

# **CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES: A COMPARATIVE STUDY OF THAI LAWS AND FOREIGN LAWS\***

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## **ABSTRACT**

Bribery is one of the most significant problems in the world that should be immediately solved as it causes harmful effects on business and society at large, weakens public accountability, democratic values, and undermines the rule of law. Nowadays, business operations are mostly done by corporations. Thus, it is not only individuals who commit bribery offences, but also corporations which cause much larger damages to economics and society, compared to the offences committed by individuals.

The United Nations Convention against Corruption or UNCAC is the first international legally binding anti-bribery instrument which had been negotiated by the members of the United Nations including 180 countries around the world and Thailand. Being a state party of UNCAC, Thailand has legal obligations to comply with its principles, including establishing corporate liability for involving in bribery offences which type of liability can be criminal, civil or administrative according to Article 26 of UNCAC concerning the liability of legal person.

According to the obligations under UNCAC, Thailand amended the Organic Act on Counter Corruption B.E. 2542 which established liability of a legal person for bribery offences. However, as shown in the Corruption Perception Index in recent years, a low score and ranking indicates severe corruption problem in Thailand which is still rising and unstoppable. The result can be interpreted that the recent law of Thailand concerning corporate criminal liability for bribery offences does not achieve its purpose of deterrence. Thus, it is necessary to seek other countermeasures which effectively deter bribery problems in Thailand.

This article will focus on criminal liability of juridical persons, especially the legal enforcement of corporate criminal liability and sanctions; it does not include criminal liabilities of natural persons representing the juridical persons.

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A comparative study of Thai laws and foreign laws is chosen as a method to seek suitable guidelines for developing Thai laws. The United States, as the successful country in combating bribery problem due to high record of detected bribery cases under the Foreign Corrupt Practices Act 1977, the United Kingdom as the UK Bribery Act which is considered the strictest law on bribery offences internationally, and lastly, France, as a model of civil law countries which is the same juristic method as Thailand, are selected to be studied for their laws in order to seek suitable countermeasures for Thailand. This should play the significant role in developing the corporate criminal liability for corruption offences in the long run.

**Keywords:** Corporate criminal liability, bribery offences, criminal liability of juridical persons

## บทคัดย่อ

การให้สินบนเป็นหนึ่งในปัญหาที่สำคัญระดับโลก ซึ่งควรได้รับการแก้ไขอย่างเร่งด่วน เนื่องจากก่อให้เกิดผลร้ายที่ต่อภาคธุรกิจและสังคมในวงกว้าง ทำลายความน่าเชื่อถือทางสังคม คุณค่าของความเสมอภาค และลดทอนหลักนิติธรรม

ในปัจจุบัน การดำเนินธุรกิจมักจะกระทำในรูปแบบของบริษัท ดังนั้น ไม่เพียงแต่บุคคลธรรมดาที่อาจกระทำความผิดฐานให้สินบน แต่ยังรวมไปถึงการกระทำความผิดโดยบริษัทต่างๆ ซึ่งก่อให้เกิดความเสียหายอย่างใหญ่หลวงต่อเศรษฐกิจและสังคม และความเสียหายที่เกิดขึ้นนั้นมีมูลค่ามากกว่าความเสียหายจากการกระทำความผิดโดยบุคคลธรรมดาอย่างมหาศาล

อนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการทุจริต ค.ศ. 2003 หรือยูเอ็นซีเอซี เป็นเครื่องมือทางกฎหมายชิ้นแรกที่มีผลผูกพันในระดับสากลเพื่อต่อต้านการทุจริตและการให้สินบน ซึ่งเกิดขึ้นจากการเจรจาร่วมกัน โดยรัฐสมาชิกของสหประชาชาติ รวม 180 ประเทศทั่วโลก รวมถึงประเทศไทยซึ่งได้ลงนามในอนุสัญญาดังกล่าวในวันที่ 9 ธันวาคม 2546 และได้มีการให้สัตยาบันอนุสัญญาดังกล่าวในวันที่ 1 มีนาคม 2554

ผลจากการเป็นรัฐภาคีของอนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการทุจริต ค.ศ. 2003 ประเทศไทยมีพันธกรณีตามกฎหมายในการปฏิบัติตามข้อกำหนดในยูเอ็นซีเอซี ซึ่งรวมไปถึงการกำหนดความรับผิดชอบทางอาญาของนิติบุคคลสำหรับความผิดเกี่ยวกับการให้สินบน โดยรูปแบบของการลงโทษ อาจเป็นการลงโทษทางอาญา ทางแพ่ง หรือทางปกครอง ตามมาตรา 26 แห่งอนุสัญญาดังกล่าวอันเกี่ยวข้องกับความรับผิดชอบของนิติบุคคล

ผลจากพันธกรณีของประเทศไทยภายใต้อนุสัญญาดังกล่าว ประเทศไทยได้มีการประกาศแก้ไขพระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยการป้องกันและปราบปรามการทุจริต พ.ศ. 2542 (ฉบับที่ 3) เมื่อวันที่ 9 กรกฎาคม พ.ศ. 2558 และได้บัญญัติถึงความรับผิดชอบของนิติบุคคลในความผิดฐานให้สินบน เพื่ออนุวัติการตามอนุสัญญาซึ่งเป็นมาตรฐานสากล อย่างไรก็ตาม จากดัชนีชี้วัดภาพลักษณ์คอร์รัปชันโลกในปีที่ผ่านมา ประเทศไทยยังคงได้รับคะแนนและอันดับต่ำลง และยังไม่เป็นที่น่าพอใจ ซึ่งบ่งชี้ให้เห็นว่าปัญหาการคอร์รัปชันในประเทศไทยรวมถึงปัญหาการให้สินบนยังคงเป็นปัญหาร้ายแรง และมีความรุนแรงขึ้นเรื่อยๆ ดัชนีดังกล่าวยังชี้ให้เห็นว่ากฎหมายไทยในปัจจุบันยังคงไม่สามารถปราบปรามปัญหาการให้สินบนได้อย่างมีประสิทธิภาพ และไม่บรรลุวัตถุประสงค์ของกฎหมายในการป้องกันและปราบปรามการกระทำความผิดฐานให้สินบน ดังนั้นจึงมีความจำเป็นที่จะต้องหามาตรการอื่นที่จะสามารถป้องกันปัญหาการให้สินบนในประเทศไทยได้อย่างมีประสิทธิภาพ

บทความนี้มุ่งศึกษาในประเด็นความรับผิดชอบทางอาญาของนิติบุคคล โดยเฉพาะในด้านการบังคับใช้กฎหมายและการกำหนดโทษ แต่ไม่รวมถึงความรับผิดชอบของผู้แทนนิติบุคคล

บทความนี้จะทำการศึกษาเปรียบเทียบกฎหมายไทยและกฎหมายต่างประเทศ เพื่อหาแนวทางที่เหมาะสมในการพัฒนากฎหมายไทย โดยกฎหมายต่างประเทศที่นำมาศึกษาได้แก่ กฎหมายสหรัฐอเมริกา ซึ่งจัดเป็นประเทศที่ประสบความสำเร็จในการจัดปัญหาการให้สินบน เนื่องจากเป็นประเทศที่มีประสิทธิภาพการให้สินบนสูงสุด ภายใต้พระราชบัญญัติว่าด้วยการกระทำความผิดอันเป็นการคอร์รัปชันในต่างประเทศของสหรัฐอเมริกา ค.ศ. 1977 (Foreign Corrupt Practices Act 1977) กฎหมายประเทศอังกฤษ ซึ่งมีพระราชบัญญัติป้องกันการทุจริต ค.ศ. 2010 (UK Bribery Act 2010) ซึ่งเป็นกฎหมายที่มีความเข้มงวดในการปราบปรามการให้สินบนจากการประเมินในระดับสากล และกฎหมายประเทศฝรั่งเศส ซึ่งเป็นประเทศต้นแบบของประเทศที่ใช้ระบบกฎหมายที่ใช้ประมวลกฎหมายหรือซีวิลลอว์ เช่นเดียวกับประเทศไทย บทความนี้จะศึกษาถึงแนวความคิดและบทบัญญัติทางกฎหมายของประเทศเหล่านี้เพื่อเสาะหามาตรการอื่นๆ ที่เหมาะสมที่สามารถนำมาใช้กับประเทศไทย และเป็นบทบาทสำคัญในการพัฒนากฎหมายเกี่ยวกับความรับผิดชอบของนิติบุคคลในความผิดฐานให้สินบนต่อไปในอนาคต

**คำสำคัญ:** ความรับผิดชอบทางอาญาของนิติบุคคล, ความผิดฐานให้สินบน

## **BACKGROUND AND PROBLEMS OF CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES**

Nowadays, we cannot deny that bribery problem is one of the most significant problems in the world that should be immediately solved as it causes harmful effects on business and society at large; weakens public accountability and democratic values; and undermines the rule of law. Unfortunately, bribery problems are increasing day by day; the acts of corruption are done widely at both domestic and international levels. Bribery is gradually changing to more complex and transnational types. Not only are the acts of corruption done by individuals but also the number of corrupt practices done by corporations increasing. Bribery which is done for the benefits of corporations mostly causes amount of damages much larger than that done for individuals' benefits.

As shown in the "Corruption Perception Index" or CPI announced by Transparency International, unfortunately, most ASEAN countries are still close to bribery. According to the result, Thailand earns transparency score of only 35 points from the total of 100, ranking in the 101<sup>st</sup> place from 176 countries around the world as surveyed in 2016, worse than 2015's 38 points with the ranking in 86<sup>th</sup> place.

The United Nations Convention against Corruption (UNCAC) requires the state parties to implement several measures, including the legal amendments, to fight against bribery problems for both domestic and foreign bribes. It also provides a requirement for state parties of UNCAC to ratify the measure on corporate criminal liability on bribery offences and make it consistent with each country's legal principle, in their countries. Thailand's ratification of UNCAC was made on 31 March 2011, almost seven years after the signatory. The ratification of UNCAC has significantly led the first amendment of the Organic Act on Counter-Corruption (OACC) of Thailand, which is now the core anti-bribery legislation in Thailand.

This article considers the recent trend of enforcement actions taken against corporations over bribery offences, the rationale for taking enforcement actions against corporations and the expected law developments in Thailand to comply with the requirements of UNCAC and to effectively cope with bribery problems in Thailand.

There was a bribery scandal occurred which related to the governor of Thailand, Gerald Green and Patricia Green, two executives of Film Festival Management, Inc. (FFM) which produced movies in Los Angeles, California, in USA. The two were indicted by the grand jury on 17 January 2008 on charge of paying bribe to a top executive of Tourism Authority of Thailand which was a foreign public official according to Foreign Corrupt Practices Act 1977 (FCPA) in the period from 2002 to 2007 at the total amount of 900,000 US Dollars for entering

into the agreement for setting up Bangkok International Film Festival (BKKIFF) in Bangkok which was valued around 7 million US Dollars.<sup>1</sup> The method used for paying a bribe, in this case, was disclosed by the prosecutor of USA that the accused had several transactions for payments through intermediaries which bank account opened overseas including the account of such executive's daughter. From the procurement budget investigation between 2003 and 2005, the budget of 200 million US Dollars was used per event whilst when the executive changed, the budget used was only 70 million US Dollars per event. Gerald and Patricia Green, have already been sentenced to six months in jail and house detention in 2010 in connection with this case. The governor and her daughter were accused of seeking kickbacks and subject to the investigation of the Supreme Court's Criminal Division for Holders of Political Positions. The governor was sentenced to 66 years imprisonment but reduced to maximum penalty of 50 years imprisonment and her daughter was also imprisoned for 44 years as a supporter. They were also subjected to confiscation of 1.8 Million US Dollars plus legal interests.

According to this case, it is noticeable that the reason Thailand does not have any legal action against Film Festival Management, Inc. (FFM) was due to the company paying a bribe to Thai official.

Another recent bribery scandal in Thailand is the Rolls-Royce case. The British giant jet engine maker has agreed to pay a huge amount of money to settle bribery charges in the UK, US, and Brazil. The indictment covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. On 17 January 2017, the Deferred Prosecution Agreement (DPA), subject to approval by the court, has been reached between UK Serious Fraud Office (SFO) and Rolls-Royce according to these charges, leading the total sum of settlement of 497.25 million Pounds plus interest and the SFO's costs of 13 million Pounds and other measures for Rolls-Royce to comply over a specific period. If Rolls-Royce does not breach the conditions of the DPA, it will not be prosecuted at the end of the agreed period. Apart from this amount, Rolls-Royce also paid 169 US Dollars in penalties to the US Department of Justice (DOJ) and 25 million to the Brazilian authorities. In the allegation, Rolls-Royce admitted that it paid more than 36 million US Dollars to Thai Airways in the period between 1991 and 2005 and another 11 million US Dollars was paid to the state-owned energy companies of Thailand, PTT Public Company Limited (PTT) and its subsidiary PTT Exploration and Production

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<sup>1</sup> 'Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts' (Department of Justice, 14 September 2009) <<https://www.justice.gov/opa/pr/film-executive-and-spouse-found-guilty-paying-bribes-senior-thai-tourism-official-obtain>>, accessed 20 November 2016

(PTTEP) between 2003 and 2013 in order to secure related supply contracts for equipment and after-market products and service. It also alleged that part of the paid amount was for individuals who were agents of the State of Thailand and employees. Due to this scandal and pressure from international organization against bribery, the investigation on the bribery case in Thailand is now under proceedings by the National Anti-Corruption Commission, and also the alleged companies are internally investigating themselves.

So far, neither the Thai two state-owned companies nor Rolls-Royce has been charged with any offence in Thailand. However, it leads to a question that whether the investigation procedure on bribery in Thailand is efficient enough or not. This also decreases the creditability of the country in international aspects.

The enactment of the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) has included corporate criminal liability for bribery offences in Article 123/5, paragraph 2 since 12 July 2015. However, Thailand still earned lower score of Corruption Perception Index (CPI) comparing to last year. As indicated in the Corruption Perception Index (CPI) and the above mentioned actual bribery cases that occurred in Thailand, it is noticeable that bribery problems in Thailand is still rising and unstoppable. Also, most of the bribery cases occurred has been committed by high-profit companies. This shows that the recent law of Thailand concerning corporate criminal liability for bribery offences does not achieve its purpose of deterring bribery problems. The author is concerned whether the provision in Thai law, which only has fine as the penalty, would be able to cope with bribery offences committed by high-profit organizations effectively. Therefore, it is necessary to seek other countermeasures to solve bribery problems in Thailand. A comparative study of Thai laws and foreign laws is one of the tools to seek appropriate countermeasures supporting the development of Thai anti-bribery laws.

### **United Nations Convention against Corruption 2003 (UNCAC)**

The general principle of UNCAC is to determine all state parties to do according to mandatory requirements or obligation to legislate. It is the minimum procedure for the state parties to adopt and use as a scope to set policy, legislate the laws and to assist in international cooperation to eliminate corruption both inside and outside the country, including the transnational crime to legislate domestic laws according to the minimum requirements of UNCAC. Nevertheless, UNCAC specifies optional requirements or obligation to the state parties to consider adopting or shall endeavor to develop domestic laws properly.

The provision concerning the liability of juridical person in UNCAC is expressly specified in Article 26 which the significant point is that each State Party

shall adopt legal measures to establish corporate liability which may be criminal, civil or administrative for the bribery offences provided in UNCAC, and ensure that juridical persons held liable for criminal offences concerning bribery are subject to proportionate and dissuasive criminal or non-criminal sanctions. As a result, Thailand shall implement the provisions of UNCAC by enacting or amending domestic laws and regulations to comply with such convention.

A recent amendment to the anti-corruption laws in Thailand as the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) includes corporate criminal liability for bribery offences in the second paragraph of Article 123/5. It provides that if the offender is an employee, agent, affiliate company or any person who represents or acts on behalf of a juridical person and induced the commission of the official's misconduct for the benefit of the juridical person, even if such person had no actual authority to do so, and that juridical person has no internal adequate procedures to prevent the commission of the offence, the juridical person will be guilty of having committed the offence. However, there is no definition of 'internal adequate procedures' which may cause problem of application.

The penalty for a juridical person who commits this offence is a fine not exceeding twice the amount of undue advantages it gained from bribery.<sup>2</sup> In this respect, the amendment brings Thai anti-bribery laws closer to UK Bribery Act.<sup>3</sup> This is noticeable whether or not such amount of fine is a proportionate and appropriate sanction.

The amendment introduces vicarious liabilities for companies earning benefits from bribes made by "associated person" including their employees, affiliates, and agents to a Thai or foreign official, irrespective of whether or not they had the authority to act on the company's behalf. The intention on the part of the company for making bribe is not required for the offence. Noticeably, there is a question whether the definition of "associated person" in this amendment is too broad for consideration of criminal offences committed by juridical persons or not.

### **Economic analysis of criminal laws**

Law and Economics or Economic Analysis of Law is a science concerning the significant study of law, theory, interpretation of the law, evaluation of law and the effects of the law on society by applying Neoclassic Economics

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<sup>2</sup> Uthit Sankosik, 'The purposes of punishment', 21st issue, 19th year, (Prosecutors Journal, July B.E. 2539), p. 271-299<sup>3</sup> Ibid

<sup>3</sup> Ibid

Methodology as the guideline and tool for analysis, especially Rational Choice Model.<sup>4</sup>

In Law and Economics viewpoint, the law is a tool used for adjusting individual behavior in the society into a desirable way such as not causing harm to society and not causing danger to others' properties and lives, and to prevent undesirable behavior such as crime commitment through legal sanctions both as monetary sanction or nonmonetary sanction.

Significant aim of criminal justice system is deterrence of criminal offences through legal punishments, both monetary and non-monetary punishments. The significant rule in Economics analysis of criminal laws is Optimal Criminal Sanction. To sanction criminal offender properly, it is necessary to understand the offender's characteristics and behavior. This leads to the proper design of sanction structure to induce adjustment of the offender's behavior effectively.

### **The Rational Choice Model**

The Rational Choice Model of Becker has been applied to explain criminal offender's behavior. It is based on the presumption that criminal offender is an economic animal which has economic rationality or is called "Rational Calculator." The criminal offender will decide to commit the crime when he estimates that the expected benefits he will get from committing the crime (such as the amount of properties to be stolen) are higher than his expected costs for such commitment. The costs of criminal punishment are to be arrested and be legally punished.<sup>5</sup>

The main legal thought to deter criminal offences by the state is to increase the expected costs of criminal offenders when committing crimes such as to increase the scale of legal sanction or to increase the probability of the offenders to be arrested, etc.

### **Monetary sanction vs. non-monetary sanction**

Monetary sanction such as fine does not cause any cost to the state as it is a transfer of properties from the offender to the state, in contrary, it produces income to public. While non-monetary sanction such as imprisonment, even though it has high efficiency for deterrence of criminal offences; it will utilize a great number of public resources, cause high costs to public for enforcement, especially, the costs for prison construction, management and maintenance, etc.

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<sup>4</sup> Pokpong Chanwith, 'Economic Analysis of Criminal Laws' 2nd edition (Thammasat University, The Thailand Research Fund (TRF), February 2011) p.1

<sup>5</sup> Ibid p.19



Besides, considering from the offender's side, imprisonment is a separation of prisoners who are productive labors from the labor market. Prisoners confront with the opportunity costs that are loss of income during imprisonment and less opportunity for career after imprisonment because of loss of working network and decrease of working skill. After imprisonment, human will have lower productivity and human capital and must face with difficulties for seeking a new job. Due to these results, the offender who was punished by imprisonment is likely to recommit the crime. Moreover, it is not only the offender who faces with opportunity cost, but also the society. Society loses productive labors from the labor market resulting decrease of productivities and public income which affect the economics growth rate.

By the above reasons, Law and Economics supports monetary sanction such as fine since it does not cause any cost to the public. Non-monetary sanction such as imprisonment should be only a supporting measure. In case that the offender has more properties than the fine, such offender shall be punished by fine only, but if the offender has not enough properties to pay fine, imprisonment will be added for the lack of payment. Imprisonment should be applied only for felonies which cause high damages that only fine may not effectively cause deterrent effect.<sup>6</sup>

Monetary profits are the aim of all business entities, and imprisonment cannot be applied to juridical persons which are liable for bribery offences. Fine is then a suitable sanction which is sufficient to deter re-commit of the crime; provided that the amount of fine must be high enough to cause deterrent effect.

## **CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES IN FOREIGN COUNTRIES**

The concept of corporate criminal liability is widely promoted in various legal systems in different countries, including the United States of America, the United Kingdom and France where the provisions concerning corporate criminal liability are established. Furthermore, the concept of corporate criminal liability in Thailand is influenced by the laws of these countries.

### **The United States**

In the USA, the notion concerning criminal sanction to juridical persons is provided. Also, types of sanction have been rapidly developed compared to other countries. The USA succeeds in combating bribery problem due to high

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<sup>6</sup> Pokpong Chanwith, 'Basic knowledge on Laws and Economics', Academic essay for seminar, Thailand Court of Justice and Thailand Development Research Institute, 26 January, 2010, p.21-22

record of detected bribery cases under the Foreign Corrupt Practices Act 1977 (FCPA). The author opines that the USA is an interesting country to be studied for its law and notion on corporate criminal liability.

The Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) are the authorities to enforce the FCPA. Recently, the enforcement actions under FCPA by SEC and DOJ have increased which reflects the efficiency of these agencies in combating bribery.<sup>7</sup>

One of the well-known cases is JP Morgan bribery scandal. JP Morgan's subsidiary in Asia created a client referral hiring program to bypass normal hiring process and rewarded well-paying, career-building job candidates referred by client executives and influential government officials who were unqualified for the positions. For the period of about 7 years, JP Morgan hired approximately 100 interns and full-time employees at the request of foreign government officials, enabling the firm to win or retain business resulting in more than 100 million US Dollars in revenues to JP Morgan.

SEC announced on November 17, 2016 that JPMorgan has agreed to pay more than 130 million US Dollars to settle SEC charges. In addition, JPMorgan is also expected to pay 72 million US Dollars to the Justice Department and 61.9 million US Dollars to the Federal Reserve Board of Governors for a total of more than 264 million US Dollars in sanctions resulting from the aforementioned misconduct.

Type of sanction to be inflicted upon juridical persons in the USA is not only fine. Probation is another type of sanction specified in the law of USA. It is a measure to put the offenders under the control of official for a period to raise their consciousness. If the probation is successful, there will be no other punishment according to the court judgment. The conditions of probation are community services, prohibition of business operation and restructuring of business management to prevent reoccurrence of the offence.

## **The United Kingdom**

For the second country, UK is a country which significantly pays attention to bribery problem and can effectively solve it. Furthermore, the UK

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<sup>7</sup> Stacey L. McGraw and Stacey E. Rufe, 'The Foreign Corrupt Practices Act: An Overview of the Law and Coverage-Related Issues' (March 2014) <<http://apps.usanbar.org/litigation/committees/insurance/Sections/janfeb2014-foreign-corrupt-practices-act.html>> accessed 25 November, 2016

Bribery Act is considered the strictest law on bribery offences internationally. The enactment of Bribery Act 2010 obviously shows that the UK gives priority to fight against bribery problem.

UK Bribery Act specifies a strict liability to juridical persons incorporated in or carrying on business in the UK. These juridical persons shall be subject to penalties when they fail to prevent bribery to obtain or retain business or for a business advantage in their organization in Section 7. This means if their employees, agents or any other 'associated persons' bribes another person to obtain or retain business or a business opportunity for the commercial organization, such juridical persons shall be liable for the offence of failing to prevent bribery.

In addition, UK Ministry of Justice has published a guide on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs on 30 March 2011. This guide consists of 6 principles that the juridical persons need to do to meet the required standard of 'adequate procedures'.

In the UK, the punishment for juridical persons is provided in 2 types<sup>8</sup> which are financial sanction and non-financial sanction.

For financial sanction, judiciary shall determine the scale of fine by considering the appeared intention of the offender or in the judiciary's knowledge to compensate the damages occurred to society from such offence. This caused the fine of juridical persons to be higher than the fine of natural persons. Legal entities may be subject to unlimited amount of fine in some cases.

Non-financial sanctions are also provided in the law of UK, for examples, restructuring of business operation, compensation to the injured persons, public service or even dissolution.

## **France**

For the last country, the author chooses to study the law of France. The provisions concerning corporate criminal liability in France are in line with the civil law juristic method. Most of other civil-law countries are influenced by the law of France.

The general principles concerning corporate criminal liabilities are provided in the Penal Code, 1992. A juridical person shall be criminally liable for

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<sup>8</sup> Taweekiat Meenakanist, 'The complete research on corporate liability for involving in transnational crime' p. 34-36

the offences if such offence is committed by its organ or representative as provided in article 121-2 to 121-7.<sup>9</sup>

The law of France also provides criminal sanctions to be imposed on juridical persons by considering harmful effects to them; this is separated from the sanction applied to natural persons. Article 131-39 empowers the judge to sanction juridical persons by comparing with the sanction which applies to natural persons. The penalties under this Article are dissolution, prohibition to do social or professional activity, placement under juridical supervision, permanent closure, disqualification from public tenders, or prohibition to draw cheques, etc.

## **ANALYSIS ON CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES IN THAILAND**

In the past, Thai courts applied Article 144 and Article 167 of Thailand Penal Code to sanction the natural person who was a representative or an employee of the juridical person alone. There was no sanction to be imposed on the juridical person who gains benefits from such offence.

Later, as Thailand became a signatory to the UNCAC on 9<sup>th</sup> December, 2003 and ratified the UNCAC on 1<sup>st</sup> March 2011. Therefore, Thailand has legal obligations to comply with its principles, including establishing corporate liability for involving in bribery offences according to Article 26 of UNCAC concerning the liability of legal person.

Before the enactment of the third amendment of Organic Act on Counter-Corruption (OACC) of Thailand in 2015, Thailand has been evaluated and followed up the ratification of the UNCAC in domestic legislative viewpoint. At that time, Thailand had no domestic law concerning corporate criminal liability for bribery offence which resulted in negative impacts in international perspective on cooperation for combating bribery in Thailand. The third amendment of the OACC enacted to comply with UNCAC is in paragraph 2 of Article 123/5. This is similar to the stated purpose of UK Bribery Act and the practices and policies of the DOJ and SEC in enforcing the FCPA.

### **The application of corporate criminal liability according to Thailand's juristic method**

Though Thailand is a civil law country, the notion of common law system had much influence in Thai society since most of the judges graduated from

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<sup>9</sup> Surasak Likasitwattanukul, 'Corporate Criminal Liability: The study to suggest juristic method for Thailand, a comparative study with UK and France' (Faculty of law Thammasat University Journal, March 2009) p.97

UK or USA. Influence of common law system, therefore, can be generally found in Thailand, especially in the matter of criminal liabilities for juridical persons.

Sometimes, the Supreme Court of Thailand applies the principle of the Civil and Commercial Code to the criminal cases such as the Supreme Court Order No. 787-788/2506 providing that “[...]juridical persons can have its intention which is the mental element of a criminal offence. Juridical persons are able to commit criminal offences which require *mens rea*. Juridical persons shall be sanctioned, only to the extent of applicable sanctions therefor; provided, types of offences, circumstance, authorization of juridical person's representative and the operating purposes of juridical persons should be considered on a case by case basis [...]”.

From the study of the Penal Code of France 1992 in Chapter 3, Article 121-2 provides a general provision for corporate criminal liability that juridical persons are criminally liable for the offences committed on their account by their organs or representatives. This provision supports several court decisions on criminal liabilities of juridical persons for criminal offences committed by their representatives which are in line with the civil law system.

So far, Thailand has not yet enacted a general provision for corporate criminal liability in the Penal Code; however, several Supreme Court decisions sanction juridical persons without a codified law. Noticeably, there is no specific applicable law in Thailand to sanction juridical persons committing criminal offences which cause huge damages to society and economics. The expansion of Supreme Court judgment to sanction juridical persons has been made without supporting codified law causing the interpretation of law depending on the consideration of each judge. Judge-made-law results in no standard or precise legal principle to be applied to each case which conflicts to the juristic method in Thailand.

To solve the problem of lack of a provision on corporate criminal liability, it is necessary to provide a specific corporate criminal liability as a general provision in the Penal Code of Thailand to effectively support the courts' decisions on criminal liabilities of juridical persons and solve Judge-made law problem in Thailand.

### **The definition of the term ‘internal adequate procedures’**

In Article 123/5, paragraph 2, there is a defense for juridical persons whom have in place internal adequate procedures provided in this provision which conforms to the UK Bribery Act<sup>10</sup>; however, there is no definition of the term

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<sup>10</sup> Tilleke & Gibbins, 'Anti-Corruption Law in Thailand, A Practical Guide for Investors (January 2016) p. 4

‘internal adequate procedures’ provided. The author views that this may cause problem on interpretation of law. Unlike in the UK, Ministry of Justice has published a guideline on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs<sup>11</sup> which consists of 6 principles that juridical person needs to do to meet the required standard of ‘adequate procedures’. The author opines that the guideline for adequate procedures should be implemented in Thailand for accurate compliance of juridical person.

### **The scope of ‘associated persons’ whose action constitute criminal liability to juridical persons**

The last paragraph of Article 123/5 expressly provides the definition of ‘associated persons’ whose acts for which the juridical person shall be criminally liable. An ‘associated person’ includes any employee, agent, subsidiary, and any other party acting for the company engaged in corrupt acts even if the offense is committed without the acknowledgement of the authorized director of the company or without management authorization, such company shall also be liable for such offence. The author opines that this may cause too heavy duties to the company and it is quite impracticable for big companies to control the action of their hundreds or thousands employees. In case the employees other than authorized director committed bribery offences for benefits of the juridical person, such employee is still subject to bribery offence for his own action personally. The scope of corporate criminal liability for bribery offences should be limited to the cases where the authorized person commits the offence by himself or knows or should have known the commitment of such offence.

The idea to limit the scope the definition of ‘associated persons’ to include only those who committed the offence with the knowledge of the authorized persons will result in effective bribery preventive measures in each juridical person. Additionally, the author foresees disadvantage for this idea to revise the definition of the word ‘associated persons’. This provision will not constitute a bribery offence against a juridical person in the event where the bribery is committed by any person for benefits of juridical person without such juridical persons’ knowledge; however, the offender himself is subject to bribery offence in Article 144 of the Penal Code or in the first paragraph of Article 123/5 of OACC (Amendment No.3) as well. Therefore, the author opines that the advantages from the amendment the definition of ‘associated persons’ exceed the disadvantages.

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<sup>11</sup> United Nations Office on Drugs and Crime, ‘United Nations Convention Against Corruption Signature and Ratification Status (2016)

<<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>

## **Sanctions for bribery offences committed for undue advantages of juridical persons**

The sanction to be imposed on a juridical person is provided in Article 123/5, paragraph 2 of the third amendment of OACC as ‘a fine from one time but not exceeding two times the damages incurred or the benefits gained’. However, the author views that it may not proportionate to the level of damages affecting to other people and society, especially for bribery offences committed by high-profit companies such as in case of two executives of Film Festival Management, Inc. (FFM) and in case of Rolls-Royce mentioned above. Sometimes, fine does not cause negative impacts to high-profit juridical persons in the freedom for operating business, freedom for owning properties, or freedom for being honored which are the high-valued assets of juridical persons. This is noticeable whether the scale of fine provided is effective, proportionate and dissuasive sanction according to Article 26 of UNCAC.

The scale of the fine which is actually charged to a juridical person is merely under the discretion of the court. The author opines that the scale of fine to be inflicted upon juridical persons should be higher since increasing the ceiling of fine will also increase the flexibility of the court to exercise its discretion to each case effectively.

Sometimes, bribery is committed for non-monetary benefits such as facilitating payment which is made with the intention of expediting a governmental process, or for getting a business license, etc. In these cases, the benefits that juridical persons gained in return of paying bribe have no monetary value but instead a pass for starting a business for future profits. For example, in the event where the bribe is paid for a business license, the benefit gained by the juridical person is only a piece of paper which has no monetary value.

The calculation of fine to be inflicted upon juridical persons may not be applicable in these cases because ‘the number of damages or benefits gained’ cannot be calculated in monetary value at the time of the court judgment.

The author opines that the sanction to be inflicted upon juridical persons should be amended to cover this kind of bribery as well. The scale of fine in the rank of fix amount should be established. Also, the ceiling of the fine amount should be high enough to result in deterrence of bribery offences. Specifying narrow scale of fine will reduce the flexibility of the judge to exercise his discretion to each court case. This may result in improper amount of fine which cannot effectively deter bribery offence committed by juridical persons.

Apart from fine, several countries provide other optional procedures to be enforced to juridical persons; for example, in the USA, the law provides other optional procedures for the court to be inflicted upon the juridical persons such as a ban from doing business with governmental agencies, Multilateral Development Banks, or termination of using business license, etc., in France, the court also can sanction juridical persons by order for dissolution, prohibition from doing some business, forfeiture of properties intended to be used for committing the offence, etc.

The author is concerned whether the provision in Thai law, which only has fine as the penalty, would be able to cope with bribery offences committed by high-profit organizations effectively. The author is also opined that other optional measures such as administrative sanctions should be established.

The most significant thing for business units is the opportunity to operate business and getting profit. The administrative sanctions mostly affect the opportunity to operate business of juridical person which should effectively deter bribery offence apart from fine. Also, in some bribery cases which the benefits to be gained by juridical persons are not related to monetary value; fine may not be applicable in such cases. Providing administrative sanctions to highly-valued assets of juridical persons in the anti-bribery provision is then an efficient solution since juridical persons do not want their business to be stopped or ceased.

## **CONCLUSION AND RECOMMENDATIONS**

Nowadays, business operations are mostly done by juridical persons such as partnership, company, or association, etc. The bribery offence committed for the benefits of juridical persons are increasing day by day. This affects economics, society, and politics both domestically and internationally.

Considering the provisions of the United Nations Convention against Corruption 2003 (UNCAC) and the problems on bribery offences found in Thailand, the laws and regulations concerning anti-bribery provisions in Thailand should be amended to effectively solve bribery problems.

### **Legislative viewpoint**

As aforementioned, there has yet to be a general legislation regarding corporate criminal liability in Thailand. The suggestions to improve Thailand law at this point are:

- i) There should be an expressed general provision in the Penal Code of Thailand specifying the conditions as to what circumstances that juridical persons shall be criminally liable.



ii) The application of law should be based on civil law-system juristic method. Thai courts should apply only the written laws to the case. Therefore, in the event where juridical persons should be liable for a criminal offence, it should be provided in the written law to prevent judge-made-law problem as the current situation.

iii) The sanctions to be applied to juridical persons should be separately specified from the sanctions applying to natural persons by considering the negative impacts occurred to juridical persons.

iv) The definition of the term 'internal adequate procedures' provided in Article 123/5 paragraph 2 should be clarified, similar to the law of UK where a guideline on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs is provided.

v) The definition of 'associated persons' whose acts constitute criminal liability of juridical persons provided in Article 123/5 paragraph 3 should be limited to directors or authorized representatives acting on such juridical persons' behalf. This will secure the liability of juridical persons from having too broad criminal liabilities for others' offences. The scope of corporate criminal liability for bribery offences should be limited to the cases where the authorized person commits the offence by himself or knows or should have known the commitment of such offence.

### **Sanction viewpoint**

From the analysis on corporate criminal liability for bribery offences, the author opines that the amendment of the sanctions provided in Article 123/5 of the third amendment of OACC is needed as the followings:

i) Administrative sanctions such as dissolution, placement under judicial supervision, permanent closure or prohibition to draw cheques should be added because juridical persons are mostly established to do business and to gain profit from such business. If these administrative penalties apply to juridical persons in Thailand, it would effectively deter them from committing bribery offences since they do not want their business to be ceased or stopped.

ii) For bribery offences committed for monetary benefits or undue advantages, the maximum scale of fine should be increased to five times the number of damages occurred or undue advantages gained from such bribery in order to enhance the judge to exercise his discretion flexibly to each case, especially for the bribery cases committed by high-profit companies. Increasing the ceiling of fine will effectively prevent reoccurrence of bribery problems in the future, compared to lower amount of fine.

iii) Other recommendation for bribery offences committed for non-monetary benefits or undue advantages: the legislation should cover the cases where

the number of damages or the benefits gained cannot be calculated in monetary value or have not yet occurred at the time of the court's judgment.

The author hopes that these recommendations should play the significant role in developing the corporate criminal liability for corruption offences in the long run.

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