

W

Management of legal liabilities

If you are a corporate director or officer or are thinking of accepting such a post in Thailand, you would be well advised to know that with the benefits of the position come responsibilities and potential liabilities. In Thailand, directors and officers can be held both civilly and criminally liable to persons injured by their actions or their failure to act. In fact, a director's duty of care is extended beyond the company shareholders to third parties and to the government.

Although there have been numerous cases of director and officer liability, none highlights the risk better than the highly publicised 1985 case filed against the directors of Esso. There, the managing director was charged criminally simply because a company clerk forgot to submit a government filing on time. More recently, the issue of director and officer liability has again come into the public eye through criminal charges filed against the directors of Samsung.

This sometimes unreasonable reach of director and officer liability stems from the definition of the term under Thai law.

A director is a representative of the legal entity that is the corporation. An officer is any director or other employee of the company who is involved in corporate decision-making. If the legal entity, or juristic person is at fault, because the juristic person can only act

through its representatives, the representatives are therefore at fault. But, because a limited company has limited liability, the director with generally unlimited personal liability may be at fault for acts that the company is protected against.

Incredibly, as of July 2007, there were 81 laws imposing criminal penalties on directors and officers in Thailand. The legislative scope is indeed broad, with penalties written into statutes covering such fields as banking and finance, commerce and industry, education, intellectual property, labour and tax, to name a few.

In addition, such liability may be applied vicariously; that is, directors' liability can originate from acts or failures of their subordinate staff, even if the directors themselves were not immediately responsible.

While a director or officer may be subjected to criminal penalties, they are also accountable for civil damages as spelled out by the Civil and Commercial Code (CCC). For example, the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies/Associations and Foundations B.E. 2499 governs liabilities for private companies, while the Public Limited Company Act B.E. 2535 spells out the major penalties for public companies. A public company is further

governed by the Securities and Exchange Act (SEA), which assigns the Securities and Exchange Commission (SEC) and the Stock Exchange of Thailand (SET) as regulatory bodies for all issues relating to securities.

Whether the company is private or public, the directors and officers have similar responsibilities. Directors must act diligently and with due care, they must avoid conflicts of interest with the company, and they must personally comply with and ensure the company complies with the laws of governance and corporate conduct. It is also worth noting that directors and officers of public companies have an even higher degree of accountability to the public than those of privately held companies.

It is therefore important to keep the principles of good governance in mind when acting on behalf of the company. Making sure the shareholders are supportive of your actions, that you have a clear accountability trail, and that you receive the board's approval for your actions is crucial since a director cannot generally be held civilly liable for acts approved by the company. Following best practices guidelines, such as the SET's "Code of Best Practices for Directors of Listed Companies", will also help a director comply with principles of good governance. Nonetheless, there are other steps you can take to limit

your liability since even the best intentions may not shield a director or officer from legal action.

Purchasing directors and officers (D&O) insurance should be an integral part of a director's risk management. D&O insurance can help insulate directors and officers from paying out-of-pocket for their legal defence. Indemnity clauses, often part of D&O insurance policies, also ensure that another party pays for costs associated with defending against charges. In short, an indemnity clause, along with a general D&O insurance policy, can diffuse the need for a director or officer to pay for his or her own defence against charges or to personally pay damage awards.

Lastly, knowledge of your personal liability situation is important. A good attorney can help identify high risk areas and weak points in your insurance policy or employment contract. Legal counsel can therefore help you avoid those paths that would expose you to higher risk and instead allow you to concentrate on the important duties of corporate governance.

Written by Michael Ramirez, Consultant, with Yael Hauser, Intern, Dispute Resolution Department, Tilleke & Gibbins International Ltd. Please send comments or suggestions to Marilyn Tinnakul at marilyn.t@tillekeandgibbins.com.