided in a subordinate law such as a notification or rule. Non-compliance with such conditions will constitute a criminal offence. Examples of administrative measures include the removal of executives from a corporation to prevent damage to public spheres as stipulated in the Commercial Banking Act and the Act on the Undertaking of Finance Business, revocation of the license of a corporation, daily fine until such legal person stops violating the laws as stipulated in the Enhancement and Conservation of National Quality Act B.E. 2535(1992) and the Act on the Control of Building B.E. 2522 (1979). Moreover, the legislation usually provides the sequence or order of punishment. Violation of such legislation will firstly be punished by the regulator of such legislation. If the violator is punished, the case is settled and there is no further indictment. For example, if the violator is to be fined, and such violator pays the fine fully, the case will be settled. On the contrary, if the violator fails to pay the fine, the regulator will further the case for prosecution.

D. Criminalization in Relation to Corporate Crime in Thailand

There is no definition of corporate crime nor is there any direct statutory provision regarding this type of crime. However, the term corporate crime can be defined as crime committed either by a corporation (for example, a business entity having a separate legal personality from the natural persons that manage its activities) or by individuals that may be identified with a corporation or other business entity¹⁶ or by their agents against members of the public, the environment, creditors, investors or corporate competitors).¹⁷

Corporate crime in Thailand usually relates to economic crime; in another words when a corporation commits a crime, it usually violates economic laws. It should also be noted that a corporation can either be a subject of the crime, which is the case when a corporation itself commits a crime, or a victim of the crime, which is the case when its executives or employers act against their fiduciary duty or dishonestly embezzle the assets of such corporation.

Economic crime in Thailand is categorized into seven types as follows:¹⁸

- offences relating to finance and banking¹⁹
- offences relating to commerce and trade²⁰
- offences relating to computer-related crimes²¹
- offences relating to product and consumer protection²²
- offences relating to price fixing and monopoly²³

¹⁵ The Civil and Commercial Code, Section 76.

¹⁶ http://en.wikipedia.org/wiki/Corporate_crime .

¹⁷ <http://www.aic.gov.au/publications/tandi/ti05.pdf> . Corporate Crime in Australia. Australian Institute of Criminology. Trends and issues in crime and criminal justice. Compiled and written by Peter Grabosky and John Braithwaite.

¹⁸ Government of Thailand, Thailand Country Report, The Eleventh United Nations Congress on Crime Prevention and Criminal Justice 18-25 April 2005 Bangkok, Thailand. Correction Press, Bangkok, 2005. p. 213

¹⁹ Examples are (a) offences relating to finance and banking in which either the Bank of Thailand, a commercial bank or credit finance company are the victim or offender under the Commercial Banking Act, the Act on the Undertaking of Finance Business and (b) offences relating to currency exchange under the Exchange Control Act B.E. 2485 (1942).

²⁰ Examples are intellectual property related crime, insurance fraud.

²¹ Examples are offences under the Computer Crime Act B.E. 2550 (2007).

²² Examples are offences under the Consumer Protection Act B.E. 2522 (1979).

²³ Examples are offences under the Trade Competition Act B.E. 2542 (1999), and the Price of Goods and Service Act B.E. 2542 (1999).

- offences relating to taxation, customs, income tax and excise tax²⁴
- offences relating to forestry, minerals, fuels, petrochemicals and natural resources.²⁵

III. CURRENT SITUATION AND ISSUES CONCERNING CORPORATE CRIME IN THAILAND

As mentioned earlier, when a corporation commits a crime, it is usually related to economic crime.²⁶ Compared to street crime, economic crime seems to be less violent since it causes no physical harm; thus it can lure one into thinking that it is not dangerous. However, its impact is far greater than one can imagine. Moreover, it is difficult to prevent, deter or combat economic crime since it is often committed by elite well-educated people of good reputation, experts and executives, directors, managers or persons responsible for the operation of or empowered to decide on behalf of such corporations in the course of their duty. In this regard, corporate crime overlaps with white collar crime. Corporate crime may also overlap with organized crime. This is because criminals may create a corporation either for the purpose of crime or as a vehicle for laundering the proceeds of crime. With the advancement of technology which makes the global market borderless and available to corporations, corporate crime may become transnational crime. Moreover, corporate crime is mostly hidden, obscured within the layers of economic complexities; thus making commission of corporate crime more sophisticated and complicated than ordinary crime. These characteristics of corporate crime make it not only difficult to prevent, deter and eradicate but also require international co-operation to do so.

At present, there are various kinds of economic crime occurring in Thailand. Examples of economic crime are crimes in relation to intellectual property, commerce, banking and finance, environment and public health. However, according to the statistics of the Royal Thai Police,²⁷ economic crime in Thailand is mostly crime in relation to commerce and finance and banking. It is said that from 1993 to 2003 the loss in capital markets and financial markets were 50,000 million baht. Out of this number, 40,000 million baht was lost in the financial market. From 1992 to 2002, there were 46 cases filed in relation to banking and financial crimes; 27 cases were filed under the Commercial Banking Act and 19 cases were filed under the Act on the Undertaking of Finance Business. The total amount of loss was 42,678.1 million baht. This paper will explore only economic crime in relation to finance and banking.

Financial and banking crime has been among the most serious corporate crime in Thailand. It destroyed Thailand's financial systems and embroiled Thailand in financial crises. The first financial crisis was the Raja case in 1979. This case stimulated the State to promulgate a new legislation called the Act on Loan Amounting to Fraudulence B.E. 2527 (1984) which later was amended in B.E. 2535 (1992) and in B.E. 2545(2002). The second financial crisis happened from 1983 to 1992 when many financial institutions collapsed and the State had to take over their business to protect the public who were creditors of those financial institutions. The third financial crisis happened in 1997. It started with the case of the Bangkok Bank of Commerce Plc. (B.B.C). B.B.C's executives had fraudulently carried out the business of the bank by providing non-collateral loans, providing loans to paper companies and making false statements of the bank. B.B.C. was blamed as the cause of the 1997 financial disaster. The impact from this third financial crisis is critical; its damage was greater than those of the earlier crises. Thailand's economic and financial systems were destroyed, resulting in economic instability which scared away foreign investors. Bank and financial institutions were left with a large number of non-performing loans and many finally collapsed. As many as 1.84 million people were unemployed in 1998.²⁸ Debtors of non-performing loan were sued. Many companies

²⁴ Examples are offences under the Revenue Code, the Custom Act B.E. 2496 (1953), the Excise Tax Act B.E.2527 (1984) and the Excise Tariff Act B.E. 2527 (1984).

²⁵ Examples are offences under the Forest Act B.E. 2484 (1941), the Mineral Act B.E.2510 (1967), the Petroleum Act B.E. 2514 (1971) and the Petroleum Income Tax Act B.E. 2514 (1971).

²⁶ As mentioned above that corporate crime relates to economic crime, therefore, the term economic crime also refers to economic crime committed by a corporation.

²⁷ [http:// www.rakbankerd.com/hotnewes.html?nid=36](http://www.rakbankerd.com/hotnewes.html?nid=36)

²⁸ http://www.info.tdri.or.th/library/quarterly/text/m99_2.htm

Summary of Discussion and Recommendations. The 1998 TDRI Year-End Conference "From Crisis to Sustainable Development". Jointly organized by Thai Chai Pattana Foundation and the Thailand Development Research Institute. December 12-13, 1998. Ambassador City Jomthien, Chon Buri Published in TDRI Quarterly Review Vol. 14 No. 1 March 1999.

went bankrupt. The impact was also felt among the poor, especially those receiving state welfare and other less advantaged groups under the care of charitable foundations. Moreover, as the economy has continued to be weak for some time, the social and economic impacts spread throughout society in the form of income reduction and a rise in living expenses, which in turn cause increasing crime, drug abuse, unsustainable exploitation of natural resources, and over-use of public facilities.²⁹

Commercial banks and financial institutions play a significant role in a country's economy. How far a country can be developed depends enormously upon its banking and financial systems and status. However, the capital used in the operation of the commercial bank is gathered from the public through the deposit system. As aforementioned, the B.B.C. case was the result of corrupt or dishonest practice of its executives; therefore to prevent the recurring of financial crisis, legal measures must also be efficiently and effectively provided to regulate or supervise the practice of these persons. It is also essential to bear in mind that legal measures must be appropriately provided so that they do not interrupt the flow of the market and the law should not be altered or amended too frequently as this would confuse investors, hindering the growth of investment.

Section 1168 of the Civil and Commercial Code states that: "the directors must in their conduct of the business apply the diligence of a careful businessman". In addition, there are statutory provisions stipulating that the operation of commercial banks and financial institutions which results in the loss of public interest is a criminal offence and the directors or management persons of the bank or financial institutions shall be punished by such provisions. Other non-criminal measures, such as remedial measures, are also provided under Thai law.

A. Preventive and Remedial Measures for Financial and Banking Crimes

1. Preventive Measures

To prevent this type of crime, criminal sanctions and non-criminal sanctions are used. These sanctions detail as follows.

(i) Criminal Sanctions

The Commercial Banking Act and the Undertaking of Finance Business were promulgated to regulate business operation of commercial banks and financial institutions respectively. However, the Commercial Bank Act does not stipulate the punishments for executives who violate the law. Therefore, the criminal sanctions applied are those specified in the Penal Code, such as fraud and embezzlement, whilst the punishments for executives of financial institutions are stipulated in the Act on the Undertaking of Finance Business. The penalties under the Penal Code and the Act on the Undertaking of Finance Business are fine and imprisonment.

(ii) Non-Criminal Sanctions

Both the Commercial Banking Act and the Act on the Undertaking of Finance Business provide administrative measures to control banking and financial business. These measures can be summarized as follows:

(a) Removal of Directors or Management Persons

This measure is provided in Section 24 ter of the Commercial Banking Act³⁰ and Section 57 bis of the

²⁹ Ibid, p.12.

³⁰ Section 24 ter: Where there is evidence that the condition or operation of any commercial bank is such that damage may be caused to the public interest, or where the directors, managers or persons responsible for the operation of any commercial bank fail to comply with the order of the Bank of Thailand under Section 24 bis, the Bank of Thailand shall have power to order such commercial bank to remove directors or persons who were responsible for the operation of the commercial bank and for having caused such damage.

Where the Bank of Thailand orders the removal of any persons under the first paragraph, the commercial bank shall, with the approval of the Bank of Thailand, appoint persons to replace the persons so removed within 30 days from the removal date.

Where any commercial bank fails to remove the persons under the first paragraph or fails to appoint other persons in place of persons so removed as specified in the second paragraph, the Bank of Thailand, with the approval of the Minister, shall have the power to remove such persons or appoint one or more persons to replace the persons so removed.

Where there is an urgent need to rectify the financial condition or the operation of any commercial bank such that any delay may cause damage to the public interest, the Bank of Thailand, with the approval of the Minister, shall have the power to immediately remove directors, managers or persons responsible for the operation of the commercial bank and appoint one or more persons to replace the persons so removed as appropriate.

Act on the Undertaking of Finance Business.³¹ Under these provisions, there are two circumstances in which the Bank of Thailand (BOT) can remove directors or management persons of commercial banks and finance institutions. The first case is when damage has been caused or may have been caused to the public interest. The second case is when damage has not yet been caused but there is an urgent need to rectify the status or the operation of commercial banks or financial institutions. These sections were amended in 1997. Before the amendment, the BOT had the power to remove such persons only when there was evidence that such persons had caused damage to the public interest in the course of their operations. However, in practice, problems that arise from the operation of commercial banks or financial institutions can rapidly result in disaster for such institutions, as happened in the case of B.B.C. Therefore, if the BOT is required to investigate the cause of such damage before the removal can be done, it may be too late to rejuvenate the commercial bank and financial institution. Having been made aware of such problems, the State thus amended these two sections.

(b) Restraint of Certain Types of People from Holding Managerial Positions or Becoming Executives
Section 12 quarter of the Commercial Banking Act and Section 22 of the Act on the Undertaking of Finance Business prohibit persons who fall under the following categories from managerial positions. These categories are:

- (1) persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent;
- (2) persons who have been a director, manager, deputy manager, or assistant manager of a commercial bank or a financial institution which has had with its licence withdrawn, unless an exception has been granted by the BOT;
- (3) persons who have been removed from a position in a commercial bank or financial institution.

The reasons to prohibit such persons from managerial positions are that they lack sufficient knowledge to operate the business, are not trustworthy and have a tendency to commit financial crimes which may lead to the collapse of the corporation.

2. Remedial Measures

Remedial measures provided in the Commercial Banking Act and the Act on the Undertaking of Finance Business are: seizure and attachment of property, restraint from leaving the kingdom and restitution or compensation for damage.

(i) Seizure and Attachment of Property

Section 46 decem paragraphs 1-3 of the Commercial Bank Act, and Section 75 tredecim paragraphs 1-3 of the Act on the Undertaking of Finance Business state that the BOT has power to order seizure or attachment of properties of directors or management persons of commercial banks or financial institutions or properties which are legally deemed to be properties belonging to such persons if the BOT considers that damage to the public interest may be caused unless an immediate action is taken. Such order of the BOT shall continue to be in effect unless the Court orders otherwise. In some instances, such as in the process of gathering evidence,

³¹ Section 57 bis: Where there is evidence that the condition or operation of any company is such that damage may be caused to the public interest, or where the directors, managers or persons responsible for the operation of any company fail to comply with the order of the Bank of Thailand under the first paragraph of Section 57 or Section 57 ter, the Bank of Thailand shall have power to order such company to remove its directors, managers or persons responsible for its operation who having caused such condition or operation of the company. If the Bank of Thailand orders the removal of any person, such company shall, with the approval of the Bank of Thailand, appoint other persons to replace the persons so removed within thirty days from the removal date. There a company fails to remove such persons or removes but fails to appoint other persons in their places, the Bank of Thailand with the approval of the Minister shall have power to issue the following orders:

- (1) removal of its directors, managers or persons responsible for the operation of the company whom the company fails to remove;
- (2) appoint one more persons to replace the person removed for a period not longer than three years. The person so appointed shall be entitled to remuneration to be paid from the assets of the company as prescribed by the Minister. During the period that the persons so appointed hold office, shareholders of the company may not pass a resolution to revoke or change the orders of the Bank of Thailand. The person removed shall no longer be involved in or manage, directly or indirectly, affair sof the company, and shall facilitate and inform facts to the person under (2) or in the manner as a competent officer may prescribe.

For the purpose of this Section, the order of the Bank of Thailand issued by virtue of this Section shall be deemed to be resolution of a shareholders' meeting under the Civil and Commercial Code or the law on limited public companies, as the case may be.

which make it impossible to file a case in Court within 180 days, the Court having territorial jurisdiction may extend the period of seizure or attachment as requested by the BOT.

An official who has the duty to carry out such an order is an official by definition of the Penal Code;³² thus in case he or she fails to comply with such order, for example destroy, conceal, steal or transfer such properties, he or she commits a criminal offence and shall be punished accordingly. These offences are offences under the Penal Code Section 141,³³ Section 142³⁴ or Section 368.³⁵ Furthermore, if non-compliance with such order is to prevent creditors from receiving payment in whole or in part, Section 350 of the Penal Code shall be applied.³⁶

(ii) Restraint from Leaving the Kingdom

This measure is stipulated in Section 46 decem paragraph 4 of the Commercial Banking Act.³⁷ Under this section, in order for the Court or Director General of the Police Department (presently Commissioner General of the Royal Thai Police) to order such restraint, two elements must be proved:

- (a) that there is sufficient evidence that the said person has committed an offence prescribed by law; and
- (b) that there is reasonable grounds for suspecting that the said person is about to abscond from the Kingdom.

(iii) Restitution or Compensation for Damage

The last paragraph of Section 46 novem of the Commercial Banking Act³⁸ and Section 75 duodecim of the

³² Response of the Judiciary Council (general assembly) to the BOT query.

³³ Section 141: Whoever removes, damages, destroys or renders useless any official seal or mark stamped or affixed by an official to anything in the due exercise of his functions as evidence in the seizing, attaching or keeping of such thing, shall be punished with imprisonment not exceeding two years or fine not exceeding four thousand baht, or both.

³⁴ Section 142: Whoever, damages, destroys, conceals, makes away with, loses or renders useless any property or document himself, or orders such person or the other person to send or keep it, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both.

³⁵ Section 368: Whoever, being informed of an order of an official given according to the power invested by law, refuses to comply with the same without any reasonable cause or excuse, shall be punished with imprisonment not exceeding ten days or fine not exceeding five thousand baht, or both.

If such order is an order authorized by law requiring a person to assist in carrying on the activities in the function of an official, the offender shall be punished with imprisonment not exceeding one month or fine not exceeding one thousand baht, or both.

³⁶ Section 350: Whoever, in order to prevent his creditor or the creditor of the other person from receiving payment in whole or in part which has been or will be claimed through the Court, removes, conceals or transfers any property to another person, or maliciously contracts a debt for any sum which is not true, shall be punished with imprisonment not exceeding two years or fine not exceeding four thousand baht, or both.

³⁷ Section 46 decem paragraph 4: In the case under the first paragraph, and where there is reasonable ground for suspecting that the said person is about to abscond from the Kingdom, the Criminal Court shall have power to restrain that person from leaving the Kingdom when requested by the Bank of Thailand. In case of emergency, when the Governor of the Bank of Thailand or a person designated by the Governor notify the Director General of the Police Department, the Director General of the Police Department shall have power to restrain that person from leaving the Kingdom for a temporary period of not more than fifteen days until the Criminal Court orders otherwise.

³⁸ Section 46 novem: In the case where it appears that any of the following offences have been committed:

- (1) in the operation of any commercial bank, the director or person responsible for the operation of that commercial bank commits an offence concerning things under the provisions of Chapter 1, Chapter 111, Chapter IV, Chapter V or Chapter V11 of title X11 of the Penal Code, or Section 40, Section 41, or Section 42, of the Act on Offences concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations B.E. 2499, or Section 243 or Section 244 of the Limited Public Companies Act B.E. 2521;
- (2) in the examination of a commercial bank's accounts, the auditor commits an offence under Section 269 of the Penal Code or Section 31 of the Act on Offences concerning Registered Partnerships, Limited Companies, Associations and Foundations B.E. 2499; or
- (3) any person who employs or supports another to commit the offence under (1) or (2), the Bank of Thailand shall be deemed to be the injured person under the Criminal Procedure Code.

Where offences under this Section have been committed, the public prosecutor, when instituting the criminal prosecution, shall have power to apply for the restitution of the property or the value thereof or the compensation for any damage on behalf of the person injured. The provisions on filing of civil cases in connection with an offence under the Criminal Procedure Code shall apply *mutatis mutandis*.

Act on the Undertaking of Finance Business³⁹ state that the public prosecutor shall have the power to apply for restitution of the property or compensation for damage. These sections also state that the provisions on the filing of a civil case in relation to penal actions are to be applied *mutatis mutandis*. Thus the public prosecutor is entitled under Section 43 of the Criminal Procedure Code⁴⁰ to file a civil case on behalf of the injured person. It should be noted that remedial measures provided in the Commercial Banking Act and in the Act on the Undertaking of Finance Business is broader than that in the Criminal Procedure Code. In the Criminal Procedure Code, the public prosecutor has power to apply only for restitution of the property or the value which the injured person is entitled to and such right of restitution is in relation to offences against property, but he or she has no power to apply for damages on behalf of the injured person. The injured person has to file a civil case in relation to such criminal offence to acquire damages.

B. Problems in Relation to Preventive and Remedial Measures

There are some problems in relation to preventive and remedial measures.

1. Problems Regarding Preventive Measures

(i) Problem Regarding the Elements of Crime

The structure of criminal liability in Thailand or the elements which are required to be successfully proved to punish a person are:

- such person commits an act intentionally, negligently, or unintentionally in cases of strict liability;⁴¹
- the law provides that such act is a crime and there is no justified cause, such as a lawful defence, to so act;
- such person is able to appreciate the nature or illegality of his or her act and is able to control him or herself. Hence, where such person is unable to appreciate the nature and illegality of his or her act or unable to control his or her defective mind, he or she is not liable for such act.

The first element, the intention, has two meanings. The first is manifest intention or simple intention. The second is special intention or bad motive. The term "special intention" is defined in the Penal Code as "to do an act dishonestly".⁴²

³⁹ The public prosecutor, when instituting criminal prosecution under Section 75 bis, Section 75 ter, Section 75 quarter, Section 75 quinqué, Section 75 sex, Section 75 septem and Section 75 octo, Section 75 novem, Section 75 decem or Section 75 undecim, shall have power to claim the restitution of the property or the value thereof or damages on behalf of the injured person and shall be exempted from the Court's fee.

⁴⁰ Section 43: In cases of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, where the injured person has the right to claim the restitution of the property he has been deprived of through of the offence, or the value thereof, the Public Prosecutor, when instituting the criminal prosecution, shall, on behalf of the injured person, apply for restitution of the property or the value thereof.

⁴¹ Section 59 of the Thai Penal Code: A person shall be criminally liable only when such person commits an act intentionally, except in the case where the law provides that such person must be liable when such person commits an act by negligence, or except in the case where the law clearly provides that such person must be liable even though such person commits an act unintentionally. To do an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing.

⁴² Section 1: In this Code

(1) "To do an act dishonestly" means to do an act in order to procure, for himself or the other person, any advantage to which he is not entitled by law.

Offences relating to financial and banking crimes as stated in the Penal Code,⁴³ the Commercial Banking Act or the Act on the Undertakings of Finance Business⁴⁴ require special intention or bad motive of the perpetrator. This requirement causes a considerable problem since the public prosecutor has a duty under the Criminal Procedure Code⁴⁵ to prove beyond reasonable doubt. If the public prosecutor fails to prove to such extent, the Court dismisses the case. In practice it is difficult to reach such standard and the Court usually dismisses the case.

(ii) Problem Regarding Persons Disqualified from Holding Executive or Managerial Positions

As mentioned above, according to the Commercial Banking Act⁴⁶ and the Act on the Undertaking of Finance Business,⁴⁷ there are three groups of people who are barred from managerial positions. These people are:

- (a) executives who have been imprisoned by a final court judgment for an offence during the performance of executive duty;
- (b) persons who have been imprisoned by a final court judgment for a dishonest act in relation to properties;
- (c) persons who have been alleged by an injured person to have committed an offence in relation to

⁴³ Criminal liability for executives or persons who commit financial and banking crimes are stated in the Thai Penal Code Section 352-355.

Section 352. Whoever, being in the possession of the property belonging to the other person, or of which the other person is a co-owner, dishonestly converts such property to himself or a third person is said to commit misappropriation, and shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht or both.

Section 353: Whoever, being entrusted with the management of a property belonging to the other person, or of which the other person is a co-owner, dishonestly does an act contrary to his duty by any means whatever so as to cause damage to the benefit on account of being a property of such other person, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht or both.

Section 354: If the offence under Section 352 and Section 353 be committed by the offender in the status of being an executor or administrator of the property of the other person under the order of the Court or under a will, or in the status of being a person having an occupation or business of public trust, the offender shall be punished with imprisonment not exceeding five years or fine not exceeding ten thousand baht, or both.

Section 355: Whoever, having found a valuable movable property hidden or buried under the circumstances in which no person may claim to be the owner, converts such property to himself or the other person, shall be punished with imprisonment not exceeding one year or fine not exceeding two thousand baht, or both.

⁴⁴ Criminal liability for executives or persons who commit financial and banking crimes are stated in Section 75 bis to Section 75 quarter:

Section 75 bis: Any director, manager or person responsible for the operation of a company, who dishonestly deceives the public by the assertion of falsehood or the concealment of facts which should be revealed to the public and, by such deception, obtains a property from a number of the public so deceived or from a third person, or causes the public so deceived or a third person to execute, revoke or destroy a document of right, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

Section 75 ter: Any director, manager or person responsible for the operation of a company, who being entrusted with the management of the property of the company or of which the company is a co-owner, dishonestly does an act contrary to his duties, by any means whatever, so as to cause damage to the usefulness in the nature of it being a property of the company, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

Section 75 quarter: Any director, manager or person responsible for the operation of a company, who being in possession of a thing belonging to the company or of which the company is a co-owner, dishonestly converts the thing to himself or a third person, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

⁴⁵ Section 227: The Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence. Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him.

⁴⁶ Section 12 quarter (2): No commercial bank shall appoint or allow any person with any of the following qualifications or attributes to be or to perform the duties of a director, manager, deputy manager, assistant manager or adviser... (2) having been imprisoned by a final court judgment for an offence related to property committed with dishonest intention.

⁴⁷ Section 22(2): No finance company shall appoint or allow any person with any of the following qualifications or attributes to be or perform the duty of a director, a manager, an officer or a person with power of management, or an adviser... (2) having been imprisoned by a final court judgment for an offence related to property committed with dishonest intent.

financial crime.⁴⁸

However, these sections do not include two groups of people who have a tendency to commit crimes and cause detriment to commercial banks and financial institutions. These groups of people are outlined below.

- (a) Executives of commercial banks and financial institutions who have been alleged to have committed financial crime and the case is in Court proceedings

As explained earlier, only executives of commercial banks and financial institutions who have been imprisoned by a final court judgment are disqualified from the operations of such institutions. During the judicial proceeding, if the board of such institutions do not remove such executives, the State has no statutory authority to do so. However, there is a tendency for such executives to surreptitiously destroy evidence which is admissible to file against them in court, thus resulting in dismissal of the case. A good example of this was the Siam City Bank (SCIB) case, where the Board of the Bank affirmed that it would not remove its executives until final judgment was rendered;

- (b) Persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent but the imprisonment is suspended

The question arises that if the Court inflicts imprisonment on such persons but suspends the penalty, is it deemed that such persons are disqualified under Section 12 quarter (2) of the Commercial Bank and Section 22(2) of the Act on the Undertaking of Finance Business? There is no precedence for this matter. However, in Supreme Court Decision No 1983/2497, the Court held that an offender who had been imprisoned by a final court judgment but had had the punishment suspended, should be deemed not to have received the punishment of imprisonment. Thus, it is predictable that the Court will decide the same should the question arise.

The objective of Section 12 quarter (2) and Section 22(2) is to prevent persons as provided above from being appointed as executives so that they cannot dishonestly procure benefits to which they are not entitled and cause detriment to the public interest. Thus it is important that these two sections are interpreted to include persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent even though such imprisonment is suspended.

2. Problems Regarding Remedial Measures

(i) *Problems Regarding Seizure or Attachment*

- (a) Problems Regarding Properties under Seizure or Attachment

Under Section 46 decem of the Commercial Banking Act and Section 75 tredecem of the Act on the Undertaking of Finance Business, there are two kinds of properties for which the BOT has the power to order seizure or attachment. These properties are properties belonging to the wrongdoer and properties which may legally be deemed to be properties belonging to the wrongdoer. These sections do not include properties which the wrongdoer has transferred to others, such as family members. Therefore, in cases where the wrongdoer has transferred properties to others, the BOT has no authority to order seizure or attachment. This is a pitfall and needs to be taken into serious consideration.

- (b) Problems Regarding Execution of Properties

In practice, the BOT will notify related agencies of such orders and demand that such properties shall not be transferred. The BOT will also notify the Execution Department that such properties shall not be sold under public auction.

A question arises as to whether a creditor of this garnishee (person whose property has been under the seizure or attachment order of the BOT) can request that such orders be revoked. The question can be distinguished into two aspects, the first is where there is no final judgment of the court asserting the right of such creditor and the second is where final judgment is rendered. In Supreme Court Decision No.6632/2542, the Court decided that where there is no final judgment asserting the rights of creditors, such creditor had no rights to request revocation of such orders. From this Decision, it can be concluded that only the judgment creditor is entitled to request

⁴⁸ Notification of the BOT.

revocation of seizure or attachment. However, according to Section 271 of the Civil Procedural Code, a judgment creditor is entitled to the execution of judgment within ten years of the date of such judgment. The execution official shall collect and sell properties of the judgment debtor and repay money debt to the judgment creditor. Thus, a question arises regarding the priority of the orders of the BOT and the Court judgment. In this regard, the Legal Execution Department have laid down a guideline that the Court judgment has priority over the order of the BOT. This makes remedial measures under the Commercial Banking Act and the Act on the Undertaking of Finance Business ineffective, and is hence a pitfall of law.

(c) Problem Regarding the AMLA

Section 49 paragraph 1 of the AMLA states that where there is convincing evidence that any property is the property connected with the commission of an offence, the Secretary General of the Anti-Money Laundering Office shall refer the case to the public prosecutor for consideration and file an application with the Court for an order that such property be vested in the State without delay. Section 51 paragraph 1 states that if the Court is satisfied, following an inquiry into an application filed by the public prosecutor under Section 49, that the property to which the application relates is the property connected with the commission of the offence and that the application of the person claiming to be the owner or transferee thereof under Section 50 paragraph 1 is not tenable, the Court shall give an order that the property be vested in the State. Section 3 provides the definition of “predicate offence” to include any offence relating to misappropriation or fraud or exertion of an act of violence against property or dishonest conduct under the law on commercial banking, the law on the operation of finance, securities and credit foncier (land loan) businesses or the law on securities and stock exchange committed by a manager, director or any person responsible for or interested in the operation of such financial institutions.

Therefore, offences relating to finance and banking crime are governed by this Act which enables the public prosecutor to file an application and the Court to order such property to be vested in the State. However, it is doubtful whether the remedial measures as provided in Section 46 of the Commercial Bank and Section 75 of the Act on the Undertaking of Finance Business which authorize the public prosecutor to apply for restitution of property or compensation for damage on behalf of the injured person will be effectively used since the AMLA empowers the Court to order such property to be vested in the State.

In addition, although Section 49, Section 50, Section 52 and Section 53 of the AMLA allow a person to claim ownership of such property, this person must be the real owner or transferee. The victim of the crime is not allowed to claim ownership under these sections. Moreover, he or she must successfully prove that such property is not connected with the offences.

Another matter which is also necessary to take into consideration is that although the Secretary General of the Anti-Money Laundering Office is empowered under Section 49 to refer the case to the competent official under the law which prescribes such offence⁴⁹ for preliminary protection of the injured person’s rights, it is within the discretion of the Secretary General to refer the case for such protection. The victim has no right to request preliminary protection.

(ii) Problem Regarding the Delay of Remedial Process

The Criminal Procedure Code also applies to the investigation and adjudication of finance and banking cases. However, the main objective of this Code is to punish the offender rather than to cure the injured. Moreover, although Section 46 novem of the Commercial Banking Act and Section 75 duodecim the Act on the Undertaking of Finance Business authorize the public prosecutor to apply for restitution of property or damage on the behalf of the injured, Section 47 of the Criminal Procedure Code states that the Court shall follow the law concerning civil liabilities when adjudicating a civil case in connection with a criminal offence and that the Court is bound by the facts as found by the judgment in the criminal case.⁵⁰ Therefore, before the Court can order restitution for the injured, criminal judgment must be pronounced. It can be concluded

⁴⁹ In case of crimes in relation to the Commercial Act and the Act on the Undertakings of Finance Business, the competent official is the Bank of Thailand.

⁵⁰ The Criminal Procedure Code, Section 47: Judgment in the civil case shall be given in accordance with the provisions of law concerning civil liabilities, without regard to conviction or non-conviction of the accused.

that whilst the Commercial Banking Act and the Act on the Undertaking of Finance Business are substantive laws aiming at curing the loss of the injured, the Criminal Procedure Code, which is a procedural law, does not enhance such an objective.

IV. THE ENFORCEMENT OF LAWS IN RELATION TO CORPORATE CRIME IN THAILAND

In order to maintain public order, the State clarifies its criminal policy by promulgating statutory provisions on what behaviour constitutes a criminal offence and is to be punished. However, in order for such laws to be enforced effectively, the enforcement authorities need to work hand in hand.

Criminal procedure for corporate crime is the same as for other types of crime. It begins with the police investigation of the crime and the submission of police opinion to the public prosecutors.⁵¹ The public prosecutor then reviews evidence gathered from the investigation and decides whether to charge or discharge the alleged offence.⁵² If the public prosecutor is of the opinion to charge the offender, he or she will institute a case in court. The Court adjudicates the case and renders its judgment. However, since the nature of financial and banking crime is different from other types of crime, the process is sometimes not easy. In some instances, the Court may have to dismiss the case because the public prosecutor does not have sufficient evidence to prove beyond a reasonable doubt that the offender committed the crime.⁵³ This part will briefly explain the investigation, prosecution and judicial process mentioned above and problems arising from the process.

A. Investigation and Prosecution of Corporate Crime

Before 2005, the Economic Crime Investigation Division (ECDI) under the Police Department⁵⁴ was the only authorized body to investigate and inquire into economic crimes. The public prosecutor was not involved in the investigation process. However, pursuant to the Act on the restructuring of governmental agencies, bureaus and departments, B.E. 2545 (2002), the Act on the Special Cases Investigation was enacted in B.E. 2547 (2004). The Department of Special Cases Investigation (DSI) was established by this Act. It is a joint professional governmental department under the Ministry of Justice, commissioned specifically for the surveillance, deterrence and effective prevention of organized criminal activities that continue to jeopardize the country's economy, social order, and national stability, as well as for the eradication of any illicit groups or activities that endanger international security.⁵⁵ Therefore, the DSI became another investigative and inquiry authority. Section 3 of this Act defines Special Cases as criminal cases as specified in Section 21. Section 21 states that Special Cases which require special investigation and inquiry are any of the criminal offences which fall under the list as prescribed in the annex of this Act and in the ministerial regulation issued as suggested by the Special Investigation Board, provided that such a criminal case is (a) complex and requires special investigation and collection of evidence; (b) seriously affects public order and morality, security of the kingdom, international relations, or the economics or finance of the kingdom; (c) is a significant transnational crime or is being or has been committed by organized crime groups; or (d) is a crime in which influential people are involved as principals, instigators or supporters.

There are 27 types of offences which are Special Cases. Twenty two are prescribed in the annex of this Act and five in the ministerial regulation issued pursuant to this Act. Lists of the offences which are in the annex are as follows:

- offences relating to the law on loan amounting to public cheating and fraud
- offences relating to the law on competition
- offences relating to the law on commercial banking

⁵¹ The Criminal Procedure Code, Section 142.

⁵² The Criminal Procedure Code, Section 143.

⁵³ The Criminal Procedure Code, Section 185: If the Court is of opinion that the accused has not committed the offence, or that the acts done by him do not constitute an offence, or that the case is barred by prescription, or that there are legal grounds upon which the accused ought not be punished, the Court shall dismiss the case and release the accused; but pending final judgment, the Court may detain or grant the accused provisional release.

⁵⁴ The Police Department has been restructured and its name is now the Royal Thai Police. The Divisions concerned are Economic Crime Investigation Division and Crime Suppression Division.

⁵⁵ www.dsi.go.th/dsi/about_box.jsp?detail=17

- offences relating to the law on the undertaking of finance business, securities business and credit foncier (land loan) business
- offences relating to the law on chain loan control
- offences relating to the law on foreign exchange control
- offences relating to the law on government procurement fraud
- offences relating to the law on the protection of layout design of integrated circuits
- offences relating to the law on consumer protection
- offences relating to the law on trademarks
- offences relating to the law on currency
- offences relating to the law on tax and duty, and compensation of exported goods procured in the kingdom
- offences relating to the law on interest on loans by financial institutions
- offences relating to the law on the Bank of Thailand
- offences relating to the law on public companies
- offences relating to the law on anti-money laundering
- offences relating to the law on the industrial product standards
- offences relating to the law on copyright
- offences relating to the law on promotion of investment
- offences relating to the law on enhancement and conservation of national environmental quality
- offences relating to the law on patents
- offences relating to the law on the security and exchange commission.

Offences which are in the Ministerial Regulations are as follows:

- offences relating to the Revenue Code
- offences relating to the Custom Act
- offences relating to the Excise Act
- offences relating to the Liquor Act.

Financial and banking crime is a Special Case under this Act. Therefore, the DSI is the investigative and inquiry agency for these cases. Offences which do not fall under these categories are under the authority of the Royal Thai Police to investigate.

Section 32 states that for the efficiency of suppression of Special Case offences, the Board of Special Cases may approve a public prosecutor or military prosecutor to inquire or participate in a special case in order to give advice and examine the evidence from the beginning of the investigation process. However, in a Special Case which is a serious transnational crime or is committed by an organized crime group or a criminal case in which an influential person is the principal, instigator or supporter, a public prosecutor or a military prosecutor is required to conduct a joint investigation with the Special Case Inquiry Official in every case. By allowing the public prosecutor to jointly investigate the case with the DSI, this section has changed the former function of the public prosecutor in which he or she was excluded from the investigation and inquiry into the offence; in this regard the public prosecutor has an opportunity to advise the DSI and learn about the necessary evidence for the case. Hence, this Act reinforces efficiency in the investigation of complex crimes and solves the loophole of evidence gathering in the traditional structure of investigation and inquiry.

The Act usually specifies what authority is the regulator of the Act. The specified authority will act primarily an investigation authority and file a complaint to either the ECID or the DSI, according to the offences. As for financial and banking crime, the BOT is a regulator and plays a significant role in gathering facts and conducts primarily investigation, however, the Commercial Banking Act and the Act on the Undertaking of Finance Business also confers a wide range of authorities upon the BOT. For example, in cases where the punishment is fine, if it is fully paid within the specified period, the case is considered settled. However, if the law does not specify that the criminal be fined, the BOT has no right to settle the case. In this context, the BOT has to further the case to the DSI.

B. Trial of Corporate Crime

At present, except for economic cases relating to intellectual property, which are under the jurisdiction of

the Central Court of Intellectual Property and International Trade, there are no other specialized courts dealing with cases relating to economic or corporate crime. Economic and corporate crime is adjudicated by the Criminal Court or other provincial courts which have jurisdiction over criminal cases.

The procedural law used in the trial is the Criminal Procedure Code. Under Section 185,⁵⁶ the public prosecutor has to prove beyond reasonable doubt that the offender committed such crimes, otherwise the Court will dismiss the case.

Another Act relating to the trial is the Act on the Protection of Witnesses in Criminal Cases B.E. 2546(2004). Under Section 3 of this Act, the term "witness" means oral evidence from a person who provides or shall provide facts for officials with the power and duty to conduct an investigation, officials with the power and duty to conduct an inquiry, and officials who have the duty to prefer a criminal charge in court against an alleged offender and the Court in the trial of criminal cases. This term also includes expert witnesses but excludes an accused who cites him or herself as a witness. Section 6 provides general safety measures for witnesses and Section 8 provides special measures for witnesses. Section 3 defines the term "safety" as safety in life, body, health, liberty, reputation and property or other rights of the witness before and after testifying in court. Both protection measures have the same objectives which are to keep witnesses in a safe place and conceal the identity of witnesses. However, in certain cases such as cases relating to the security of the kingdom or organized crime or cases where the maximum rate of imprisonment exceeds ten years, special protection, such as changing the name and identity of the witness and providing education or training for the witness so that he or she can live his or her life, may be used to protect the witness.

C. Problems Regarding the Law Enforcement Process and Authorities

1. The Complexity of Corporate Crime and the Lack of Specialized Personnel

The complexity of corporate crime makes it difficult to investigate and prosecute a company. Although the DSI was established in the hope of investigating corporate crime in particular and the specific departments were created to prosecute perpetrators of different types of economic crime, (namely the Department of Economic Crimes Litigation, the Department of Tax Litigation and the Department of Intellectual Property Litigation, which were established by the Office of the Attorney General (OAG)), the problem continues since the number of skilled personnel is minimal compared to the number of cases of economic crime arising. Moreover, these personnel may be transferred to other public agencies, either by their own will or by compulsory rotation. The lack of specialized personnel may result in delay in investigation and prosecution, and the loss of the best evidence which can be used against the defendant in court. As for the court, there is no specialized court or division in the court to try economic crime except for the Central International Trade and Intellectual Property Court.

2. The Lack of Real Co-operation between Enforcement Authorities

Although Section 32 of the Special Investigation Act authorizes joint investigation between a public prosecutor and the Special Case Inquiry Officials, it applies only in a serious transnational crime case committed by an organized crime group or a criminal case in which an influential person is the principal, instigator or supporter. Moreover, the regulator of certain Acts, for example in financial and banking crime, the BOT, which is the regulator of the Commercial Bank Act and the Act on the Undertaking of Finance Business and plays a significant role in gathering facts and conducting preliminary investigation, will meet with public prosecutors and the Special Case Inquiry Officials only when a crime has already been committed. In such cases, evidence which may have been available at the time when such malicious acts or corrupt practices began may have already been destroyed.

3. Public Awareness of Corporate Crime and its Danger

The public may not be aware of corporate crime. Therefore they do not make allegations of offences and the police cannot make an inquiry unless such an offence is a public offence. In these circumstances, the criminal is not punished. In addition, the public may be aware of corporate crime, however, in some cases they view the seriousness of the crime as equivalent to 'ordinary' crime, not fully understanding the impact which corporate crime will have. Therefore they do not actively co-operate with the State in fighting it.

⁵⁶ Section 185, supra 5.

4. Collection of Evidence

(i) Public Awareness

Lack of public awareness makes it difficult to collect supportive evidence.

(ii) Social Status of the Criminal

Because of the social status of the criminals the public may be afraid to provide evidence or to co-operate with the police. Witness may be intimidated and may not be willing to testify.

(iii) Electronic Evidence

In some instances, investigative and inquiry authorities need to have some skill and knowledge to obtain such evidence. They must know when and where to collect this type of evidence since it is easily destroyed. In cases where the evidence is destroyed, problems may arise in cases where there is no other evidence.

5. Burden of Proof

The public prosecutor needs to prove beyond reasonable doubt that the offender committed such a crime. However, corporate crime is usually committed by the executives or the employees of the corporation; therefore there is a tendency that the executives or employees destroy the evidence to conceal the crime. Hence, to satisfy the court with such an extensive degree of proof without the necessary evidence is almost impossible.

6. International Co-operation

Corporate crime is a not only a domestic issue but also a global issue. To prevent and combat this crime, international co-operation is essential. This is especially true when the local perpetrator successfully flees the country and escapes until the statute of limitations has expired; provided there is extradition, it is not possible to prosecute him or her. In this case extradition is necessary. For example, in the B.B.C case which, as mentioned earlier, was a serious corruption case and was a cause of the collapse of Thailand's economy in 1997, the criminals had escaped to Canada. Thanks to extradition the criminals were extradited and were prosecuted. Later they were found guilty and were punished. However, in some cases where extradition was not possible, the criminal was able to escape from justice and use another country as a safe haven.

V. INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS

Apart from the Extradition Act B.E. 2472(1929), Thailand has also promulgated the Act on Mutual Legal Assistance in Criminal Matters B.E. 2535(1992). This Act does not constitute new provisions on criminal procedures. It is merely a legal tool for Thai officials to exercise their power when foreign states request co-operation. This Act allows a faster move to respond to crimes since there is no judicial procedure involved which will prolong the process. In this case, co-operation between administrative authorities of the requesting and requested states is required. In addition, according to this Act, if the requesting state is a party to a bilateral treaty or agreement with Thailand, the requesting state can directly request legal assistance through the OAG. As of 2005, Thailand has mutual legal assistance treaties with ten countries: Canada, China, France, India, Norway, Poland, Republic of Korea, Sri Lanka, the UK and the USA.

The contents of this Act are summarized as follows.

A. Types of Legal Assistance

There are eight types of legal assistance categorized in this Act which are:

- (a) investigation and inquiry as provided in Chapter 2 Section 15-17;
- (b) provision and procurement of documents or information which is in the possession of the Thai agencies as provided in Chapter 3 Section 18-20;
- (c) delivery of documents as provided in Chapter 4 Section 21-22;
- (d) search and seizure as provided in Chapter 5 Section 23-25;
- (e) extradition of persons under custody for the taking of evidence as provided in Chapter 6 Section 26-29;
- (f) location of persons as provided in Chapter 7 Section 30;
- (g) commencement of criminal proceedings of the court as provided in Chapter 8 Section 31;
- (h) confiscation and seizure of property as provided in Chapter 9 Section 32-3.

B. Persons in Charge of Co-operation

Section 6 states that the Central Authority in matters of international co-operation shall be the Attorney General or the person designated by him or her. Section 12 states that the Central Authority shall transmit the following requests for assistance to the Competent Authority:

- (a) the request for inquiry, procurement of documents or other evidence outside court, delivery of documents, search and seizure of documents or articles and locating persons shall be sent to the Commissioner General of the Royal Thai Police;
- (b) the request for proceedings in court such as requests for taking oral evidence, documentary evidence and material evidence and requests for confiscation and seizure of property shall be sent to the Executive Director of the Office of Criminal Litigation;
- (c) the request for transferring persons in custody for the purpose of testimony shall be sent to Director General of the Department of Corrections;
- (d) the request for the institution of criminal proceedings shall be sent to the Commissioner General of the Royal Thai Police and the Executive Director of the Office of Criminal Litigation.

Section 18 states that the Central Authority shall send the request on the procurement of documents and information to the agencies that have such documents and information in their possession.

C. Methods of Requesting Assistance and Providing Assistance

Section 10 provides methods of requesting for assistance which are summarized as follows:

- (a) a State which has a mutual assistance treaty with Thailand shall submit its request directly to the Central Authority;
- (b) a State which has no mutual assistance treaty with Thailand shall submit its request through the diplomatic channel.

D. Grounds for Refusal

Section 9 provides four grounds for refusal as follows:

- (a) There is no mutual assistance treaty between Thailand and the requesting State and the requesting State does not commit to assisting Thailand in a similar manner when requested;
- (b) The act which prompts the request for assistance is not an offence punishable under Thai laws unless the mutual assistance treaty between Thailand and such State specifies otherwise;
- (c) Such request has an effect on the sovereignty, stability and other crucial public interest of Thailand;
- (d) Such request is related to a political offence or military offences.

In 2002, there were 41 requests, most of which were requests for collection of evidence, taking oral evidence, delivery of documents or copy of documents. In general, Thailand has provided legal assistance to requesting States without delay.

E. International Co-operation in Criminal Matters and Extradition

Apart from the Act on Mutual Legal Assistance in Criminal Matters, Thailand has another act called the Extradition Act B.E. 2472 (1929). These two acts may seem to be the same but they are not. Extradition is a long-established legal method while international co-operation in criminal matters is a new idea. The Extradition Act is exercised by order of the court while the Act on Mutual Legal Assistance on Criminal Cases is exercised by administrative power.

VI. CONCLUSION

In conclusion, corporate crime is serious crime which has tremendous effects and impacts on economic stability and social security at both domestic level and international level. Therefore, it is incumbent upon the State to impose efficient and appropriate criminal liability upon a legal person as well as its representatives who are the soul and the mind of such corporations and are actually the persons operating the business of the corporations. Since corporate crime is usually economic crime, the laws in relation to economic crime need to be flexible, up to date and in advance of the criminals. In addition, the laws should not be so over-regulated and frequently changing that they obstruct the flow of the market which would destroy the country's economic stability. The personnel involved in law enforcement need special training and need to work in co-operation. Moreover, international co-operation is essential to prevent and combat economic crime or corporate crime. Although Thailand has not become party to all of the international conventions in relation to the prevention of crime nor has she concluded a treaty on extradition or mutual assistance in criminal matters with every country, Thailand may co-operate with other countries in extradition and mutual assistance in criminal matters on a reciprocal basis. This is to ensure that criminals must not be able to escape from justice and use any country as a safe haven.

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