MONEY LAUNDERING IN INSURANCE BUSINESS: PREVENTIVE AND SUPPRESSIVE MEASURES*

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ABSTRACT

Insurance business is a target of money laundering like another financial intuition such as bank and security firm in reality. A money launderer pays the insurance company premium which derived from crime, while the insurance company has duty to perform customer due diligence and should know that customer might be a money launderer or money derived from predicated crime.

There is a situation so called "dual purpose transaction", a situation that the criminal enters to a transaction aiming either for personal use or laundering money that is quite hard to proof because a money launderer generally uses financial institutions to launder proceeds of crime like another *bona fide* customer. Since money laundering is a process to "conceal and disguise" and intention to launder money and simply spend money is relatively different, the persecutor needs to prove beyond reasonable doubt about specific intention to "conceal or disguise" of the customers. However, "acquiring possession and use proceeds of crime" of both criminal (customer as a spender) and insurer (financial institution as a transferee)has knowledge that premium has been derived from predicate offense is a criminal offense in many jurisdiction such as the U.S, the U.K and the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988 which Thailand is a member state criminalizes such offense.

The criminalization of "possession, acquiring and use" of proceeds of crime can makes a wide range of application against both criminal and insurer in the situation of "dual –purpose transaction". If the prosecutor fails to prove specific intention "to conceal and disguise", he can still prove about the possession, acquiring and usage of proceeds of crime in both civil case and criminal case. Moreover, the criminalization of such offense makes Thailand comply with the United Nations Convention against Illicit Traffic in Narcotic and Psychotic Substance 1988 entirely.

Furthermore, the insurance company shall be supervised about anti-money laundering compliance by the Anti-Money Laundering Organization effectively by risk-based approach, the AMLO also can allocate resource more wisely.

Keywords: Money Laundering, Insurance, Proceeds of Crime, Supervision

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* The article is summarized and rearranged from the thesis "Legal Measures for Controlling Recreational Diving Business in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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บทคัดย่อ

ในความเป็นจริงธุรกิจประกันภัยตกเป็นเป้าหมายของการฟอกเงินเช่นเดียวกับสถาบันการเงิน โดยทั่วไปแล้วผู้ฟอกเงินจะใช้วิธีจ่ายเงินค่าเบี้ยประกันภัยโดยเงินที่ได้มาจากการกระทำความผิดมูลฐาน ในขณะที่บริษัทประกันภัยมีหน้าที่ในการจัดให้ลูกค้าแสดงตน (Customer Identification and Due Diligence) และควรทราบได้ว่าลูกค้าอาจจะเป็นผู้ฟอกเงิน

มีสถานการณ์ที่เรียกว่า "ธุรกรรมสองวัตถุประสงค์" (dual purpose transaction) ซึ่งเป็นสถานการณ์ที่อาชญากรได้ทำธุรกรรมที่อาจจะเป็นไปเพื่อประโยชน์ส่วนตัวหรือเพื่อการฟอกเงิน ซึ่งกรณียากที่จะพิสูจน์เพราะผู้ฟอกเงินจะใช้สถาบันการเงินฟอกเงินเหมือนลูกค้าผู้สุจริตคนอื่น โดยเหตุที่ว่าการฟอกเงินนั้นเป็นกระบวนการเพื่อปกปิดหรืออำพราง การฟอกเงินและการใช้จ่ายเงินโดยปกติธรรมดานั้นแตกต่างกันโดยสิ้นเชิง พนักงานอัยการต้องพิสูจน์โดยปราศจากข้อสงสัยถึงเจตนาพิเศษดังกล่าวของลูกค้า อย่างไรก็ดี การได้มา การครอบครองและการใช้ทรัพย์ที่ได้มาจากการกระทำความผิดโดยที่ทั้งอาชญากร (ลูกค้าในฐานะผู้ใช้เงิน) และ ผู้เอาประกัน (สถาบันการเงินในฐานะผู้รับเงิน) โดยที่มีเจตนารับรู้ว่าได้ให้หรือรับเบี้ยประกันที่ได้มาจากการกระทำความผิดเป็นการกระทำความผิดอาญาในหลายประเทศ เช่น ประเทศสหรัฐอเมริกา หรือประเทศสหราชอาณาจักร หรือ อนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการลักลอบค้ายาเสพติดและวัตถุที่ออกฤทธิ์ต่อจิตและประสาท ค.ศ. 1988 (the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988) ซึ่งประเทศไทยเป็นภาคีของอนุสัญญาดังกล่าวก็ได้กำหนดให้การกระทำดังกล่าวเป็นความผิดอาญา

การทำให้การครอบครอง การได้มา หรือการใช้ทรัพย์ที่ได้มาโดยการกระทำความผิดจะทำให้การดำเนินคดีต่ออาชญากรฟอกเงินและผู้เอาประกันภัยนั้นทำได้กว้างมากขึ้นในสถานการณ์ "ธุรกรรมสองวัตถุประสงค์" ถ้าหากพนักงานอัยการไม่สามารถพิสูจน์เจตนาพิเศษ"เพื่อปกปิดหรืออำพราง" พนักงานอัยการยังสามารพิสูจน์ได้ว่ามีการรับมา หรือใช้ไปของทรัพย์ที่ได้กระทำความผิดในทั้งคดีอาญาและคดีแพ่ง (คดียึดทรัพย์) นอกจากนี้การทำให้การกระทำดังกล่าวเป็นความผิดนั้นจะทำให้ไทยได้อนุวัตรการตามอนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการลักลอบค้ายาเสพติดและวัตถุที่ออกฤทธิ์ต่อจิตและประสาท ค.ศ. 1988 อย่างสมบูรณ์

พระราชบัญญัติป้องกันและปราบปรามการฟอกเงินควรให้นายหน้าประกันภัยมีหน้าที่ในการรายงานธุรกรรม จัดให้ลูกค้าแสดงตน และจัดเก็บเอกสารเกี่ยวกับการแสดงตนในลักษณะเดียวกับที่ผู้รับประกันภัยมีหน้าที่เพราะนายหน้าประกันภัยเป็นผู้ที่มีการติดต่ออย่างแท้จริงต่อลูกค้า

นอกจากนี้ ผู้เอาประกันภัยควรถูกกำกับดูแลในการปฏิบัติตามพระราชบัญญัติป้องกันและปราบปรามการฟอกเงินอย่างมีประสิทธิผลโดยใช้ระบบกำกับดูตามความเสี่ยง (Risk Based Approach) ซึ่งสำนักงานป้องกันและปราบปรามยาเสพติดจะสามารถใช้ทรัพยากรได้อย่างคุ้มค่า

คำสำคัญ การฟอกเงิน, ประกันภัย,ทรัพย์ที่ได้มาจากการกระทำความผิด, การกำกับดูแล

It is crucial to develop the anti-money laundering regime in both preventive and suppressive measures in order to improve domestic law to handle money laundering risk more effectively.

1. Legal Measures under Foreign Laws

1.1 Preventive Measures

This article focuses on roles and duties of two crucial players in anti-money laundering regime, anti-money laundering supervisor and insurance intermediary as financial institution.

For roles of supervisor, the Financial Action Task Force (FATF) recommends that every jurisdiction shall has authority which supervises financial institutions includes insurance company if such institution complies with anti-money laundering law properly. The supervisor should have authority enough to supervise financial institutions such as to revoke license and acquire information relating to money laundering from them.

In 2007, FATF developed "FATF Guideline in Risk Based Approach to Combating Money Laundering and Terrorist Financing" and proposed the "Risk Based Approach"as a method to supervise financial institution, regarding to anti-money laundering risk.The approach improves the quantity and quality of money laundering compliance, regarding to reporting duty[1]. Nowadays, many jurisdictions adopt risk based approach as a tool to supervise financial institution.

In the United States, the Federal government has primary authority according to the Bank Secrecy Act and each state responsible to regulation of insurance and financial examination. However in 2006, FinCen and states insurance commissioner agree to use anti-money laundering examination as part of life and annuity insurer's financial examination in order to enhance customer identification and money laundering detection measures. [2]

In Canada, both life and general, in Canada is supervised in the scope of save and sound practice by "Office of Superintendent of Financial Institution" (OSFI). The OSFI uses "Supervisory Framework and Guides to Intervention" to supervised insurer. The OFSI's formula against risk is "inherent risk mitigated by quality of risk management is net risk" [3]

1.2 Suppressive Measures

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) or so called "Vienna Convention" criminalizes the commission of "Money Laundering". The convention also criminalized the commission of "acquisition, possession or use of property by any person who knows, should have known or suspects that such property is the proceeds of crime." The offense not requires specific intention like the first offence, just general intention that receiver knows or should have known that the property derived from crime.

2. Legal Measure under Thai Laws

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[1] Lucia DallaPellegrinaDonatoMasciandaro, *"The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View"*5:2 **RLE** 931, 932 (2009).

[2] International Monetary Fund, "*United States: Publication of Financial Sector Assessment Program Documentation –Report on Observance and Codes"* , *available at* https://books.google. co. th/ books?id= bvh-AJmoPvYC&pg= PA55&lpg= PA55&dq= ICP+ 28+ money+ laundering&source=bl&ots=xFEPfIxhZM&sig=ijl2M8k0CShbd3J6WL5AQZgAvI&hl=th&sa=X&ei=r8K4VMqgC9DJuATl_IHICg&ved=0CDUQ6AEwBA#v=onepage&q=ICP%2028%20money%20laundering&f=false (last visit Dec. 25, 2014).

[3] Julia Black, The Development of Risk Based Regulation in Financial Services:Canada, the UK and Australia (2004), research report, Center for the Analysis of Risk and Regulation, London School of Economic and Political Science

2.1 Preventive Measures

2.1.1 Roles of Supervision

In July 2007, "the Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism of Thailand considered that the financial supervision regarding to anti-money laundering still need to be improved because there is no designed authority to supervise anti-money laundering compliance and there is no actual punishment for severe incompliance. Furthermore, the Detailed Assessment suggested that the Thai anti-money laundering law should delineate the roles of Anti-Money Laundering Office and the supervisor for supervise anti-money laundering regime compliance and design authority to conduct inspection.

According to Section 40 (3/1) of the Act, Office of the Anti-Money laundering Organization(AMLO) is responsible for drafting guideline regarding the compliance of financial institution in comply with the Anti-Money laundering Act B.E.2542(The Act). While insurance company directly by the Office of Insurance Commission (OIC)in accordance with Insurance Commission Act Section 20 (2) but there is no specific provision prescribed with relation to money laundering compliance. There is also no provision regarding method or sanction of anti-money laundering compliance in Insurance Commission Act.In 26 April 2011, the Office of Insurance Commission and Anti-Money Laundering and the Office of Insurance Commission signed Memorandum of Understanding in cooperation to control the operation of insurance company to be incompliance with the anti-money laundering law.[4]

There is no specific guideline or approach prescribing how to supervise and sanction insurance company which do not comply with the Act and its regulations. Even the Office of Money Laundering has authority as stipulated by the Act. I may conclude that Thailand does not control insurance company in money laundering matters practically. Furthermore, Thailand is in need to have particular approach to supervise insurance company. So the Office of Money Laundering can supervise and investigate insurance company, if it complies with statutory and regulatory obligation according to money laundering law.[5]

2.1.2 Roles of Intermediary

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[4] *คปภ. ผนึก ปปง. ยกระดับมาตรฐานฟอกเงิน"* **กรุงเทพธุรกิจออนไลน์**, 26 เม.ย. 2554, (ICO and AMLO Enhances Money Laundering Standard, **Bangkokbiznews**, Apr. 26, 2011), http://www.108acc.com/news/267414/%E0%B8%84%E0%B8%9B%E0%B8%A0.%E0%B8%9C%E0%B8%99%E0%B8%B6%E0%B8%81%E0%B8%9B%E0%B8%9B%E0%B8%87.%E0%B8%A2%E0%B8%81% E0%B8% A3%E0%B8%B0%E0%B8%94%E0%B8%B1%E0%B8%9A%E0%B8%A1%E0%B8%B2%E0%B8%95%E0%B8%A3%E0%B8%90%E0%B8%B2%E0%B8%99%E0%B8%95% E0%B9%89%E0%B8%B2%E0%B8%99%E0%B8%9F%E0%B8%AD%E0%B8%81%E0%B9%80%E0%B8%87%E0%B8%B4%E0%B8%99.html

[5] The Anti-Money Laundering Act §40 (3/1)

"establish guidelines for observance, supervise, examine and evaluate reporting entities on implementation of this Act in accordance with rules, procedures and guidelines established by ordinance of the Board"

Both life and general insurers are the "Financial Institution" in accordance with the Money Laundering Act. Then they have duties to comply with measurements specified by the Act. So insurance companies have duties to perform customers identification and due diligence, keep customer records, report suspicious transactions, report cash transactions and manage internal control.

Although the law prescribes duties to insurer, it still not prescribes any duty to insurance intermediary, who really makes contact with customers and perform customer due diligence on behalf of the insurer. Even the law still requires the insurer to incorporate intermediary to internal program, the intermediary has no personal liability if it fails to perform duty according to Anti- Money Laundering Law.

2.2 Suppressive Measures

2.2.1 Money Laundering Offences

The Money Laundering offence is provided in Section 5 of the Act. The provision criminalized money laundering offence which focuses on "specific intention" which is "for concealing or disguising" origin of property or true nature, source, location, deposition, moment or right or "assisting the other to evade criminal.

However, the offense of "acquisition, possession or use" of proceeds of crime with knowledge that the asset proceeds of crime is not criminalized by Thailand. The offences are criminalized by Article 3(c) and The UN Model Law Article5.2.1 (c). The commission of acquisition, possession or use is totally different from the two former offences because it lacks of specific intention "for concealing or disguising" Thus, commission of "acquisition, possession or use" is not a crime in Thailand and the prosecutor cannot forfeit the asset getting invalid with such acquisition, possession and use.

According to legislative history, the Minister of Foreign Affairs once addressed to the Secretary of the Prime Minister regarding the draft bill of money laundering. The Minister concerned about lack of provision "acquisition, posses and use" in the draft bill.[6] However, the committee of anti-money laundering bill drafting considered that the implementation would affect the *bona fide* party and financial institution. Moreover, the committee considered that the Vienna Convention "acquisition, possession or use" offence is not compulsory to imply.[7]

Additionally, the Vienna Convention Art 3 paragraph 2 provided condition of implementation of "acquisition, possession or use" which is "subject to its constitutional principles and the basic concepts of its legal system". The offense is not optional to imply which is stated in the first chapter. The jurisdiction such as the United States, the United Kingdom, Australia, Canada and Singapore implied the offence in their own concepts. While country like Bolivia consider that "use, consumption, possession, purchase or cultivation" of coca leaf by Bolivian people is part of constitutional principle and basic concept of the country.

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[6] หนังสือด่วนที่สุดที่ถด.0605/12500 ลงวันที่ 23 มิถุนายน 2538(Urgent Letter 0605/12500 from Ministry of Foreign Affair to Council of State (Jun 23,1995).

[7] การประชุมครั้งที่ 9 ของคณะกรรมการร่างกฎหมาย (2/2540) 9/2539 (Meeting No.9 of Law Drafting Commission (2/1997) 9/1996).

Furthermore, the Detailed Assessment also evaluated that section 5 of the Anti-Money Laundering Act is not exactly in accordance with the Vienna Convention 1988 Art 3 (1)(b) and (c), particularly for commission of acquiring, possession and use of proceeds of crime. It also stated that there is no provision of constitution or any legal system of Thailand prohibit the criminalization. Thus, the Detailed Assessment suggested that Thailand should criminalize the commission.

3. The analysis of problems on legal measures on money laundering in insurance business.

3.1 Preventive measures

The Anti Money Laundering Act designed the Anti-Money Laundering Office as supervisor for anti-money laundering compliance. There is still no actual method or guideline to supervise financial institution. In addition, there is a need of improve effectiveness of anti-money laundering compliance of insurance company because the performance of insurance company since the statistic of reporting is very few, compare with bank industry.

3.2 Suppressive Measures

The money laundering offence according to Section 5 is the commission of "transfer or accept for concealing or disguising" and "any act to conceal and disguise information about asset". Section 5 is not criminalized a commission of "posses, acquire and use" of asset derived from crime with knowledge that the asset derived from crime. The two main offences are very different because the former offense has specific intentions "to conceal and disguised" but the letter does not have.

The Vienna Convention 1988 and the U.N. Model law and Many jurisdictions like the United States, the United Kingdom, Canada, Australia and Singapore criminalized the commission of "acquiring, possession and use" of proceeds of crime. Moreover, countries like the United Kingdom, Australia or Singapore do not require the specific intention "to conceal and disguise" to persecute money laundering at all.

In case of money laundering in insurance business, the criminal generally buys insurance products with proceeds of crime as premium in return to right to receive an amount of money or proceeds of insurance policy in case of life insurance and indemnity in case of general insurance. When the criminal buy insurance, it can be both money laundering and just money spending depending on intention of criminals which the prosecutor needs to proof in beyond reasonable doubt. The situation is called "dual-purpose transaction". When the prosecutor cannot proof the specific intentions "to conceal or disguise", the practice is not a crime, even the criminal has knowledge that it is a proceeds of crime and the insurer know or should have known that the premium has been paid by proceeds of crime, especially from process of Customer Due Diligence.

Therefore, Thailand should criminalize the commission of "posses, acquire and use" proceeds of crime" in provision of money laundering Section 5 in order to tackle "dual-purpose transaction" effectively. The criminalization will make insurance institutions more aware about customer due diligence duty. Since insurance can claim for rights in

premium as owner or third party according to Section 50 which the insurer can claim that the asset is not subject to forfeit because it is not an asset which get involved in ‘money laundering’The proof of intention “knows or should know that premium was an asset derived from crime rest on the insurer as the innocent third party who owns evidence from customer due diligence process.If the insurer performs customer due diligence correctly, the premium can be relived to insurance. The insurance should have active roles to prevent money laundering by performing due diligence properly, while the *bona fide* insurer can have protection of owner defense.

Form financial institution perspectives, rather than prove that insurer did not know or should have not known that the premium is proceeds of crime from the evidence of customer due diligence obligation, the jurisdiction like The United States or the United Kingdom have outstanding system to persecute “money spending or acceptance” of insurer or financial institution and protect *bona fide* financial institution.The American system design threshold for acceptance or spend proceeds of crime exceeds than 10,000 dollars to be prosecuted, while British system let the third party prove that they does not have intention in civil standard even it is criminal case. Moreover, the financial institution could raise a defense in criminal charge if the financial institution reports suspicious transaction to the authority.

Moreover, Thailand has an obligation to imply the offence according to Vienna Convention 1988 “subject to forfeiture” which has one condition “subject to constitutional system and legal system”. The Thai legal system the penal offence must be impose by law, so the act of “possession, acquirement and use” of proceeds of crime must be imposed by law or provision in money laundering act.

Conclusion

For preventive measures, Thailand should adopt risk-based approach to supervise insurance company, regarding to money laundering issue. It could be increase performance of state authority to detect money laundering in insurance sector.

For suppressive measures, the possession, acquiring and usages an asset derived from crime with knowledge that asset derived from crime is a criminal offense should be criminalized like in many jurisdictions such as The United States, The United Kingdom, Australia, Canada and Singapore. Moreover, the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988 which Thailand is a member state criminalized the acts of possession, acquiring and usages of proceeds of crime as well.

Recommendation

Preventive Measures

The Anti-Money Laundering Organization should supervise on anti-money laundering compliance more actively. The office of the Anti-Money Laundering Organizationhas duties to impose guideline, supervise, examine and evaluate anti-money laundering compliance of reporting entity. The office of The Anti-Money Laundering Organization has duty to specify rules, method and guideline according to section 40/1 of the Act.

Thailand should imply the risk-based approach to supervise the insurance company about anti-money laundering compliance in the same way that the Bank of Thailand supervises banks about money laundering regime too.The AMLO should more intervene to supervise insurance industries but spend resource more wisely by risk-based approach which considers if the insurance company complies with anti-money laundering properly and meet minimum requirements by law. The measures should focus on on-site examination and communication with insurance firms. However, the Anti-Money Laundering should cooperate with the Office of Insurance Commission through mechanism of Memorandum of Understanding. The Office of Insurance Commission has authority to supervise and inspect insurance company according to The Insurance Commission Act Section 20 (2). Then they can inspect insurance company for the matters of money laundering by the guideline which Anti-Money Laundering Office issues. The Practice is also conducted in the United States and Canada. Moreover, the Anti-Money Laundering Organization has duty to educate or to train knowledge about money laundering. So they can provide training program to the Office of Insurance Commission.

Suppressive Measure

The offense of money laundering in Section 5 of the Act shall include the commission of "acquisition, possession or use of property with knowledge by any person who know or should have known that the property derived from predicated offence" which is exceed than reporting threshold**.**

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