



**Corporate Criminal Liability for Bribery Offences:  
A Comparative Study Between Thai Laws And Foreign  
Laws**

**BY**

**Ms. Kornkaew Luangthanakun**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS  
IN BUSINESS LAWS (ENGLISH PROGRAM)  
FACULTY OF LAW  
THAMMASAT UNIVERSITY  
ACADEMIC YEAR 2016  
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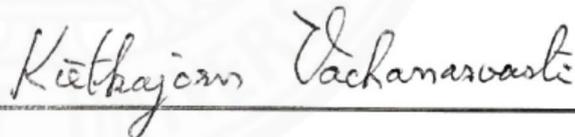
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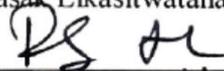
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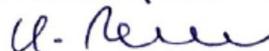
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Thesis Title	CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES: A COMPARATIVE STUDY BETWEEN THAI LAWS AND FOREIGN LAWS
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## ABSTRACT

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 negotiated by the members of the United Nations, it includes 181 countries around the world. Thailand became a signatory state to the UNCAC on 9<sup>th</sup> December 2003 and ratified the UNCAC on 1<sup>st</sup> March 2011.

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 persons.

According to the obligations under UNCAC, Thailand amended the Organic Act on Counter Corruption B.E. 2542 to cover liability of a legal person for bribery offences. However, as shown in the Corruption Perception Index in recent

years, a low score and ranking indicate 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 deterring bribery problems. Thus, it is necessary to seek other countermeasures which effectively deter bribery problems in Thailand.

This thesis 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 people representing the juridical persons.

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 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 its laws concerning corporate criminal liability 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**

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Ms. Kornkaew Luangthanakun

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## LIST OF ABBREVIATIONS

<b>Symbols/Abbreviations</b>	<b>Terms</b>
FCPA	The Foreign Corrupt Practice Act
NACC	National Anti-Corruption Commission
OACC	The Organic Act on Counter-Corruption
OECD	The Organization for Economic Cooperation and Development
SEC	The Securities and Exchange Commission
UK	The United Kingdom
UKBA	The UK Bribery Act
UNCAC	The United Nations Convention Against Corruption
US	The United States
USDOJ	U.S. Department of Justice

# CHAPTER 1

## INTRODUCTION

### 1.1 Background and Problems

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 both at domestic and international level. Bribery is gradually changing to more complex and transnational types. Not only are the acts of corruption done by individuals are increasing, but so are the number of corrupt practices done by corporations. Bribery which is done for the benefits of corporations mostly causes large amount of damages, much larger than the damages caused for individuals' benefits.

As shown in the "Corruption Perception Index" or CPI as announced by Transparency International, unfortunately, most ASEAN countries are still close to bribery. According to the result, Thailand earns only 35 points from the total of 100, ranking in the 101<sup>st</sup> place from 176 countries around the world 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) is the first international legally binding anti-bribery instrument. It is a convention negotiated by the members of the United Nations. It requires the state parties to implement several measures, including the legal amendments, to fight against bribery problems for both domestic and foreign bribery. Thailand became a signatory to the UNCAC on 9 December 2003, and ratified the UNCAC on 1 March 2011, being the 149<sup>th</sup> state party of the UNCAC. It is also a requirement for state parties of UNAC 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 is 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. Being a state party of UNCAC, Thailand has to comply with its principles which led it to implement the required amendments of Thai laws by the Thai government. This thesis considers the recent trend of enforcement actions taken against corporations over bribery offences, and also the rationale for taking legal enforcement against corporations, including the expected law developments 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) whom produced movies in Los Angeles, California, in USA. The two were accused by the jury on 17 January 2008 in the charge of paying bribe to Ms. Jutamas Siriwan, a top executive of Tourism Authority of Thailand which is a foreign public official according to Foreign Corrupt Practices Act 1977 (FCPA) in the period from 2002 to 2007, including the total amount of bribe to 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 in 2003 to 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. Ms. Jutamas Siriwan, 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. Ms. Jutamas Siriwan was sentenced to 66 years imprisonment but subject to maximum penalty of

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<sup>1</sup> Department of Justice, 'Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts' (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

50 years imprisonment and her daughter, Ms. Jittisopa Siriwan 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 and 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 (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 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 investigating procedure on

bribery offences in Thailand is efficient enough or not. This also decreases the creditability of the country in international aspects.

As indicated by the low score of Thailand 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. After the enactment of the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) which includes corporate criminal liability for bribery offences in Article 123/5, paragraph 2 on 12 July 2015, Thailand earned lower score of Corruption Perception Index (CPI) compared to last year and most of the bribery cases were 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. 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 measures supporting the development of Thai anti-bribery laws.

## **1.2 Hypothesis**

To comply with civil law juristic method and the requirements of the United Nations Against Corruption 2003 (UNCAC) on corporate criminal liability matter, it is necessary to establish and implement the general provision for corporate criminal liability in the Penal Code of Thailand. Also, the current law concerning criminal liability for bribery offence should be amended as it is insufficient to deter bribery offences which are committed by high profit juridical persons. The sanctions to be imposed on juridical persons in the Organic Act on Counter-Corruption B.E. 2558, article 123/5 should be increased and there should be other countermeasures i.e. administrative penalties and guidance of required standard of 'adequate procedures' should be established to achieve the purpose of criminal law on deterrent effect.

## **1.3 Objectives of Study**

- a) To study the general principles and sanctions of corporate criminal liability in foreign and Thai laws;

- b) To study the principles of international cooperation on anti-bribery laws, foreign and Thai anti-bribery laws with a focus on enforcement of corporate criminal liability and sanctions;
- c) To collect data and samples set forth by other countries with more effective legal principles and sanctions regarding enforcement of corporate criminal liability under anti-bribery laws;
- d) To conduct an analysis study of the problems with the use of Thai anti-bribery enforcement on corporate criminal liability and sanctions; and
- e) To propose solutions to resolve legal problems arising from enforcement of corporate criminal liability under Thai anti-bribery laws.

#### **1.4 Scope of Study**

The scope of this research paper involves a look into legal principles, doctrines, and articles relating to corporate criminal liability in anti-bribery laws. The article focuses on criminal liability of juridical persons only, and does not include criminal liabilities of people representing the juridical persons. This research focuses on the legal enforcement of corporate criminal liability and sanctions of USA, UK, France and Thailand in order to make a comparison and analysis to see what other countermeasures can be effectively applied to Thai laws.

In this chapter, it introduces the background and problems, hypothesis, objectives of the study, scope of the study, methodology, and expected the result of the overall thesis. This chapter presents the concept and the intention that motivated the author to write this thesis.

Chapter II considers the general information of juridical persons and bribery, continuing with the concepts of corporate criminal liability and bribery offence. It starts with the general information of the international cooperation against bribery, the United Nations Convention Against Bribery, 2003 (UNCAC), including its obligations of the state parties to adopt necessary measures to establish the liability of a juridical person for committing the offences in accordance with the UNCAC, followed by Thailand's ratification of UNCAC, a consideration on Article 26 concerning liability of juridical persons, and the notion of economic analysis of criminal law.

Chapter III focuses on the general principles, liability, and sanctions of the laws concerning corporate criminal liability and the specific laws concerning corporate criminal liability for bribery offence under anti-bribery laws in foreign countries including the USA, UK, and France.

Chapter IV considers the general principle and the specific laws concerning corporate criminal liability for bribery offence in Thailand compared with the principles and enforcement of foreign laws studied in Chapter III and also presents the analysis information of Thailand law in a comparative approach.

Chapter V presents the conclusion of all information gathered from researching and analysis results and provides recommendations to improve the efficiency of corporate criminal liability for anti-bribery laws in Thailand.

### **1.5 Methodology**

The Method used in this thesis is based on documentary research conducted by searching, comparing and analyzing Thai and foreign textbooks, articles, journals, statutory laws, government publications, scholar's opinions, information on the internet and any other relevant documents.

### **1.6 Expected Result**

- a) To thoroughly understand the principles concerning corporate criminal liability in foreign countries and Thailand;
- b) To thoroughly understand the principles of international cooperation on combating bribery and corporate criminal liability for bribery offences in foreign and Thai laws;
- b) To thoroughly analyze and understand the problems of the enforcement of corporate criminal liability in the course of using Thai anti-bribery laws;
- c) To thoroughly understand the principles of foreign corporate criminal liability for bribery offences to applied to Thai laws; and
- d) To provide appropriate legal measures as a solution to resolve problems arising from the inefficiency of Thai anti-bribery laws in point of corporate criminal liability and sanctions.

## **CHAPTER 2**

### **CONCEPTS OF CORPORATE CRIMINAL LIABILITY AND BRIBERY OFFENCE**

The problem on bribery for benefits of the juridical persons has been increasing more and more. Bribery is done in both domestic and transnational level which leads to difficulty in prevention and suppression of such offence. The corruption problem affects the whole economic system and society broadly. Every country around the world including Thailand is aware of such problem and make great attempt to fight against corruption by countersigning in the United Nation Convention against Corruption 2003 (UNCAC), resulting in domestic related law amendment and development for ratification of the UNCAC for solving the problem on bribery for juridical person's advantages.

In this chapter, it provides 5 parts of topics to be studied;

- i) The first part will be the information of juridical person including the definition, causes and types and related theories concerning the status of juridical person to enhance basic knowledge regarding bribery and juridical persons,
- ii) The second part will consider on general information about bribery,
- iii) The third part will be the overview of the United Nations Convention Against Corruption (UNCAC), the international cooperation against corruption which Thailand is a State Party to this convention. The chapter provides the general provision, the historical background of Thailand's ratification and the provision concerning liability of juridical person in UNCAC,
- iv) The fourth part will be the explanation of criminal sanction, including its definition, features, and purposes, and
- v) The last part will be the notion of economic analysis of criminal law.

#### **2.1 Juridical person**

This portion is the basic chapter of the juridical person, including the definition, types of juridical person likely to do bribery offences, and theories concerning the status of juridical person.

### **2.1.1 Definition of juridical person**

The law does not provide a definition of the word "juridical person"; however, several lawyers such as Prince Ratchabuti Direkrit,<sup>2</sup> Professor Jitti Tingsabhat defined such word as a person assumed by law to have rights and obligations under the laws and regulations or the memorandum of association. A juridical person may not only establish itself under the Civil and Commercial code but under other laws. A juridical person can operate its business within the scope of its objectives by its representative. Any action done by its representative within the scope of corporate objectives is deemed the action of the juridical person itself.<sup>3</sup>

Professor Dr. Surasak Likasitwatanakul defined the word "juridical person" as an organization that the law assumed to be an entity which has the same status as a natural person. In some cases, the law expressly defined a juridical person as an entity such as The Securities and Exchange Commission (SEC) or the juridical person registered under the specific law such as a limited company.<sup>4</sup>

According to Article 65 of the Civil and Commercial Act of Thailand, a juridical person can come into existence only by virtue of the Civil and Commercial Code or of other laws. The examples of juridical persons that come into existence by the Civil and Commercial Code are registered partnership, a company limited, association and foundation. Some juridical persons come into existence by other laws such as ministries, bureaus and departments under Development of Ministry, Bureau and Department Act B.E.2545, etc.

### **2.1.2 Types of juridical person**

There are 2 types of juridical person which are:

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<sup>2</sup> Rajburi Direkrit, Prince. (n.p:n.d.), Krungtheppannakarn, B.E. 2468, Sobhonpipattanakorn Publisher, p. 14, alledged in Prasit Kovilaikool 'The explanation of Civil and Commercial Code on title person and corporate criminal liability, 2nd edition, (Bangkok: Nititham, B.E. 2549) p. 18

<sup>3</sup> Somphobpsit Sukpisit, 'The explanation of civil and commercial code, Title person', 2nd edition, (Bangkok: Pimauksorn Publisher, B.E. 2549) p. 81

<sup>4</sup> Surasak Likasitwattanakul, 'Civil and criminal liability of the business management', 1st edition, (Bangkok: Winyuchon Publisher, B.E. 2539) p. 14

### **1) Juridical person established under the private law**

A juridical person under the private law arises from the integration of individuals to do business. It is necessary for the business whereby a single person cannot achieve its business purpose on a large scale. The integration caused by the voluntariness of such individuals to establish a juridical person by the declaration of intention, for example, entering into a contract or a unilateral act and register to the relating government authority according to the law. The business operation of a juridical person is based on the equality of rights and obligations. Business operation is basically on the basis of benefits changing between the private sectors. The legal status, legal rights, obligations and responsibilities of the juridical person is same as those of a natural person. The properties of a juridical person can also be under the court power to enforce the debt of such person.

There are 5 types of the juridical person established under the Civil and Commercial Code of Thailand which are:

- (1) Association
- (2) Foundation
- (3) Registered Partnership
- (4) Limited Partnership
- (5) Company Limited

### **2) Juridical person established under the public law**

A juridical person in this type is a juridical person which is established by the operation of the public law. The purpose of this type of juridical person is to be an entity for providing public services according to the public law. This kind of juridical person has a special status over private individuals and entities in part of the administration or the public authorization. It also has the duty to preserve public interests more than the duty according to the contract with private sectors.

A juridical person under the public law can operate a business concerning public authorization. This type of juridical person can exercise its administration power and peacekeeping power to provide public service.

The examples of juridical person established under the public law are such as ministries, bureaus and departments under Development of Ministry, Bureau and Department Act B.E.2545.<sup>5</sup> Bangkok is a juridical person established under Bangkok Metropolis Administrative Organization Act B.E. 2528; lawyer council is a juridical person established under Lawyer Act B.E. 2538; political party is a juridical person established under the Organic Act on the Political Parties B.E. 2541; judiciary is a juridical person established under the Court of Justice Administration Act B.E. 2543; Crown Property Bureau is a juridical person established under the Crown Property Bureau Administration Act B.E. 2497 and No. 3 B.E. 249; and the Thai Red Cross Society is a juridical person established under the Thai Red Cross Act B.E. 2461, etc. These juridical persons established under the public law all have the objectives aimed at peacekeeping in society and for public interests.

This thesis focuses on the study of the juridical persons established under the private laws in types of registered partnership, limited partnership and company limited in (3), (4), (5) of sub-article 1) of Article 2.1.2 and public companies which are established for commercial purposes and to operate business for sharing profits among the shareholders. These juridical persons may commit illegal actions which cause damages to the society due to the business operation purpose. The purpose is different from that of the juridical persons in (1), (2) and those established under the public laws which is to reserve the public interests that causes no intent to do illegal action.

### **2.1.3 Theories concerning the status of juridical person**

#### **1) Realistic Theory**

This theory is supported by Savigny, a German legal expert, and also supported by Gierke and Maitland; it is opined juridical person exists and is accepted by society, not merely a presumption by law. A juridical person is a person, separate from natural persons who assembled to be such juridical person. The law only

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<sup>5</sup> Prasit Kovilaikool, 'The explanation of Civil and Commercial Code, 22

certifies the living conditions of juridical persons.<sup>6</sup> A juridical person, then, has its own intention and can express its intention through natural persons. The action of a natural person who is the representative of the juridical person is compared to the action of the juridical person because the representative is like an organ of the juridical person.

## **2) Fiction Theory**

This theory opined that a juridical person is established by the certification of the law. The status of the juridical person is separate from natural person thereof. Juridical person is treated as if it was a person.<sup>7</sup> It is presumed by law to have its own rights and obligations as a natural person<sup>8</sup> but it does not actually exist nor having its substance. Therefore, the juridical person does not have its intention. The rights and obligations of the juridical person are only those specified by law. The juridical person can be established or ceased by law.<sup>9</sup>

## **3) Civil law doctrine concerning the status of juridical person**

According to the civil law doctrine, "person" (either natural person or juridical person) has the capacity to hold rights. Civil law accepts that juridical persons can have their own rights and obligations same as natural persons.

In conclusion, considering the above-mentioned theories and doctrine, a juridical person is considered to be the subject of right, same as a natural person. Juridical persons can have their own rights and obligations.

In Thailand, the status of juridical person is according to the Fiction Theory<sup>10</sup> which explained that juridical persons are established by law or presumed by

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<sup>6</sup> Friedmann, 'Legal Theory' (5th Edit, New York: Columbia University Press, 1967) p.557

<sup>7</sup> Prasit Kovilaikool, 'The explanation on the Civil and Commercial Code regarding juristic persons and corporate criminal liability' (Winyuchon Publisher, 2016) p.6

<sup>8</sup> Ervin Hacker, 'The Penal Ability and Responsibility of the Corporate Bodies', 14 J. of Crim. & Crimino. And Pol.Sc. 91-102 (1923-1924) p.91

<sup>9</sup> Prayoon Kanjanadul, 'The explanation of administrative law' (Bangkok: Chulalongkorn Publishing, 1989) P. 96

<sup>10</sup> Ibid

law. According to Article 65 of Civil and Commercial Code<sup>11</sup>, a juridical person can come into existence only by the Civil and Commercial Code or of other law. The conditions and components of juridical persons by operation of law<sup>12</sup> are the purposes, the scope of authorizations of a juridical person and its representative, liabilities, funds or other properties, management method, and domicile, etc.

### **2.1.4 Rights and restrictions of juridical person**

A juridical person is a person stipulated by law to response the objectives of the establishment. The law specifies its rights, obligations, and responsibilities of a juridical person same as a natural person for operating its business based on the provided regulations; however, a juridical person is, actually, a person assumed by the law. It has no body and minds which results to some differentiation in rights and obligations between a natural person and a juridical person according to its nature. Rights of a juridical person shall be according to the Civil and Commercial Code or other related laws within the scope of its objectives specified in the Article of Association or the Memorandum of Association.<sup>13</sup>

In the UK, this principle is called “Ultra Vires”. It mentions that any action done by the representative of a juridical person out of its scope of purposes should not be assumed as the action of the juridical person itself, and such juridical person shall not have any rights or obligations by any action done therefor. Such action shall not bind the juridical person.<sup>14</sup> This principle is interpreted to especially limit the authorities and responsibilities of the juridical person.

As a civil law country, Thailand complies with the organic theory which mentioned that any action of the representative of a juridical person is always

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<sup>11</sup> Article 65 of Civil and Commercial Code of Thailand: "A juristic person can come into existence only by this Code or by other law."

<sup>12</sup> Prayoon Kanjanadul,(n9)

<sup>13</sup> Article 66 of the Civil and Commercial Code "A juristic person enjoys the same rights and is subject to the same duties as a natural person, because of their nature, may only be enjoyed or incurred only by a natural person."

<sup>14</sup> Kittisak Prokati, 'The explanation of civil law: General Principle on natural persons and general principles concerning legal entity's', 2nd edition (Bangkok: Winyuchon, B.E. 2550) p. 205

assumed as the action of the juridical person itself. The juridical person cannot deny its obligations of such action to the third party by alleging that such action is out of its scope of purposes.

Furthermore, in the event where the representative's action is out of the scope of objectives, but was done to accomplish the business according to the purposes of the juridical person or the juridical person takes the advantages or benefits from such action, the juridical person, then, cannot deny to responsibility<sup>15</sup> for such action and has to be responsible for such it as well.<sup>16</sup>

According to the Supreme Court Order No. 787-788/2506<sup>17</sup>, the leading and highly influential case in Thailand concerning this topic,<sup>18</sup> the judgement states:

“the intention of juridical person is expressed through its representative according to the Civil and Commercial Code, Article 75 (which is Article 70, paragraph 2 according to the current issue of Civil and Commercial Code)<sup>19</sup>. Whenever the representative of juridical person expresses its intention which is within the scope of business purposes of such juridical person, such intention is deemed to be of that juridical person. Therefore, the intention is the component of criminal offenses and criminal action of a juridical person. To constitute an offence, the criminal offender must have the intention [...] however, the features of offense, natures of

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<sup>15</sup> Supreme Court Judgment No. 4211-4212/2528 “A limited company having no business purpose for insurance against losses entered into a contract for insurance against loss and received insurance premium as the return benefit from the insured. Such limited company cannot deny that it is out of its business purpose to avoid its liabilities under the insurance contract.

<sup>16</sup> Supreme Court Judgment No. 553/2493 “Even the business purpose for money borrowing is not mentioned in the Memorandum of Association of a limited partnership, but in the case that the managing director of such limited partnership signed for money borrowing on behalf of such limited partnership for doing business according to the purpose of the partnership. Such borrowing is assumed to be the business purpose of such limited partnership, the partnership, itself, shall be liable for such borrowing transaction, even the seal stamped in the loan document was fake.”

<sup>17</sup> The Supreme Court Order published by the Thai Bar Under the Royal Patronage, page 1352

<sup>18</sup> Such as the Supreme Court No. 1669/2506, 584/2508, 59/2507, etc.

<sup>19</sup> Surasak Likasitwattanukul, 'Corporate Criminal Liability' 1st edition, (Bangkok: Thammasat University Publisher, B.E. 2553) p. 78

action, authorization of the juridical person together with the purposes of such juridical person should be considered case by case [...] as Mr. Boonpetch (managing partner) did an action for selling drugs which are within the scope of his authorization and also in the scope and for the benefits of the defendant (limited partnership). Then, the action of Mr. Boonpetch is considered as the action of the defendant too [...] the court ordered punishment to the defendant too.”

## **2.2 Bribery**

The study of the definition of bribery will help for a clear understanding of bribery offence which will cause the efficient study of the solutions and suitable measures to cope with bribery offences.

### **2.2.1 Definition of bribery**

The Royal Institute defines "Bribe" or "Sin Bon" in Thai language as property, or other benefits that are given to the person to act or omit anything as the giver desires.<sup>20</sup>

Black's Law Dictionary defines “Bribery” as the receiving, or offering any item of value to influence the actions of an official or another person in charge of a public or legal duty and to persuade him to act contrary to his duty.<sup>21</sup>

The Council of Europe and the UN Conventions and the Organisation for Economic Co-operation and Development or OECD does not define the word "corruption" in criminal law; however, "the offences for a range of corrupt behavior" are established, provided that the provisions also include embezzlement, misappropriation or other property diversions by a public official and obstruction of

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<sup>20</sup> The Royal Institute, Dictionary <<http://www.royin.go.th/Dictionary>>, accessed 16 October, 2016

<sup>21</sup> The Law Dictionary, 'What is bribery?', <<http://thelawdictionary.org/bribery/>>, accessed 10 January, 2016

justice. The convention prescribes specific corruption offences rather than define a generic definition.<sup>22</sup>

Contrarily, the definitions of corruption by The Council of Europe and the UN Conventions and the OECD for policy purposes are much more common than the definition in criminal law. "Abuse of public or private office for personal gain" is one often-used definition that covers a broad scope of corrupt activities. Apart from this definition, several other definitions of corruption are varying from each country's cultural, legal or other factors. Nonetheless, even though there are many definitions of corruption, there is no general definition which can specify what action is or is not corruption.<sup>23</sup>

In the UK, there is no conclusive definition of corruption, but "offering, giving or receiving any undue reward by or to any person whatsoever in a public office in order to influence his behavior in office and incline him to act contrary to the know rules of honesty and integrity" are the points that commonly accepted as composition of corruption.<sup>24</sup>

Transparency International (TI), a non-governmental organization which controls and broadcasts international development of corporate and political corruption, defines "corruption" as 'the abuse of entrusted power for private gain.' It provides the wide scope of immoral, corrupt activities in the public and private sectors.<sup>25</sup>

In conclusion, 'bribery' means offering or giving properties or goods to persuade any person who helps the giver meets his expectation or offering or giving

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<sup>22</sup> Organization for Economic Co-operation and Development, 'Corruption: A Glossary of International Standards in Criminal Law' (2008), <<http://www.oecd.org/daf/anti-bribery/41194428.pdf>>, accessed 3 October, 2016

<sup>23</sup> Ibid

<sup>24</sup> CMS Cameron McKenna, 'A guide to existing bribery and corruption offences in UK and Wales' 3 (2010)

<sup>25</sup> Transparency International UK, 'UK Corruption' <<http://www.transparency.org.uk/our-work/uk-corruption>>, accessed 12 October, 2016

any property to persuade the receiver to act illegally or to omit to do his duty so that the giver could get benefits from such action.

### **2.2.2 Causes of bribery**

The causes of bribery are concluded in 2 categories which are:

#### **2.2.2.1 Causes from internal control system**

Internal Control System is the capability to control himself of the offender which consists of 4 compositions:

(1) Opportunity: in the event where the offender is in the responsible position which there is an opportunity to request or receive bribes, then, there is a chance of the giver to give bribe

(2) Reward: benefits in return is much enough for the risk or not

(3) Risk: the risk of being detected and punished

(4) Honesty: The honesty of each person who has opportunity to do bribery offense

#### **2.2.2.2 Causes from external factors or environment**

(1) Economics and living standard factor: The income of the offender is not proportionate to the living cost. Also, the difference between rich and poor leads to struggle in poor people to become more accepted in the society.

(2) Political factor: The politicians are in lack of election aid support from the government although they have to spend much money for the election campaign. Some of them have the supporting money from other legal business, but some of them decide to do bribery offence in return when they are appointed by the election.

(3) Social environment factor: In the former time, Thailand uses the patron-client system which allows governors and nobilities to collect taxes from the people on behalf of the government authority. Paying money as a reward for those governors and nobilities are normally found in society.

(4) Inefficient management

(5) No corporate criminal liability principle provided in the substantive law, no suitable criminal penalty for juridical person specified in the law. The domestic law does not cover transnational bribery.

(6) Lack of evidence of the related witness and evidence are hidden. Both bribe giver and receiver get benefits from bribery; therefore, none of the parties reveal the bribery offence.

(7) No power balancing. The working position facilitates doing bribery offense. The higher working position results in the less inspection system.

(8) Inefficient information perception of the public: The information is concealed or distorted by some group of people affects the lack of public investigation.

### **2.2.3 Types of bribery offences**

Types of bribery offences are considered based on the components of related offences which are:

#### **2.2.3.1 The bribe giver**

According to The Penal Code Article 144 and 167, the word "any person" is used for the offender. This word is explained to be a legal person<sup>26</sup>. The Supreme Court used 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.

The punishment to the natural person does not cause any harm directly to the juridical person. Moreover, facts show that the juridical person gained huge benefits from the bribery offence, therefore, although the court punishing the offender by imprisoning the representative of the juridical person or the employee who convicted the bribery, such juridical person still can hire another person to continue its business. The court punishment, therefore, does not cause any harm to the juridical person itself or high-value assets of the juridical person.

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<sup>26</sup> Kanit Na-Nakorn, 'Criminal Law, misconducts part' 9th edition (Bangkok: Winyuchon Publisher B.E. 2549) p. 721

In the present, almost all of the bribery offences that cause huge damages have been committed for the benefits of the juridical persons, for examples:

- i) to provide sales and purchases of goods or services of such juridical person,
- ii) to promote purchasing, entrusting the juridical person,
- iii) to avoid legal proceedings,
- iv) to facilitate juridical person for doing illegal activities,
- v) to cancel the law affecting the business operation of such juridical person, or
- vi) to persuade the official to do or not to do something favor the juridical person etc.

#### **2.2.3.2 The bribe receiver**

The Penal Code Article 144 specified that “official” who is the bribe receiver has to be an official according to the criminal law or the Penal Code. Such official shall be the person who is appointed to do governing work whether all time or for a period and whether there are any benefits in return or not.<sup>27</sup> Normally, the official according to the criminal law does not include foreign state official or international organization official. In addition, Thai government cannot request other states to punish such bribe giver in Thailand as a result of Penal Code Article 8<sup>28</sup> as the bribery offence under Article 144 is not provided in Article 8 of the Penal Code.

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<sup>27</sup> Yud Sang-Uthai, 'Criminal Law part 2-3', 10th edition, (Bangkok: Thammasat University Publisher, B.E. 2544) p. 43

<sup>28</sup> Article 8 of the Penal Code of Thailand: “Whoever commits an offence outside the Kingdom shall be punished in the Kingdom; provided that, and, provided further that the offence committed be any of the following namely:

(a) The offender be a Thai person, and there be a request for punishment by the Government of the country where the offence has occurred or by the injured person; or

(b) The offender be an alien, and the Thai Government or a Thai person be the injured person, and there be a request for punishment by the injured person;

If such offence to be the offence specified as following shall be punished within the Kingdom namely:

Later, the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3), a recent amendment to the anti-corruption laws, took effect on 12 July 2015. Article 3 of this law covers the bribe given to a foreign state official or an international organization official in Thailand.

### 2.3 Criminal Sanction

Criminal sanctions that are imposed on a juridical person are not expressly legislated unlike the criminal sanctions imposed on a natural person. In practice, judiciary sector imposes criminal sanctions that are specified for natural persons to juridical persons; however, the extent of such criminal sanctions is limited to fines and forfeiture of property. Legal theorists have argued whether such adoption is correct according to legal proceedings in civil law countries, in line with the purpose

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1. Offences Relating to Cause Public Dangers as provided in Section 217, Section 218, Section 221 to Section 223 excepting the case relating to the first paragraph of Section 220, and Section 224, Section 226, Section 228 to Section 232, Section 237, and Section 233 to Section 236 only when it is the case to be punished according to Section 238;
  2. Offences Relating to Documents as provided in Section 264, Section 265, Section 266 (1) and (2), Section 268 excepting the case relating to Section 267 and Section 269; (2/1) Offence Relating to the Electronic Card according to be prescribed by Section 269/1 to Section 269/7.
  3. Offences Relating to Sexuality as provided in Section 276, Section 280 and Section 285 only for the case relating to Section 276;
  4. Offences Against Life as provided in Section 288 to Section 290;
  5. Offences Against Body as provided in Section 295 to Section 298;
  6. Offences of Abandonment of Children, Sick or Aged Persons as provided in Section 306 to Section 308;
  7. Offences Against Liberty as provided in Section 309, Section 310, Section 312 to Section 315, and Section 317 to Section 320;
  8. Offences of Theft and Snatching as provided in Section 334 to Section 336;
  9. Offences of Extortion, Blackmail, Robbery and Gang-Robbery as provided in Section 337 to Section 340;
  10. Offences of Cheating and Fraud as provided in Section 341 to Section 344, Section 346 and Section 347;
  11. Offences of Criminal Misappropriation as provided in Section 352 to Section 354;
  12. Offences of Receiving Stolen Property as provided in Section 357;
  13. Offences of Mischief as provided in Section 358 to Section 360.”

of legal sanction and suitable for a juridical person or not. If not, what should be the suitable criminal sanctions for juridical persons? In this thesis, the definition of criminal sanction, the general features of the punishment and the purposes for punishment will be studied as a fundamental knowledge before starting further study for seeking other countermeasures for solving legal problems in Thailand. This will make criminal sanctions which to be inflicted upon juridical persons to be more efficient in preventing crimes committed for the benefits of juridical persons.

### **2.3.1 Definition**

Legal theorists explained that the definition of criminal sanctions consists of 5 essences that are:

- 1) Punishment must result in pain. The person who is punished must feel any of pain and suffer whether freedom restrictions, physical pain or loss of properties, etc.
- 2) Punishment must be applied to the offender. Only the offender is punished, others who did not commit the crime cannot be punished.
- 3) Punishment is only applied when there is a crime. In case there is no crime committed, punishment cannot be applied.
- 4) Punishment is a method which a person other than the offender applied to the offender. Any negative impacts occurred from the offender's action is not criminal punishment.
- 5) Punishment is caused by the person in authority according to the legal proceedings.

#### **2.3.1.1 Definition of criminal punishment in criminal law viewpoint**

In criminal law viewpoint, the definition of criminal punishment is provided in Article 2 of the Penal Code<sup>29</sup> that “criminal punishment” is imposed on any person only when:

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<sup>29</sup> Article 2 of the Penal Code: “A person shall be criminally punished only when the act done by such person is provided to be an offence, and the punishment is defined

- 1) the act done by such person is provided to be an offence, and the punishment is defined by the law in force at the time of the doing of such act, and
- 2) the punishment to be inflicted upon the offender shall be that provided by the law.

Considering on such provision, criminal punishment will be inflicted upon the offender when:

- 1) a crime is committed,
- 2) the act done is defined by the law in force as an offence at the time of doing of such act, and
- 3) the law in force provides punishment to be inflicted upon the offender.

In Article 18 of the Penal Code, criminal punishments to be inflicted upon the offender are:

- 1) death,
- 2) imprisonment,
- 3) confinement,
- 4) fine, and
- 5) forfeiture of property.

In the event where the punishments to be inflicted upon the offender are those other than provided in Article 18 of the Penal Code, Professor Jitti Tingsabhat noticed that the true feature and purpose of such punishments should be considering whether those are criminal punishments or not. The significance of consideration whether such punishment is criminal or not is not merely based on what it is called.

Therefore, if the punishment to be inflicted upon the offender aims to cause negative impacts on the offender from the crime committed by him, and such punishment is provided in the law by the person in authority, such punishment is then considered a criminal punishment according to this meaning.

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by the law in force at the time of the doing of such act, and the punishment to be inflicted upon the offender shall be that provided by the law."

Graeme R. Newman gave the definition of “punishment” as a necessity and an unavoidably part of society.<sup>30</sup>

"Criminal punishment," according to the Royal Institute, is a legal measure provided to punish the criminal offender according to the Penal Code of Thailand. It includes death sentence, imprisonment, confinement, fine and forfeiture of property.<sup>31</sup>

“Criminal punishment” means negative impacts occur to the offender due to the commitment of a criminal offence. Criminal punishment comprises of 3 significant elements<sup>32</sup> which are:

- (1) Punishment causes negative impacts to the offender,
- (2) Punishment can be done when there is a criminal offence,
- (3) Punishment is a retribution for the criminal offence committed by the offender.

“Legal punishment” affects the offender negatively as a result of the crime committed by such offender. The bad effects to be inflicted to such person are the punishments specified by the law in force, at the time such action. Only the state can punish the offender. The criminal sanction cannot be transferred to the heirs of the offender.

### **2.3.2 General features**

The criminal sanction which is enforced consists of the following features<sup>33</sup>:

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<sup>30</sup> Graeme R. Newman, 'The Punishment Response' (Transaction Publishers) 1978

<sup>31</sup> Article 18 of the Criminal Code of Thailand: “Punishments for inflicting upon the offenders are as the follows:

- 1) Death,
- 2) Imprisonment,
- 3) Confinement,
- 4) Fine, and
- 5) Forfeiture of property.

<sup>32</sup> Narong Jaiharn, 'The explanation of criminal laws on general part concerning punishment and measure for safety' P. 1-2

(1) Sanction shall be as provided by law; this means a person shall be criminally punished only when the act done by such person is provided to be an offence and the punishment is defined by the law in force, at the time of committing such act. Also, the punishment to be inflicted upon the offender shall be as provided by the law according to Article 2, Paragraph 1 of the Penal Code of Thailand.

(2) Sanction shall be equal; this means punishment to each of the offender shall be done without bias, whether such person is different from the other person in social status, environmental factors or others. When there are two people committing the same offence, these two people must be punished exactly in the same way.

(3) Criminal sanction cannot be transferred to the offender's heirs. Only the offender can be punished for his crime. Nevertheless, there is a principle regarding strict liability specified punishment for other's illegal action to promote surveillance and supervision of the defendants.

### 2.3.3 Purposes

The purposes of punishment of a natural person and a juridical person are the same which are<sup>34</sup>:

- (1) Retribution purpose – to compensate or provide justice to the injured person.
- (2) Deterrence purpose – to indicate the offender for the negative impacts of the offence and to remind him not to do such offence again.
- (3) Rehabilitation purpose – to give a chance to the offender to reform himself and become a good citizen.

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<sup>33</sup> Jitti Tingsabhat, 'Criminal Law, part 1' (Bangkok: Legal Institute of the Thai Bar under the Royal Patronage, B.E. 2525) p. 876-886

<sup>34</sup> Uthit Sankosik, 'The purposes of punishment', Prosecutors Journal, 21st issue, 19th year, (July B.E. 2539), p. 271-299

### 2.3.3.1 Retribution purpose

In the former times, committing a crime was considered as the rule-breaking. The behavior of the offender was studied, especially the free will and personal capability in rationalization on the effects of his behavior. The decision making of a human is based on the expectation of cost and benefit gained from such action.

The history of Retributive Theory started from Free Will doctrine. This doctrine has a fundamental belief that humanity is rational. Humanity has the freedom to think or to do any action based on his own belief and decision. Before doing any action, a human always has his own reason. Thus, human should be responsible for his own action. In the event where such action is a good action, he will gain back reward, and, in contrary, if such action is against the rules of the society, unavoidably, he deserves to be blamed or punished. Punishment is then retribution of his bad action.

Retributive Theory is influenced by Classical School which believes the offender is a moral violator who violates social rules. Such offender deserves to be punished as retribution of his fault.

Punishment is retribution to the offender's crime. Philosophers gave an explanation of the purpose of punishment as below:

Bradley<sup>35</sup>, an English philosopher mentioned that humanity feels crime and punishment are dual. Punishment is inflicted by the reason that the offender deserves it. Any benefit or the following results from the punishment are just outermost shell; the core of punishment is that he deserves to be punished for his committed crime.

The punishment according to this theory looks back to the action committed, not the results that may occur in the future or whether such offender will be return to be a nice person or not.

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<sup>35</sup> A. Flew, 'Definition of Punishment in Contemporary Punishment' ed. By Rudolph J. Gerber and Patrick D. McAnany Notre Dame (University of Notre Dame Press 1972) p. 31-37

The purposes of punishment according to Retribution Theory are:

- 1) to revenge the offender for the crime committed,
- 2) to let the offender shows the responsibility for his action,
- 3) to preserve justice in the society,
- 4) to maintain the law.

In conclusion, the purpose of punishment according to this theory is to revenge the offender for his committed crime. The punishments aim to preserve justice in society. It should be inflicted upon only the offender self, to all offenders without exemption and the scale of punishment must be proportionate to the committed crime.

#### **2.3.3.2 Deterrence purpose**

Caecar Beccaria, a well-known Italian criminologist, mentioned about the severity of punishment in 1764. Classical Criminology School is developed from 3 basic philosophies which are Social Contract Philosophy, Utilitarian Philosophy, and Hedonic Philosophy<sup>36</sup>. Caecar Beccaria opined that human has free will, freedom, and rights to choose to do, or not to do any act. Humanity is a kind of rational animal. Before committing a crime, human will weigh its costs and the benefits to be gained. He considers well before committing crime that the benefits he will gain from such crime exceeds his costs. Thus, he should be responsible for his action. Sufficient punishments should be inflicted to the offender whenever the crime is committed.

Deterrence Theory is based on the belief when there is a crime committed; we cannot turn back to prevent such crime. Therefore, we should seek a solution to prevent recommitment of such crime rather than retribution.

This notion considers that sanctions should be used as a countermeasure to prevent reoccurrence of crimes. As a moral cultivation, sanctions are used to deter other people in the society not to commit the crimes.

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<sup>36</sup> Nattawat Sutthiyothin, 'Criminology Theory' in Criminal Law and Advanced Criminology, Division 5 (Sukhothai Thammathirat University, 2011)

Caesar Lombroso is a scientific doctor who applies the notion of Positivist to study the behavior of offenders to seek a preventive measure for the society. He believes that the result of study will lead to a proper solution to prevent those offenders from committing crimes.

The main purpose of punishment is for deterrent effect according to Deterrence Theory. The purposes of punishment according to this theory are separated into 2 purposes which are:

- 1) Specific Deterrence: To punish the offender to deter him from recommit the crime, in other words, it is a specific prevention.
- 2) General Deterrence: To punish the offender as a case study to the society. The people in society will be afraid of the punishment for committing crimes and decide not to commit the crime. In other words, it is a general prevention.

The punishment to be imposed on a juridical person shall be considered from the above purposes accompany with the high-valued properties of a juridical person. These will encourage the efficiency of criminal punishment which resulting in deterrent effects on crimes committed by juridical persons.

The high-valued assets of a legal entity as follows<sup>37</sup>:

- (a) Freedom to operate business
- (b) Freedom to own assets and properties
- (c) Freedom of having fame and honor

### **2.3.3.3 Rehabilitation purpose**

Rehabilitation purpose was started with the development of scientific study which emphasizing in rationality. The knowledge of social science and Empirical Method had been applied to jurisprudence to study the cause of criminal offences by rationality, data collection and results of analysis.

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<sup>37</sup> Kulthita Yuwahong, 'Suitable legal enforcement for legal entities' (Master of law thesis, faculty of law, Thammasat University, B.E. 2549) p. 38

The purposes of punishment according to Rehabilitation Theory:

- 1) To study the cause of criminal offences by emphasizing on the offender and environment,
- 2) To seek a method to rehabilitate the offender instead of punishment,
- 3) To revive the offender back to live peacefully in the society.

In conclusion, punishment according to this theory is aimed to rehabilitate the offender to return to be a good person, not re-commit the crime and to be able to live peacefully with other people in the society.

According to the study of legal theorists and Criminologists, the reoccurrence of crime indicates that severe penalties cannot deter the offender. Imposing criminal sanctions on the offenders only for retribution or deterrence purpose cannot achieve the prevention of recommitment of crimes. Therefore, it is necessary to seek other methods to be inflicted upon the offender which emphasize the rehabilitation of the offenders according to the notion of Herbert L. Packer.<sup>38</sup>

The principles of punishments for rehabilitation are:

- 1) Try to prevent the offender from confronting with anything that ruins the offender's characteristics,
- 2) Apply other methods instead of short-time imprisonment such as confinement, probation or reprieve,
- 3) Punishments shall be suitable to each offender,
- 4) Stop the punishment in the event where the offender rehabilitated,
- 5) Adjust the sanctions during punishment to help the offenders rehabilitate themselves.

However, it is necessary to consider which offender is suitable with punishments according to this theory. This theory is suggested to apply to the offender

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<sup>38</sup> Herbert L. Packer, 'The Limits of the Criminal Sanction' (California: Stanford University Press 1979) p. 54

committing petty offences to subsist their lives, but it is not suggested to apply to those offenders committing severe crimes or committing the offences habitually.

## **2.4 United Nations Convention Against Corruption 2003 (UNCAC)**

### **2.4.1 Background and concepts of UNCAC**

The general principle of UNCAC determines all state parties to comply with mandatory requirements or obligation to legislate.<sup>39</sup> 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. Nevertheless, UNCAC specifies optional requirements to the state parties to consider adopting or shall endeavor to develop domestic laws properly.<sup>40</sup>

There was no clear evidence when the concept of criminal punishment for juridical persons appeared; however, this concept has been developed continuously. The case of bribery committed for the benefits of juridical persons started apparently in 1976. Lockheed, a US company producing airplanes paid a bribe to some of the Japanese politicians including Mr. Tanaka Kakuei, the prime minister to assist the sales of the airplane to All Nippon Airways of Japan. This scandal caused Mr. Tanaka to resign from the position of prime minister at that time. After that, the Foreign Corruption Practices Act 1977 or FCPA was established in the USA. However, bribery offences still occurred timely. The United States Congress had a concern about the disadvantages of the US-registered companies since they are under the control of FCPA, but the companies registered outside the USA committing bribery

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<sup>39</sup> The mandatory requirement is a procedure set for the state parties to consider adopting by modifying, changing the existing laws or legislating new laws as domestic laws of such country. In the event where the state party does not comply with this requirement, it will be considered as a violation of obligations under UNCAC.

<sup>40</sup> Optional requirement is a procedure recommended, not mandatory, for the state parties to consider adopting for amendment, change or add domestic laws in order to develop the existing laws to be up to date and effective in prevention and suppression of corruption.

would not be punished under FCPA. Moreover, those companies registered outside the USA can deduct their tax amount for the expenses used for bribery.

In 1988, the United States Congress, therefore, appointed administrative department to negotiate with the Organization for Economic Cooperation and Development (OECD) to conclude the Convention on Combating Bribery of Foreign Officials in International Business Transactions and completed in 1997 with 35 countries as parties to this Convention. Active bribery to a foreign official is emphasized under this Convention. After this convention, there are other several conventions done, but the offences still occur regularly and tend to be increased. Types and means of bribery have been changed by applying modern communicating technology, fast and easy transportation. Thus, the offender can escape from arrestment easily and able to bring properties or benefits gained from bribery to overseas. It turned out to be a complex processes causing huge amount of damages to society and economics broadly.

Thailand and other 180 countries around the world which are the state parties of the United Nations<sup>41</sup> are all aware of this problem and engross in international cooperation to prevent and suppress corruption systematically and effectively. This caused the issuance of United Nations Convention Against Corruption 2003 or UNCAC as a tool to be used for achieving the purpose in prevention and suppression of corruption problems. UNCAC is the standardization tool for every country to develop the procedure for prevention or corruption both in public and private sector. It specifies several measures as a guideline for each country to draw up the policy, legal procedures and to assist in prevention of corruption whether in the type of domestic or transnational crimes. The measures under UNCAC are expected to solve such problem effectively.

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<sup>41</sup> United Nations Office on Drugs and Crime, 'United Nations Convention Against Corruption Signature and Ratification Status as of 21 September 2016' <<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> accessed 1 December 2016

### 2.4.2 Thailand's ratification of UNCAC

After Thailand had countersigned in UNCAC on 9 December 2003, Justice Ministry and Office of the Attorney General are the main organizations in considering obligations under UNCAC and amending domestic laws and other measures to comply with UNCAC according to the resolution of the cabinet on 18 November 2003.

Since then, the Organic Act on Counter Corruption B.E. 2542 (OACC) has been promulgated and used specifically for bribery offences relating to Thai government officials.<sup>42</sup>

Later, amendments were made in the anti-corruption law in Thailand as the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) to include corporate criminal liability for bribery offences in Article 123/5, paragraph 2 took effect on 12 July 2015.

### 2.4.3 Liability of juridical person

The provision concerning the liability of juridical person in UNCAC is clearly specified in Article 26<sup>43</sup> 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 shall ensure that

<sup>42</sup> Norton Rose Fulbright, 'Anti-Corruption in Thailand: new amendment strengthens rules on corporate bribery', February 2016 <<http://www.nortonrosefulbright.com/knowledge/publications/135252/anti-corruption-in-thailand-new-amendment-strengthens-rules-on-corporate-bribery>> accessed 16 October, 2016

<sup>43</sup> Article 26 of UNCAC, Liability of legal entities:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal entities for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal entities may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal entities held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

juridical persons held liable for criminal offences concerning bribery are subject to proportionate and dissuasive criminal or non-criminal sanctions.

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, associated company or any person who represents or acts on behalf of a juridical person and induced the commission of the official's misconduct or negligence to his official duties 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 for defending to 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 up to twice the number of damages incurred or benefit received<sup>44</sup>. In this respect, the amendment brings Thai anti-bribery laws closer to UK Bribery Act<sup>45</sup> (which will be explained in details in the next Chapter). This is noticeable whether such amount of fine is a proportionate and dissuasive sanction or not.

The amendment introduces vicarious liabilities for companies earning benefits from bribes committed 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 that whether the definition of "associated person" in this amendment is too broad for consideration of criminal offences committed by juridical persons or not.

Vicarious liability is a kind of secondary liability which is imposed when the parties have a particular relationship. Vicarious liability is often applicable to the relationship between employer and employee. *Respondeat Superior* is a type of

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<sup>44</sup> Uthit Sankosik, 'The purposes of punishment', 21st issue, 19th year, (Prosecutors Journal, July B.E. 2539), p. 271-299

<sup>45</sup> Ibid

vicarious liability. The meaning of “*Respondeat Superior*” is “let the master answer”. For the relationship between employer and employee applying *Respondeat Superior*, an employer shall be liable for its employee’s actions that occur during the course of employment and within the scope of employment.

## 2.5 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 Methodology as the guideline and tool for analysis, especially Rational Choice Model.<sup>46</sup>

In Law and Economics viewpoint, the law is a tool used for adjusting individual behavior into a desirable way such as not causing harm to society and not causing danger to others’ properties and lives. It aims to prevent undesirable behavior such as commitment of crimes through legal sanctions both in form of monetary sanctions and non-monetary sanctions.

Under the definition above, the root of the study of Law and Economics was started in the 18<sup>th</sup> Century, in the academic writing of Cesare Beccaria named “*On Crimes and Punishments*” and another writing of Jeremy Bentham named “*An Introduction to the Principles of Morals and Legislation*” which presenting the concept that legal sanctions affect people’s behavior. The law deters and reduces the undesirable behaviors which conflict to good morals. The law should mainly focus on sanctioning the offender. Later in 1960, it was the starting of the new era of Law and Economics by integrating Economic equipment with legal issues in all area of laws such as tort law, criminal law, administrative law or constitutional law, etc.<sup>47</sup>

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<sup>46</sup> Pokpong Chanwith, ‘Economic Analysis of Criminal Laws’ 2nd edition (Thammasat University, The Thailand Research Fund (TRF), February 2011) p.1

<sup>47</sup> Ibid p.2

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 the 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.

### **2.5.1 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 having economic rationality or which 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 (such as to be arrested and be legally punished).<sup>48</sup>

### **2.5.2 Deterrence of criminal offences and expected costs**

The notion of deterring criminal offences by the state is to increase the expected costs of criminal offenders when they considers to commit a crime, for examples,

- 1) To increase the scale of legal penalties,
- 2) To increase the probability of the offenders to be arrested such as increasing the number of police officers, installing CCTV to detect the offender’s image, and developing investigating technology, etc.
- 3) To increase the costs of equipment supporting criminal offences such as enact the law to control weapon selling and purchasing,
- 4) To increase the opportunity costs of the offender by increasing the value of other alternative ways such as to increase the living wage and social welfare. This method will push forward those people who are thinking to be criminal offenders to change their mind and choose to do work in good faith.

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<sup>48</sup> Ibid p.19

### **2.5.3 Comparison between monetary and non-monetary sanction according to Law and Economics viewpoint**

Types of legal sanction causing deterrence of criminal offences are both in monetary and non-monetary sanctions.

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.

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.

In Law and Economics view point, after imprisonment, human will have lower productivity 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 affecting 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 compared to the amount 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; however, imprisonment should be applied only for

felonies which cause high damages that only fine may not effectively cause deterrent effect.<sup>49</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-commitment of the crime; provided that the amount of fine must be high enough to cause deterrent effect.



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<sup>49</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

### **CHAPTER 3**

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

This chapter describes corporate criminal liability for bribery offence in foreign countries, consisting of the United States, the United Kingdom, and France. The laws of these countries aim to suppress bribery problems which can be enforced to the offenders both in the form of natural persons and juridical persons effectively. Comparison between domestic laws and foreign country's laws is necessary for consideration of adopting and developing Thai law to be more efficient and to seek other countermeasures to effectively solve the bribery problems in Thailand.

### **3.1 The United States**

In the USA, the notion of criminal sanctions to be imposed on juridical persons is provided and types of sanction have been rapidly developed compared to other countries. The USA, as the most powerful country in the world is an interesting country to be studied for its law and notion on corporate criminal liability.

In the past, the lawyers of common law countries, including the USA, opined that juridical persons cannot be criminally punished since juridical persons had no personality to commit any action by themselves. Also, juridical persons have no own spirits and mind. Therefore, juridical persons cannot have their own criminal intent. Moreover, some types of criminal sanctions cannot be applicable to juridical persons such as death and imprisonment due to natures. Vicarious liability cannot be applied to criminal sanctions because it contradicts to the rule of criminal law that only the offender can be criminally punished; however, since the role of juridical persons have been more and more important in economics, the lawyers of common law countries nowadays opine that juridical persons may be able to commit criminal offence.<sup>50</sup>

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<sup>50</sup> Suchart Thammapiatagkul, 'The theories concerning the status of legal entities and criminal liability', National Justice Academy, Justice Ministry, 1998 P.10

In the USA, the scope of corporate criminal liability is broader than that in the UK, especially for the offences which *mens rea* is not required as a component such as the offence under the labor law, offence for causing pollution to environment, etc.

The Supreme Court in the case of New York Central & Hudson River Railroad Co., v. USA adopted this rule and sentenced the juridical person to be liable for its representative. The fact of this case was New York Central & Hudson River Railroad, the defendant, with its managing agent, was violating a federal law prohibiting the payment of rebates by paying rebates to the American Sugar Refining Company arising out of shipments of sugar from New York to Detroit. The rule of law held by the court, in this case, was that a corporation might be held criminally liable for the acts of its agents acting within the scope of their authority.

The notion on corporate criminal liability was then changed from the past that a juridical person cannot be liable for a criminal offence to be that a juridical person can be liable for the criminal offences which do not requiring *mens rea*. Later, corporate criminal liability was expanded to cover other offences which require *mens rea* as a component such as insult or libel, etc.<sup>51</sup> This shows the significant role of juridical persons to the entire society.

Bribery is one of the widespread problems in the USA. In 1970s, the Securities Exchange Commission (SEC) found more than 400 listed companies to be paying money through irregular channel or illegally, totaling to an amount over 300 million US Dollars. Additionally they found these companies to be doing acts to the government, officials, political parties, or foreign official within the country where these companies dealt business with and resulted in the foreign government to do or omit his official duties, etc. To prevent reoccurrence of these problems and to enhance confidence in doing business straightforwardly for the US citizens, US Congress then legislated Foreign Corrupt Practices Act 1977 (FCPA) to cope with widespread bribery to foreign officials by U.S. companies.

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<sup>51</sup> Organization for Economic Co-operation and Development, (n22) p.12-14.

The provisions of the FCPA prohibit any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her official duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person<sup>52</sup>.

The provisions of FCPA contains two main components, first, the anti-bribery provisions, which prohibit payments to foreign officials to obtain or retain business, and second, the accounting provisions that require issuers to make and keep accurate books and records and to maintain an adequate system of internal accounting controls<sup>53</sup>. The scope of study of this thesis will focus on the principles in FCPA only in part concerning bribery to foreign public officials.

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<sup>54</sup>. In 2016, the record of enforcement of the FCPA is one of the highest records in a year. So far, SEC has resolved FCPA charges against 13 companies and 3 individuals (one charge is resolved through administrative proceedings) while DOJ has resolved FCPA charges against 5 companies and 3 individuals.<sup>55</sup>

FCPA has applied to all United States persons and certain foreign issuers of securities since 1977. There was an enactment of certain amendments in 1998. This

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<sup>52</sup> Fraud Section, 'Foreign Corrupt Practices Act, An Overview' (July 20, 2016) <<https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>> accessed 25 November, 2016

<sup>53</sup> Prasit Kovilaikool, (n.5)

<sup>54</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

<sup>55</sup> Ibid

amendment additionally provides the provisions to cover bribery committed by foreign companies and persons who cause corrupt payment whether directly or through intermediaries within the territory of the United States.

There are many bribery cases detected by SEC such as the followings:

In 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 also is 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.

In Glaxo Smith Kline case, SEC announced on September 30, 2016 that Glaxo Smith Kline Public Company Limited ("GSK"), a UK pharmaceuticals company, has agreed to pay 20 million US Dollars to settle charges that it violated FCPA when its China-based subsidiaries engaged in bribery to increase sales by paying bribe to doctors and hospitals in order to have their products promoted. GSK also provided doctors with many international trips and made payments to them under the guise of participation as advisors in the advisory boards. A SEC investigation found that the bribery has been committed for years and involved the transfer of money, gifts, and other things of value to health care professionals, which led to millions of dollars in increased sales of GSK pharmaceutical products to China's state health institutions. Sales and marketing managers within GSK's China-based subsidiaries were also involved with this violation. GSK failed to maintain a sufficient system of internal accounting controls and lacked internal adequate procedures to detect and prevent bribery. The SEC's ordered that GSK violated the FCPA's internal

controls and books-and-records provisions. GSK consented to the order and agreed to pay 20 million US Dollars as a civil penalty and also agreed to provide status reports to the SEC for the next two years on its remediation and implementation of anti-corruption compliance measures.

In Vision Technologies, Inc.<sup>56</sup>, having its headquarter at California, a company selling machine for dynamite detection in passengers' bags in the airport, led its employees or agents or distributors to pay or promise to pay money to foreign public official or overseas political parties to enter into a contract with the foreign government, including Thailand.

For Thailand, In Vision company's distributor proposed to pay money in the amount equal to the difference between the price of goods purchased from In Vision Company and the price sold to Airports of Thailand Public Company Limited and Thai government in order to enter into the contract with Airports of Thailand Public Company Limited without price bidding and being a distributor to purchase products from In Vision company and resell to Airports of Thailand Public Company Limited. The total amount of this case was 35.8 million US Dollars. In Vision company agreed to pay fine of 800,000 US Dollars to Ministry of Justice of the United States and SEC for the offence committed against FCPA. In the plea agreement mentioned that the company shall strictly not show off or announce to the public, whether directly or indirectly, that the complaint of SEC is not true.

### **3.1.1 Corporate criminal liability for bribery offences**

The bribery to foreign public official's offences under FCPA consists of the following elements:

#### **(1) External elements**

##### **a. Offender**

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<sup>56</sup> Department of Justice, 'INVISION TECHNOLOGIES, INC. ENTERS INTO AGREEMENT WITH THE UNITED STATES', Monday, December 6, 2004 <[http://www.usdoj.gov/opa/pr/2004/December/04\\_crm\\_780.htm](http://www.usdoj.gov/opa/pr/2004/December/04_crm_780.htm)>, accessed 20 November, 2016

FCPA applies to two categories of persons which are first, those with a formal connection to the USA and second, those who makes violation in the USA.<sup>57</sup>

i) Issuers which are US and foreign public companies listed on the US Stock exchanges or which are required to file periodic reports with SEC<sup>58</sup>, including an officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer according to Section 78dd-1(a). Also, certain foreign persons and companies' commission in the territory of the USA may be subject to the FCPA.<sup>59</sup>

ii) Any person related to domestic concerns in the USA according to Section 78dd-2(a). This means any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which having its principal in the USA or organized under the laws of the USA including any officer, director, employee, agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concerns.

iii) Any person, apart from (i) and (ii) according to Section 78dd-3(a).<sup>60</sup> Any person who has native habitat or operating business in the USA or a USA company including an officer, director, employee, agency, shareholder acting on behalf of such person who does bribery offence in the USA.

The term "person" includes natural person other than a national of the USA<sup>61</sup> or any corporation, partnership, association, or shareholders.

The parent company in the USA shall be liable for any action of its subsidiaries or affiliates listed overseas in the event where its subsidiaries or affiliates violate anti-bribery laws as appointed from or on behalf of the parent company.

In conclusion, natural persons and juridical persons are both subject to this law. Apart from those persons who are committing bribery offences, anyone assisting,

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<sup>57</sup> R. Christopher Cook, Stephanie Conner, 'The Foreign Corrupt Practices Act: An Overview' (Jones Day, January 2010) p. 2

<sup>58</sup> Kittisak Prokati, (n.14)

<sup>59</sup> Kittisak Prokati, (n.14)

<sup>60</sup> Section 78dd-3 was amended in 1998.

<sup>61</sup> As defined in 8 U.S.C.§1101

supporting, or conspiring with the offender are considered as the persons directly committing bribery by themselves.

iv) Action

The actions constituting the offences under this act are specified in Section 78dd-1, 78dd-2 and 78dd-3 which consist of similar components that are offering, giving, or proposing money or any valued assets such as shares, cars, diamond, tuition fees, etc. to foreign public official<sup>62</sup> to induce others to commit such offence. The offence includes paying money through intermediaries who know it was given for bribery purpose<sup>63</sup>, whether in whole or in part.

The bribe is given for the purpose to induce the receiver to do or to omit to do his lawful duties or to securing any improper advantage.<sup>64</sup> This will constitute the offence without consideration of the achievement of such action.

v) The objected person

The objected person for bribery offences under FCPA is “foreign public official” which having broad meaning that is:

- 1) Foreign public official
- 2) Political party, politician, official of political party
- 3) Political candidate,
- 4) Staff or employee of international organization such as United Nations

**(2) Internal element**

The internal element of the offences under FCPA is the intention or *mens rea* of the offender. To constitute the offences, the offender shall have the intention to commit the crime. The offender has to know that his commitment was offering, giving, or proposing bribe to foreign public official whether directly or through intermediaries.

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<sup>62</sup> Section 78dd-1(f)(1)(A), 78dd-2(h)(2)(A) and 78dd-3(f)(2)(A).

<sup>63</sup> Section 78dd-1(f)(2), 78dd-2(h)(3) and 78dd-3(f)(2) defines the term "knowing" to include intentionally not knowing or intentionally ignore.

<sup>64</sup> Prasit Kovilaikool, (n.5) p.22

Apart from aforementioned, the offender shall have the specific intent which is to induce foreign official to act or omit any action of his duties or to do or not to do any action for the offender's or other person's benefits. The consideration whether such action was accomplished or not is not required as a component of the offence.<sup>65</sup>

### 3.1.2 Sanction

#### 3.1.2.1 Types of sanction

There are 2 types of sanction for juridical persons in the USA that are:

1) Fine – the main punishment that is the most popularly applied. Fine is the punishment that has the least negative impacts to the society; however, to set the suitable scale of fine for juridical persons is the problem of this type of punishment.

In the event fine amount is too low, juridical persons will not be afraid of the punishment, and the offences will be committed easily, but, in contrary, if the fine amount is too high, it may indirectly affect the economy such as high cost of living. This will directly affect the consumers or cause cease of business units which resulting high number of unemployed.

Thus, the measure of shareholders fine is adopted. This is an indirect mean raising good control and supervision of shareholders for such juridical persons' business operation. However, this measure is broadly criticized because it causes bad effects to shareholders who are not the real offender who committed the crimes.

2) Probation – even though probation is less popularly applied compared to fine, but it is a punishment that causes benefits to juridical persons because a huge amount of fine may affect innocent persons negatively.

Probation is a measure to put the offenders under the control of official for a period of time 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 as follows:

(2.1) Community Services such as donation of money to the community

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<sup>65</sup> Office of the Council of State, 'Foreign Corrupt Practice Act', Law development journal, 2-5 May, 2005

(2.2) Prohibition of business operation or business transaction directly relating to the committed offence to prevent repeat of offence

(2.3) Restructuring of business management to prevent repeat of offence

Additional 3 types of punishment can be applied to both natural persons and juridical persons which are:

i) Forfeiture of properties – an additional punishment popularly applied to juridical persons committing an economic crime. It aims at reducing the benefits of juridical persons gained from committing a crime, and reducing the inducement to commit the crime. The principle for forfeiture of properties for economic crime is provided broadly such as to forfeit all benefits gained from committing offence including those increasing from such benefits. The principle is also used for forfeiting third party's properties in the case where the offence committed when such third party negligently causes the offender to use his/her properties to commit the crime or conspiring with or supporting the offender.<sup>66</sup>

ii) Notice to victim – an additional measure to reduce the damages. The offender shall inform the victim for such offence to investigate the facts which are the element of the offence in whatever channel. This measure does not let the offender correct the misunderstanding of the victim.

iii) Restitution – is previously an additional punishment applied together with other punishments. It was widely accepted after the USA amended the law in 1987. This measure has been changed to be the main punishment for every offence.

Restitution may be to return of the properties lost or damaged, to pay back the compensation (in case damages to life and body) or to work for the injured person instead of paying compensation (subject to the consent of the injured person).

### **3.1.2.2 Sanctions provided in anti-bribery provisions**

The punishment specified for any violation of accounting provision in Section 78ff(a), (b) and the punishment for violation of anti-bribery provisions

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<sup>66</sup> Chaiwat Wongwattanasarn, 'Forfeiture of properties' Legal Journal, 12<sup>th</sup> issue, p. 100-101

(Section 78dd-1, 78dd-2, 78dd-3) is provided in Section 78dd-2(g), 78dd-3(e) and 78ff(c). This portion will focus on criminal punishment for violation of anti-bribery provisions.

The sanction to be imposed to the company provided in anti-bribery provision is fine in the amount of not more than 2 million US Dollars. A natural person, officer, director, shareholder, employee or agency shall be fine for the amount of not more than 100,000 US Dollars or imprisonment up to 5 years or both. General Attorney or SEC may be entitled to subject the offender to a civil fine which shall not exceed 10,000 US Dollars. Additional fine may be imposed by the courts under the Alternative Fines Act, according to USA Code, Title 18, Section 3571(d)<sup>67</sup>.

### 3.2 The United Kingdom

In the UK, the corporate criminal liability arises whenever a juridical person is alleged for committing a criminal offence which does not require *mens rea* as the component. It is also applied when the juridical person is negligent for not complying with the laws and regulations specified for juridical persons. These cases are difficult to seek the responsible person; therefore, the juridical person should be liable for such offence.

For example, in Regina v. Birmingham and Gloucester Railway Co. case, the court punished the defendant for not demolishing the bridge constructed by defendant which obstructing the road. After that case, the legal opinions about corporate criminal liability was expanded to include the offences requiring *mens rea*.

After this case, there was the enactment of Interpretation Act, 1889 which Article 2 provides the interpretation of the word "person" to include "juridical person"

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<sup>67</sup> The USA Code, Title 18, Section 3571(d) ALTERNATIVE FINE BASED ON GAIN OR LOSS.—

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

unless provided otherwise. Therefore, juridical person can be criminally liable under statutory law unless the law expressly provided otherwise.<sup>68</sup>

Tesco Supermarket Ltd. v. Naltrass (1972) was a leading decision showing that *Alter Ego Doctrine* or Identification doctrine is different from Vicarious liability. The fact in this case was Tesco Supermarket Ltd. was offering a discount on washing powder which was posted on advertising posters displayed in the store. After Tesco Supermarket Ltd. had run out of the discounted price products, the store replaced the regularly priced stock instead but failed to take the discounted sign down, and a customer was charged for the washing powder at the regular price which was higher than the advertised price shown. According to this action, Tesco Supermarket Ltd. was charged under the Trade Description Act 1968 for falsely advertising the price of washing powder. In the trial, Tesco Supermarket Ltd. argued that Tesco Supermarket Ltd. had taken all reasonable precautions and all due diligence, and also mentioned that the conduct of the store manager could not attach liability to Tesco Supermarket Ltd., a corporation. The judgment, in this case, was that the House of Lords accepted that the manager of Tesco was not a 'directing mind and will' of Tesco. Therefore, his action was not attributable to the corporation. In conclusion, this judgment leads to the rule that juridical person and the controlling officer, who has the directing mind and will of the entity, is the same person. The action of the controlling officer is considered as the action of the juridical person itself. Therefore, the juridical person shall be liable for criminal offences including the offences requiring *mens rea*.

UK is a country which significantly pays attention to bribery problem and can effectively counter it. As a common law country, British judges consider the cases based on facts of the dispute. In the event where the facts in the following cases are the same as the previous cases, the judge shall have the same decision. Written law is also applied to a common law country like the UK as a tool to fill the gap of law. Written law is, then also significant in the UK as a secondary law applying to the cases. The enactment of Bribery Act 2010 obviously shows that the UK gives priority

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<sup>68</sup> Jittra Pianlalert, 'Corporate Criminal Liability, Handout for explanation on criminal law and advanced Criminology' (Sukhothai Thammathirat University) p.16

to fight against bribery problem. This act covers several types of offences; to study this law is then beneficial for the development of Thai law on this issue.

### 3.2.1 Corporate criminal liability for bribery offence

After several decades of reports and draft bills, the Parliament of UK introduced the Bribery Act 2010 that covers the criminal law relating to bribery in the Queen's speech in 2009 to update and enhance UK law on bribery with its international obligations under OECD anti-bribery Convention 1997. The Act received the Royal Assent on 8 April 2010 and was initially scheduled to enter into force on 1 July 2011. The Act provides statutory and common law provisions concerning bribery. UK Bribery Act is now the strictest legislation in the world on bribery. The key international anti-corruption obligations for UK are retrieved from OECD Convention on the Bribery of Foreign Public Officials in International Business Transaction 1997 (entered into force in 1999) and the UN Convention Against Corruption 2003 (entered into force in 2005)<sup>69</sup>. This act also provides a strict liability offence for juridical persons failing to prevent bribery. This provision provides a burden of proof on juridical persons to prove that they have internal adequate procedures to prevent bribery.<sup>70</sup> This act applies to the crimes committed both inside and outside the UK. Thus, it is necessary for business units having a connection to the UK to aware of the provisions of this Act<sup>71</sup>.

The contents of UK Bribery Act are separated into 2 categories which are<sup>72</sup>:

#### (1) Corporate liability

<sup>69</sup> Martin Polaine, 'A Guide to the UK's Bribery Act 2010', Anti-corruption Forum, 007/2015, London Centre for International Law Practice, p. 2-3

<sup>70</sup> Transparency International UK, 'The Bribery Act' <<https://www.transparency.org.uk/our-work/business-integrity/bribery-act/>> accessed 25 November, 2016

<sup>71</sup> Kennedys Law LLP, 'Summary of the UK Bribery Act' (16 December 2011) <<http://www.kennedyslaw.com/article/briberyactsummary>> accessed 25 November, 2016

<sup>72</sup> Ministry of Justice of UK, 'Bribery 2010 Circular 2011/05' <<http://www.justice.gov.uk/downloads/legislation/bills-acts/circulars/bribery-act-2010-circular-2011-5.pdf>> accessed 3 December, 2016

- (1.1) Failing of commercial organizations to prevent bribery
- (2) Individual liability
  - (2.1) offering, promising or paying a bribe,
  - (2.2) requesting, agreeing to receive or accepting a bribe, and
  - (2.3) bribing to a foreign public officials.

In Section 7 of the UK Bribery Act, it specifies a strict liability to juridical persons incorporated in or carrying on business in the UK to be subject to penalties when it fails to prevent bribery committed to obtain or retain business or for a business advantage in its organization.<sup>73</sup> This means if any of the juridical persons'

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<sup>73</sup> Section 7 of the UK Bribery Act, Failure of commercial organizations to prevent bribery

- (1) A relevant commercial organization ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending –
  - (a) to obtain or retain business for C, or
  - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For this section, A bribes another person if, and only if, A –
  - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
  - (b) would be guilty of such an offence if section 12(2)(C) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for duty on the Secretary of State to publish guidance.
- (5) In this section –
  - “partnership” means –
    - (a) a partnership within the Partnership Act 1890, or
    - (b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the UK,
  - “relevant commercial organization” means –
    - (a) a body which is incorporated under the law of any part of the UK and which carries on business (whether there or elsewhere),
    - (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the UK,
    - (c) a partnership which is formed under the law of any part of the UK and which carries on a business (whether there or elsewhere), or
    - (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the UK, and, for this section, a trade or profession is a business."

employee, agent or any other 'associated person' bribes another person to obtain or retain business or a business opportunity for the commercial organization, the juridical person shall be liable for the offence of failing to prevent bribery.

Section 7 of UK Bribery Act, 2010 is the first law specifying separate corporate liability from natural person's liability. This provision is applied to all juridical persons whether they are established in the UK or elsewhere in the world.

The elements of this offence consist of:

**(1) External element**

**a. Offender**

The "associated person" is defined in Section 7(4) and Section 8<sup>74</sup> which is any person (whether individuals or juridical persons) who performs services on behalf of the juridical persons and include employees, agents and subsidiaries<sup>75</sup>. To consider whether such person is performing services on behalf of the juridical person or not, surrounding circumstances relating to such person shall be considered. It should not be considered solely based on the relationship between such person and the juridical person. Also, the ability and position of such person to the juridical person shall not be considered.

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<sup>74</sup> Section 8 of the UK Bribery Act, 2010, Meaning of associated person:

- (1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.
- (2) The capacity in which A performs services for or on behalf of C does not matter.
- (3) Accordingly, A may (for example) be C's employee, agent or subsidiary.
- (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.
- (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

<sup>75</sup> Kennedy Legal Advice in Black and White, 'Summary of the UK Bribery Act' (16 December 2011) <<http://www.kennedyslaw.com/article/briberyactsummary/>> accessed 25 November, 2016

Also, Section 8(5) specifies a presumption that in the event where such associated person is an employee of such corporation, it is presumed that such person performs services on behalf of such corporation unless otherwise shown. Therefore, any person who is an employee, agent or subsidiary of the business organization located in anywhere in the world can be the offender under this offence.

### **b. Action**

The other external element of this offence is act of “bribing” which is provided in Section 1<sup>76</sup> for bribing another person and in Section 6<sup>77</sup> for bribing foreign public officials.

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<sup>76</sup> Section 1 of the UK Bribery Act, 2010, Offences of bribing another person

- (1) A person (“P”) is guilty of an offence if either of the following cases applies.
- (2) Case 1 is where—
  - (a) P offers, promises or gives a financial or other advantage to another person, and
  - (b) P intends the advantage—
    - (i) to induce a person to perform improperly a relevant function or activity, or
    - (ii) to reward a person for the improper performance of such a function or activity.
- (3) Case 2 is where—
  - (a) P offers, promises or gives financial or other advantages to another person, and
  - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
- (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
- (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

<sup>77</sup> Section 6 of the UK Bribery Act, 2010, Bribery of foreign public officials:

- (1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
- (2) P must also intend to obtain or retain—

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- (a) business, or
  - (b) an advantage in the conduct of business.
- (3) P bribes F if, and only if—
- (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
    - (i) to F, or
    - (ii) to another person at F's request or with F's assent or acquiescence,and
  - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.
- (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
- (a) any omission to exercise those functions, and
  - (b) any use of F's position as such an official, even if not within F's authority.
- (5) “Foreign public official” means an individual who—
- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory),
  - (b) exercises a public function—
    - (i) for or on behalf of a country or territory outside the UK (or any subdivision of such a country or territory), or
    - (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
  - (c) is an official or agent of a public international organization.
- (6) “Public international organization” means an organization whose members are any of the following—
- (a) countries or territories,
  - (b) governments of countries or territories,
  - (c) other public international organizations,
  - (d) a mixture of any of the above.
- (7) For subsection (3)(b), the written law applicable to F is—

In Section 1, it provides an offence to offer, promise or give money or other advantages for the purpose of acquiring an improper action of duty or activity whether directly or through intermediaries. Section 6 provides a discrete offence of offering, promising or giving money or other advantages to a foreign public official, whether directly or through intermediaries, where such advantage is not permitted under the written law applicable to that foreign official. The definition of "foreign public officials" provided in this Act is very broad and includes international organizations' officials.

The briber must have the intention to induce the foreign official in the performance of his official duties and intend to secure business or to obtain a business advantage from such giving or offer.

Also, the term "bribe" under this act includes advantages which can be a monetary benefit or other advantages able to be appraised, for example, to provide a car or an apartment to be used freely, to give shares in a company, etc. It can be either tangible or intangible such as to propose a higher position in a company or to give a privilege for a project bidding etc.

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- (a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the UK, the law of that part of the UK,
  - (b) where paragraph (a) does not apply and F is an official or agent of a public international organization, the applicable written rules of that organization,
  - (c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—
    - (i) any written constitution, or provision made by or under the legislation, applicable to the country or territory concerned, or
    - (ii) any judicial decision which is so applicable and is evidenced in published written sources.
- (8) For this section, a trade or profession is a business.

## (2) Internal element

The internal element of the offence in Section 7 is the intention of the offender to do the offence. At the time when the offender commits the offence, he shall be conscious that he is bribing another person. Moreover, the offender must have the special intent that such act is done to obtain or maintain business or business advantages for business organizations.

Section 7(5) provides the “relevant commercial organization” which shall be criminally liable under this section consists of 2 types that are:

- (1) Business organization whether a juridical person or partnership registered under the law of UK which carries on a business whether in the UK or elsewhere, and
- (2) Business organization whether a juridical person or partnership registered under the law of any country which carries on business in the UK.

To avoid corporate liability for bribery in Section 7, the juridical person must have strong, up-to-date and effective anti-bribery policies and systems to prove that it had internal 'adequate procedures' designed to prevent bribery commission<sup>78</sup>. The adequate procedures are a defense for a commercial organization to prevent such corporation from the liabilities for bribery offence committed by its associated persons. It is the credible evidence that such corporation provides proper measures to prevent its associated persons from committing bribery offences<sup>79</sup>.

According to Section 9 of UK Bribery Act, it requires the Secretary of State to publish guidance on procedures that relevant commercial organizations can do to prevent bribery<sup>80</sup>. UK Ministry of Justice has published a guide on compliance

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<sup>78</sup> Uthit Sankosik,(n.34) p. 4

<sup>79</sup> Uthit Sankosik,(n.34) p.4

<sup>80</sup> Uthit Sankosik,(n.34) p.10

with UK Bribery Act on adequate procedures for corporate anti-bribery programs<sup>81</sup> on 30 March 2011 which the necessary details will be described below<sup>82</sup>:

(1) Proportionate procedures – the procedures adopted should be proportionate to the risk that the commercial organization faced and to the nature, scale and complexity of its activities. The procedures have to be clear, practicable, accessible, effectively implemented and enforced<sup>83</sup> to prevent bribery committed by its associated persons.

(2) Top-level commitment – the company should foster a culture of zero tolerance in which bribery is never acceptable through a commitment by senior management who is in the highest position of the organization<sup>84</sup>.

(3) Risk assessment – the company should identify its potential external and internal bribery risks on its behalf by its associated persons<sup>85</sup> and prioritize its actions in high-risk areas from time to time to design appropriate anti-bribery procedures<sup>86</sup>.

(4) Due diligence – the company should take appropriate care when entering into relationships or markets with a risk of bribery based approach, in respect of the associated person, to mitigate identified bribery risks<sup>87</sup> and to ensure that such organization safeguards itself against those who are susceptible to the risk of bribery. The due diligence measures should be proportionate to the risk that such organization faced<sup>88</sup>.

(5) Communication – the company should ensure its bribery prevention policies are clearly communicated to all relevant parties, supported by appropriate

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<sup>81</sup> United Nations Office on Drugs and Crime, (n.42)

<sup>82</sup> United Nations Office on Drugs and Crime, (n.42)

<sup>83</sup> Uthit Sankosik,(n.34) p.14.

<sup>84</sup> Allen & Overy, 'Guidance on “Adequate Procedures” under the Bribery Act 2010' (30 March 2011) <[http://www.allenoverly.com/publications/en-gb/Pages/Guidance-on-"Adequate-Procedures--under-the-Bribery-Act-2010.aspx](http://www.allenoverly.com/publications/en-gb/Pages/Guidance-on-)> accessed 25 November, 2016

<sup>85</sup> Uthit Sankosik,(n.34) p.14.

<sup>86</sup> Allen & Overy, (n.85)

<sup>87</sup> Allen & Overy, (n.85)

<sup>88</sup> Uthit Sankosik,(n.34) p.15

training programs and a strong bribery prevention message from top-level management to raise concerns about bribery<sup>89</sup>. The measures of communication must be proportionate to the risks it faces<sup>90</sup>.

(6) Monitoring and review – the procedures put in place should be reviewed and updated as the company's risks change over time. The business organization is expected to assess the existing procedures designed to prevent bribery timely to ensure they are put in place and fit for purpose<sup>91</sup> and to improve them where necessary<sup>92</sup>. The frequency and nature of monitoring depend on each organization to determine, based on its internal structures and external factors<sup>93</sup>.

Although there is no legislative requirement for an organization to have any external assessment of its anti-bribery policy and procedures, it might be helpful to have them tested by an external body. The assessment may include testing through a critical case exercise, or practical debriefing to its employees whether they can understand company policy and procedure well; however, it should be taken in to account that such external reviews are not a guarantee that the 'adequate procedures' will be satisfied by Section 7.<sup>94</sup>

### 3.2.2 Sanction

In the UK, the punishment for juridical persons is provided in 2 types<sup>95</sup> which are:

- i) Financial Sanction and
- ii) Non-Financial Sanction.

Financial sanction used in the UK is the fine specifically provided for juridical persons in Article 19 of The Criminal Justice Act – specifying that judiciary

<sup>89</sup> Uthit Sankosik,(n.34) p. 16

<sup>90</sup> Uthit Sankosik,(n.34) p. 14

<sup>91</sup> Allen & Overy, (n.85)

<sup>92</sup> Uthit Sankosik,(n.34) p. 14

<sup>93</sup> Uthit Sankosik,(n.34) p . 17

<sup>94</sup> Uthit Sankosik,(n.34) p.17

<sup>95</sup> Taweekiat Meenakanist, 'The complete research on corporate liability for involving in transnational crime' p. 34-36

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. For example, a transportation company in the offence of illegally releasing oil into the sea can be fined in the amount of 50,000 Pounds considered by a summary conviction and may be subject to unlimited amount of fine according to Prevention of Oil Pollution Act 1917.

There are several types of Non-Financial sanction, for example:

- (1) Restructure – to let juridical persons restrict their business operation.
- (2) Adverse publicity – to make juridical persons dishonorable which affects the image and reputation of legal entities.
- (3) Public service – to make juridical persons do public services.
- (4) Compensation to injured persons – to make juridical persons compensate the injured persons.
- (5) Corporate dissolution.
- (6) Disqualification from government contracts – to obstruct the business operation of juridical persons.

The good points of these sanctions are to make various types of punishment for juridical persons, to meet the expectation for punishment purpose and to eliminate the limitation of financial sanctions. The non-financial sanction in (5) and (6) are considered to be the severe measure and have a strong affect to juridical persons including their employees, shareholders, and consumers, therefore, these measures should be used as the last option and only when serious damages occurred.

For UK Bribery Act, apart from the penalty for individuals, the Bribery Act also provides penalties for juridical persons. For juridical persons, they are also punishable by non-limited fines according to Section 11(3)<sup>96</sup>. Notably, that top-

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<sup>96</sup> Section 11 of the Bribery Act, 2010: Penalties

(1) An individual guilty of an offence under section 1, 2 or 6 liable –

executive of the company who conspire with, consent to or is a part of a bribery shall be liable as individual as well.<sup>97</sup>

### 3.3 France

The notion concerning corporate criminal liability in France is obviously different from those common-law countries. In the past, a juridical person cannot be liable for criminal offence because juridical persons have no own spirits and mind. It causes lack of criminal intent or *mens rea* which is the required component of the offender. Moreover, some types of criminal sanctions cannot be applied to a juridical person such as death, imprisonment, etc. Then, the achievement for criminal sanction cannot be reached. However, there are some types of criminal sanctions can be applied to juridical person according to the specific laws which especially specifying corporate criminal liability.

Consequently, the problems concerning corporate criminal liability were solved by the enactment of the Penal Code, 1992 of France which clearly specifies the rules for corporate criminal liability. It shows the admission that a juridical person can be liable for a criminal offence.

For other civil-law countries, most countries followed the notion of corporate criminal liability of France, including Thailand.

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- (a) On summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
  - (b) On conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
  - (2) Any person guilty of an offence under section 1, 2 or 6 is liable –
    - (a) On summary conviction, to a fine not exceeding the statutory maximum,
    - (b) On conviction on indictment, to a fine.
  - (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
  - (4) The reference in subsection (1)(a) to 12 months is to be read –
    - (a) In its application to UK and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
    - (b) In its application to Northern Ireland, as a reference to 6 months.

<sup>97</sup> Uthit Sankosik,(n.34) p.5

In Thailand, corporate criminal liability was firstly enacted in 1893. It covered the liability of partnership, company, association, and foundation. Later, after the enactment of the Penal Code, the laws concerning the liability of partnership and company were repealed from the Penal Code; however, at the same time, there was the enactment of the Act concerning the liability of partnership, company, association and foundation instead. The purpose of the division of corporate criminal liability from the Penal Code is to limit the scope of liability of juridical person to the event where there are specific laws providing so.

As a model country of civil law, France is selected to be studied in this thesis for the countermeasures of corporate criminal liability for bribery offences for Thailand. In France, the notion of corporate criminal liability is in line with the civil law juristic method. Before enactment of the principle concerning corporate criminal liability in the Penal Code 1992, the Supreme Court of France penalized the juridical persons only in the cases that there are special laws expressly or implicitly specifying liability of juridical persons.

After enactment of the principle concerning corporate criminal liability in the Penal Code 1992, the supreme court of France sanctioned the juridical persons not only in the cases where there are special laws specifying liability to juridical persons, but also sanctioned juridical persons in the offences according to the Penal Code 1992 whether the offences were done intentionally or negligently in some cases.

The principle of corporate criminal liability in France conforms to *Alter Ego Doctrine* or Identification Doctrine which has its root in the English law. This doctrine states that the corporate criminal liability is attributed or identified to a person who has a control of the affairs of such juridical person and that person is held criminally liable for the crime committed by such juridical person under his supervision.

The "Identification Doctrine" is different from the normal rule of agency as it merges legal purposes of an individual and a juridical person into one entity. This

doctrine is also called as the 'alter ego,' the 'organic' and the 'directing mind and will' approach.<sup>98</sup>

The general principles concerning corporate criminal liabilities in the Penal Code, 1992 are as follows:

#### **A. Types of juridical persons subject to criminal liability**

Article 121-2 of the Penal Code, 1992<sup>99</sup> specified that juridical persons, except for the state which is a juridical person under the public law, shall be subject to criminal liability under this law.

In conclusion, juridical persons which shall be subject to criminal liability under the Penal Code are juridical persons under the civil and commercial law such as company, association, labor union, foundation, etc.<sup>100</sup>

#### **B. Conditions of corporate criminal liability**

A juridical person shall be criminally liable for the offences committed by its organ or representative as provided in article 121-2 to 121-7.<sup>101</sup>

### **3.3.1 Corporate criminal liability for bribery offence**

In France, corporate criminal liability for bribery offences is provided in the Penal Code, 1992 which are:

(1) Active and passive bribery of national public authority or administration according to Article 433-1 and 433-2,

<sup>98</sup> Principles and Theories of Corporate Criminal Liability <[http://shodhganga.inflibnet.ac.in/bitstream/10603/107447/10/10\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/107447/10/10_chapter%203.pdf)> accessed 25 November 2016

<sup>99</sup> Article 121-2 of the Penal Code of France, 1992: "Legal entities, except the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal entities does not exclude that of any natural persons who are perpetrators or accomplices of the same act, subject to the provisions of the fourth paragraph of article 121-3."

<sup>100</sup> Surasak Likasitwattanakul, '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

<sup>101</sup> Ibid

- (2) Passive bribery of members of judiciary according to Article 434-9,
- (3) Active and passive bribery of foreign or international public officials or judiciary according to Article 435-1 and 435-3,
- (4) Bribery in the private sector according to Article 445-1 and 445-2.

This thesis focuses on active bribery according to Article 433-1<sup>102</sup>, 435-3<sup>103</sup>, and 445-1<sup>104</sup>.

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<sup>102</sup> Article 433-1 of the Penal Code of France, 1992: “Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate: 1° to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate; 2° or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;

is punished by ten years' imprisonment and a fine of €1,000,000 in which an amount of fine may be raised up to double of benefits gained by the offender. The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2°.”

<sup>103</sup> Article 435-3 of the Penal Code of France, 1992: “For the implementation of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris the 17th December 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a person holding public office or discharging a public service mission, or an electoral mandate in a foreign State, or within a public international organisation, to carry out or abstain from carrying out an act of his function, duty or mandate or facilitated by his function, duty or mandate, with a view to obtaining or keeping a market or other improper advantage in international commerce is punished by ten years' imprisonment and a fine of €150,000. The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph. Prosecution of the misdemeanors referred to under the present article may only be initiated on the orders of the public prosecutor.”

<sup>104</sup> Article 445-1 of the Penal Code of France: “Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation

The Penal Code of France does not separate criminal sanctions to be applied to natural persons from juridical persons. Nevertheless, when the offender is a juridical person, the general provisions and conditions for liability in Article 121-1 and 121-2 shall be applied. In the event where an offender is a natural person but having a relationship with a juridical person in the position of a representative or an authorized person and such bribe was given for the benefits of such juridical person, the juridical person then shall be liable for the offence committed by such natural person.

### 3.3.2 Sanction

The Penal Code of France 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. It is more suitable than applying the same sanction provided for a natural person because the sanctions that could cause harmful effects to juridical persons are different from those applicable to natural persons such as dissolution, banned from doing business, etc.

Criminal sanctions for juridical persons which are provided in the Penal Code are separated below:

#### **(1) Sanctions incurred by juridical persons for felonies and misdemeanors**

Article 131-37<sup>105</sup> in the Penal Code of France specifies penalties for felonies and misdemeanors incurred by juridical persons; while the

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or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual or professional obligations”

<sup>105</sup> Article 131-37 of the Penal Code of France:

“Penalties for felonies and misdemeanors incurred by legal entities are:

1° a fine;

penalties enumerated for juridical persons are provided in Article 131-39.<sup>106</sup>

a) Fine: Article 131-38<sup>107</sup> specifies the maximum amount of a fine applicable to juridical persons to five times which applies to natural persons for the offence. For an offence that provides no fine to natural persons, juridical persons shall be fined 1,000,000 Euros.

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2° in the cases set out by law, the penalties enumerated under Article 131-39.”  
<sup>106</sup>Article 131-39 of the Penal Code of France: “Where a statute so provides against a legal entity, a felony or misdemeanor may be punished by one or more of the following penalties:

1° dissolution, where the legal entity was created to commit a felony, or, where the felony or misdemeanor is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects to commit them;

2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;

3° placement under judicial supervision for a maximum period of five years;

4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;

5° disqualification from public tenders, either permanently or for a maximum period of five years;

6° prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;

7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

8° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it;

9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

The penalties under 1° and 3° above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers.”

<sup>107</sup> Article 131-38 of the Penal Code of France: “The maximum amount of a fine applicable to legal entities is five times that which applies to natural persons by the law sanctioning the offence. Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal entities is €1,000,000.”

b) The penalties enumerated under Article 131-39<sup>108</sup> are specifically provided for applying with juridical persons. This Article empowers the judge to sanction juridical persons by comparing with the sanction which applies to natural persons.

The penalties under this Article are as follows:

- (i) Dissolution,
- (ii) Prohibition to do social or professional activity permanently or for a maximum period of five years,
- (iii) Placement under judicial supervision for a maximum period of five years,
- (iv) Permanent closure or closure up to five years,
- (v) Disqualification from public tenders permanently or up to five years,
- (vi) Prohibition to make a public appeal for funds permanently or up to five years,
- (vii) Prohibition to draw cheques or use of credit cards for up to five years except for certified cheques,
- (viii) Confiscation of properties used to commit the offence,
- (ix) Posting a public notice or disseminating the decision whether in the written press or through electronic media.

## **(2) Sanctions incurred by juridical persons for petty offences**

Article 131-40 of the Penal Code of France provides 2 types of sanction to be incurred by juridical persons for petty offences which are:

a) Fine: maximum of five times of which applies to natural persons according to Article 131-41<sup>109</sup>,

<sup>108</sup> Uthai Artivej, 'Collection of law journal on criminal procedure code of France' 2nd edition (Bangkok: V.J.Printing, 2014) p. 37-38

<sup>109</sup> Article 131-41 of the Penal code of France: "The maximum amount of a fine applicable to legal entities is five times that which applies to natural persons by the regulation sanctioning the offence."

b) Forfeiture or restriction of rights set out in Article 131-42<sup>110</sup> which is additional penalties, for example, prohibition to draw cheques for up to five years, confiscation of properties used for the commission of the offence, etc.



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<sup>110</sup> Article 131-42 of the Penal code of France: "Concerning any petty offence of the fifth class, a fine may be replaced by one or more of the following penalties entailing forfeiture or restriction of rights:

1° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of one year;

2° confiscation of the thing which was used or was intended for the commission of an offence, or of any thing which is the product of it."

## **CHAPTER 4**

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

This Chapter considers on the laws concerning bribery offence and corporate criminal liability for bribery offence in Thailand including its sanctions whether they can effectively deter corruption problems. Also, the purpose of study is to consider other suitable countermeasures to develop and improve anti-bribery provision in Thailand. Comparison approach to foreign laws and countermeasures for solving such problem will be the guideline for amendment of Thai laws to be more proper to the nature of the offence occurred in Thai society so that it can effectively deter corruption problem. The topics for study in this chapter would be separated into 3 categories.

In this first category, it will be the comparison approach on corporate criminal liability in Thailand and foreign countries that are the USA, UK, and France.

Second, it will consider the analysis part which consists of the analysis of the proper measure for specifying corporate criminal liability for bribery offence.

The third part will propose the guideline for amendment of corporate criminal liability provisions in Thailand.

#### **4.1 Thailand**

##### **4.1.1 Laws concerning bribery offence**

###### **1) The bribe giver**

According to The Penal Code Article 144<sup>111</sup> and 167<sup>112</sup>, the word "any person" is used for the offender. The word "any person" is explained to be a legal

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<sup>111</sup> Article 144 of the Penal Code of Thailand: "Any person, giving, offering or agreeing to give the property or any other benefit to the official, member of State Legislative Assembly, member of Provincial Assembly or member of Municipal Assembly so as to induce such person to do or not to do any act, or to delay the doing

person<sup>113</sup>. In the past, the Supreme Court sanctioned a natural person who is a representative or an employee of a juridical person alone, without any sanction to the juridical person which gains benefits itself.

The punishment to the natural person does not cause any harm directly to the juridical person or the benefits that the juridical person or related persons obtained. Moreover, it is evident in the society that the benefits which juridical person or related persons gained from the bribery offence are huge, therefore, though the court punished the offender by imprisonment the representative of the juridical person or the employee who convicted the bribery, such juridical person can hire another person instead and continue its business. The sanction, therefore, does not cause any harm to the juridical person itself or any high-value assets of the juridical person.

In present, almost all of the bribery offences that cause huge damages have been done for the benefits of the juridical persons such as:

- i) to provide sales and purchases of goods or services of such juridical person,
- ii) to promote purchasing, entrusting the juridical person,
- iii) to avoid legal proceedings,
- iv) to facilitate juridical person for doing illegal activities,
- v) to cancel the law affecting the business operation of such juridical person or
- vi) to persuade the official to do or not to do something favor the juridical person etc.

## 2) The bribe receiver

Article 144 of the Penal Code specifies the term “official” who is the bribe receiver as an official according to the criminal law or the Penal Code. Also, the

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of any act contrary to one's own duty, shall be imprisoned not out of five years or fined not out of ten thousand Baht, or both.”

<sup>112</sup> Article 167 of the Penal Code of Thailand: “Whoever, giving, offering or agreeing to give the property or any other benefit to the official in the judicial post, Public Prosecutor, Official to conduct the cases or Inquiry Official so as to induce oneself wrongfully to do, or not to do the act or to delay the doing of any act, shall be imprisoned not out of seven years and fined not out of fourteen thousand Baht.

<sup>113</sup> Kanit Na-Nakorn, 'Criminal Law, misconducts part', 9th edition, (Bangkok: Winyuchon Publisher B.E. 2549) p. 721

official must be appointed to do governing work whether all time or for a period of time and whether he receives any benefits in return or not.<sup>114</sup> Normally, the official according to the criminal law does not include foreign state official or international organization official.

Nowadays, bribery offences are being done transnationally, if the bribe is given to foreign state official or international organization official in Thailand, Thai court cannot punish the bribe giver according to the Penal Code Article 144. Also, Thai government cannot request other states to punish such bribe giver in Thailand as a result of Penal Code Article 8 as the bribery offense in Article 144 does not provide in Article 8 of the Penal Code.

### **3) Specific intent**

The specific intent of committing the bribery offence is required according to the Penal Code Article 144 and Article 167. The provisions provide that the specific intent of the offender of persuading the bribe receiver to act, not to act or to neglect to do his appointed duties is required to constitute the offence. However, these provisions do not cover bribery committed with the specific intent for persuading the official to act other than his appointed duties. For example, in the event where the bribe was given to the police in return for being a witness and giving a false statement to the court which is not an appointed duty for a policeman, this is not considered as bribery according to Article 144 of the Penal Code.<sup>115</sup>

#### **4.1.2 Laws concerning corporate criminal liability**

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

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<sup>114</sup> Yud Sang-Uthai, "Criminal Law part 2-3", 10th edition, (Bangkok: Thammasat University Publisher, B.E. 2544) p. 43

<sup>115</sup> Preedee Kasemsub, 'Legal basic knowledge' (Bangkok: Phranakorncharoenwit Publisher, B.E.2520) p. 6

The development of criminal liabilities for juridical persons in Thailand are as follows:

a. The Supreme Court of Thailand is able to sanction juridical persons only for the offences expressly or implicitly provided in the written law therefor.

b. In the offences where criminal sanctions to be imposed on juridical persons are not expressly or implicitly provided in the written law, 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:

"...A juridical person is able to have its intention which is the mental element of a criminal offence and is able to commit a criminal offence which intention is required. A Juridical person shall be sanctioned, to the extent of sanctions applicable 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 ..."

Most of the cases sanctioned by the Supreme Court of Thailand are the offences which the intention of the offender is required.<sup>116</sup> Also, the offence must be committed by its authorized representative within the scope of its purposes (*Intra vires*), in line with the application of *Alter Ego Doctrine* or Identification Doctrine of UK.

c. In the offences committed negligently, there are no express provisions in Thailand specifying that legal entities shall be liable for the criminal offences committed negligently. However, the Supreme Court of Thailand used to sanction a juridical person for manslaughter offence (Supreme

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<sup>116</sup> Article 59 of the Penal Code of Thailand: "A person shall be criminally liable only when such person commits an act intentionally, except in case of the law provides that such person must be liable when such person commits an act of negligence, or except in case of the law clearly provides that such person must be liable even though such person commits an act unintentionally."

Court Order No. 3446/2537<sup>117</sup>) applying Article 291<sup>118</sup> of the Penal Code without any written law therefor.

The above Supreme Court Decision indicates the problem of corporate criminal liability in Thailand on the application of the law of the Supreme Court without supporting written law and the problem of lack of an express general provision concerning corporate criminal liability.

Thai laws concerning corporate criminal liability are separated into 3 categories which are as the followings:

### **1) The law expressly specifying corporate criminal liability**

The law regularly specifies the duties of juridical persons to comply, when any juridical person does not comply with such law, it would be a criminal offence.

The examples of the laws categorized in this type are such as

- a) Credit Information Business Act, B.E. 2545 specifies corporate criminal liability expressly<sup>119</sup>.
- b) Management of Partnership Stakes and Shares of Ministers Act, B.E. 2543 specifies corporate criminal liability in Article 16<sup>120</sup>.

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<sup>117</sup> Supreme Court Order No. 3446/2537 “The plaintiff sued Gas Siam Industry Company which is a legal entity conducting gas and chemicals sales and purchasing business as the defendant 1 and the managing director of Defendant 1 as Defendant 2. Defendant 1 is sued in the offence of manslaughter. The court judged that Defendant 1 was negligent and sanctioned Defendant 1 according to the Article 291 with a fine of 20,000 Baht.”

<sup>118</sup> Article 291 of the Penal Code “Whoever, doing the act by negligence and that act causing the other person to death, shall be imprisoned not exceeding ten years and fine not exceeding 20,000 Baht.”

<sup>119</sup> Article 42 of the Credit Information Business Act, B.E. 2545 “Any credit information company who fails to comply with Article 7, 8 or 16 shall be subject to fine of not exceeding 300,000 Baht and fine of not exceeding 10,000 Baht per day during the period of failure to comply or until the correction is made.”

<sup>120</sup> Article 16 of Management of Partnership Stakes and Shares of Ministers Act, B.E. 2543 “Any juristic person not complying with Article 10 or 13 paragraph one shall be liable to a fine not exceeding 300,000 Baht.”

c) Life Insurance Act, B.E. 2535 in Article 90 and 95<sup>121</sup>.

## 2) The law implicitly specifying corporate criminal liability

In this type, the law does not expressly specify the criminal liabilities for juridical persons, but the law clearly specifies the status of the offender whether they are a natural person or a legal entity.

The examples of such laws are as below:

- i) The Multimodal Transport Act, B.E. 2548 in Article 71<sup>122</sup>.
- ii) Fuel Trade Act, B.E.2543 in Article 36<sup>123</sup>.

Moreover, in some cases, the law specifies liabilities of a juridical person for others' action such as the Book, Document and Newspaper Act, B.E. 2470 which specifying the liability of the newspaper owner. Also, a juridical person can be liable as a principal or an employer as shown in the Animal Foods Quality Control Act, B.E. 2506.

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<sup>121</sup> Article 90 of Life Insurance Act, B.E. 2535 “Any company which fails to inspect the register of shareholders, or inform its shareholders failing to comply with Article 12 shall be liable to a fine from 10,000 Baht up to 50,000 Baht, to a further fine not exceeding 5,000 Baht per day for every consecutive day during which such violation continues.”

Article 95 of Life Insurance Act, B.E. 2535 “Any company which issues policies or document attaching or endorsements which violating Article 29, or specifies rates of premiums which violating Article 30, or violates Article 31, or fails to comply with Article 32 shall be liable to a fine not exceeding 100,000 Baht.”

<sup>122</sup> The Multimodal Transport Act, B.E. 2548 in Article 71 “Any registered multimodal transport operator who does not comply with Article 43 or 47 paragraph two or violates order suspending his operation under Article 57 paragraph two shall be subject to punishment by fine from 50,000 Baht to 500,000 Baht and additional fine of 3,000 Baht per day as long as the violation continues.”

<sup>123</sup> Article 36 of Fuel Trade Act, B.E.2543 “Fuel trader under Article 7 who fails to comply with the conditions set by the Minister under Article 8 shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding 50,000 Baht, or to both.”

### 3) The law which does not specify corporate criminal liability

This type of offence is different from the previous types mentioned. The law does not directly specify sanction to a juridical person and does not provide any status of the offender. It should be considered into the details of such case whether the word "any person" mentioned in the law shall include the meaning of juridical person or not.

The examples of the laws categorized in this type are such as:

- i) Decree on Obtaining Loans Amounting to Public Cheating and Fraud, B.E. 2527 in Article 12<sup>124</sup>,
- ii) Act Concerning Offences Relating to the Submission of Bids to Government Agencies, B.E. 2542 in Article 4<sup>125</sup>.

#### 4.1.2.1 Corporate criminal liability for bribery offence

On 9 July 2015, Thailand enacted the third amendment to OACC, in this amendment, there is a provision specifying corporate criminal liability for bribery offences committed by associated persons of a juridical person. It provided fines penalty equal to and at the maximum twice the number of damage incurred or benefits gained to be imposed on companies when an "associated person" (include employees,

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<sup>124</sup> Article 12 of Decree on Obtaining Loans Amounting to Public Cheating and Fraud "Any person who commits an offence under Article 4 or 5 shall be liable to imprisonment of 5 to 10 years and a fine of 500,000 Baht to 1,000,000 Baht, and a further fine not exceeding 10,000 Baht for each day of the continuation of the offence for the duration of such offence."

<sup>125</sup> Article 4 of Act Concerning Offences Relating to the Submission of Bids to Government Agencies, B.E. 2542 "Any person who agree to collaborate in the submission of bids with an objective to provide a benefit to any person so as to be the person entitled to enter into a contract with state agencies by avoiding a fair price competition or by preventing the offer of other goods or services to government agencies or by taking advantage of government agencies in a manner which is not a normal course of business shall be liable to punishment by imprisonment for a term of one to three years or by a fine amounting to 50 percent of the amount of money representing the highest bid made between such co-offenders or of the amount of money of the contract entered into with a government agency, which amount is greater."

agents, consultants, subsidiaries, and any other party acting for the company, etc.) engaged in corrupt acts even if the offense is committed without the knowledge of the directors of the company or without management authorization, such company shall also be liable for such offence.

This principle conforms to the UK Bribery Act.<sup>126</sup> In other words, if an agent of a company commits a corruption offence for benefits of such company, that company will be deemed liable for a corruption offence, unless that company had "internal adequate procedures" to prevent the corrupt acts. This new provision to OACC is found in the second paragraph of Article 123/5<sup>127</sup>.

The purpose of this amendment is to make Thai companies develop and implement anti-corruption policies aimed at preventing corrupt practices before the problem occurs. This is similar to the stated purpose of UK Bribery Act and the practices and policies of the USDOJ and SEC in enforcing the FCPA.

#### **4.1.3 Sanction**

The punishment for individuals who was convicted of violating Thai bribery laws is either fine or imprisonment or both. A person giving, offering or agreeing to give the property or any other benefit to the public officials shall be subject to imprisonment of not over 5 years or fined not exceeding 100,000 Baht or both according to Article 144 of the Penal Code.<sup>128</sup> An intermediary who arranges the payment of a bribe is subject to maximum imprisonment of 5 years and fine of not

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<sup>126</sup> Tilleke & Gibbins, 'Anti-Corruption Law in Thailand, A Practical Guide for Investors (January 2016) p. 4

<sup>127</sup> Article 123/5, Paragraph 2 of the third amendment of the Organic Act on Counter-Corruption (OACC) of Thailand, B.E. 2558: "In cases where an offence is committed by a party related to a juristic person and is committed to the interest of such juristic person, such juristic person shall be deemed guilty of the offence under this Article and shall be liable for a fine at the minimum equal to and at the maximum twice the number of damages incurred or benefits gained, unless it can be proven that the juristic person has in place an appropriate internal control measures to prevent the offence."

<sup>128</sup> Penal Code Amendment Act No. 26 of 2017, Section 4.

exceeding the amount of 100,000 Baht<sup>129</sup> according to Article 143 of the Penal Code.

For a person giving, offering or agreeing to give the bribe to the official in the judicial post, Public Prosecutor, Official to conduct the cases or Inquiry Official to induce any of them to wrongfully do or not to do any act shall be subject to imprisonment not exceeding 7 years and fined not over 140,000 Baht.<sup>130</sup>

While the public official who is convicted of taking a bribe could be sentenced from 5 years to 20 years or life term imprisonment or the death penalty and fine of 20,000 to 40,000 Baht according to Article 147 of the Penal Code. The death penalty can be imposed against both Thai state official, foreign and international public officials who receive bribes.

For juridical persons, according to the new amendment to OACC in B.E. 2558, a company can be fined equal to and at the maximum twice the number of damages incurred or benefits gained from the bribery committed by its associated persons for its benefits.

Apart from criminal sanctions, several countries specify other penalties such as administrative penalties. For example, in USA and UK, apart from fine, there are other options for the court to sanction juridical person such as a ban from doing business with government agencies and revoke business license, etc. In France, the court can punish juridical person with other sanctions apart from criminal sanction such as cease of business, prohibit from doing certain activities, forfeiture of properties, etc. However, in Thailand, fine is the only criminal sanction which the court can apply to juridical persons for bribery offence.

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<sup>129</sup> Penal Code Amendment Act No. 26 of 2017, Section 4.

<sup>130</sup> Penal Code Amendment Act No. 26 of 2017, Section 4.

**4.1.4 Comparison between Article 144 of Thailand Penal Code and Article 123/5 of the Organic Act on Counter-Corruption (OACC) of Thailand, B.E. 2558, (Amendment No. 3), announced on 9 July, 2015.**

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, Thailand now 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.

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. Therefore, the third amendment of the OACC is enacted to comply with UNCAC provisions. The concerning provision in this amendment on corporate criminal liability is provided in Article 123/5.

This portion will be considering the difference and comparison between Article 144 of the Penal Code and Article 123/5 of the third amendment of OACC which are both specified for bribery to officials.

<b>Article 144 of Thailand Penal Code</b>	<b>Article 123/5 of the third amendment of OACC</b>
“Any person, giving, offering or agreeing to give the property or any other benefit to the official, member of State Legislative Assembly, member of Provincial Assembly or member of Municipal Assembly so as to induce such person to do or not to do any act, or to delay the doing of any act contrary to one's own	“Whoever gives, offers or agrees to give an item of property or any other benefit to any State Official, Foreign State Official, or International Organization Official in order to induce such person to do or not to do any act, or to delay the doing of any act, which is contrary to his functions,

<b>Article 144 of Thailand Penal Code</b>	<b>Article 123/5 of the third amendment of OACC</b>
<p>duty, shall be imprisoned not out of five years or fined not out of one hundred thousand Baht, or both.”</p>	<p>shall be punished with imprisonment not exceeding five years or a fine not exceeding one hundred thousand Baht, or both.</p> <p>In case the offender under paragraph one is a person related to a juristic person and commits the offence for the benefit of the juristic person, whereby the said juristic person does not have appropriate internal control measures to prevent the commission of the offence, such juristic person shall be liable under this Section and shall be punished with a fine from one time but not exceeding two times the damages incurred or the benefits gained.</p> <p>An associated person to a juristic person under paragraph two shall include an employee, agent, affiliated company, or any person acting for or on behalf of the juristic person, where he has the power or duty to act as such.”</p>
<p>Types of person (e.g. natural person, juridical person) who are able to commit the offence are not expressly specified in this provision. (However, there are some Supreme Court decisions that applied this</p>	<p>Expressly specify corporate criminal liability in paragraph 2.</p>

<b>Article 144 of Thailand Penal Code</b>	<b>Article 123/5 of the third amendment of OACC</b>
provision and sanction juridical persons in only applicable context.)	
The offence does not include bribery to state official, foreign state official and International Organization Officials.	The offence covers bribery to state official, foreign state official and International Organization Officials.
No express provision and defense on the corporate criminal liability for bribery offence.	Second paragraph, it provides a defense for juridical persons which have internal adequate procedures to prevent bribery.
<p>Penalty is not separated between that applicable to natural persons or juridical persons.</p> <p>“Imprisonment for not out of five years or fine not out of one hundred thousand Baht, or both.”</p>	<ul style="list-style-type: none"> <li>• Penalty for natural person is provided in the first paragraph.</li> </ul> <p>“Imprisonment not exceeding five years or a fine not exceeding one hundred thousand Baht, or both.”</p> <ul style="list-style-type: none"> <li>• Penalty for juridical person is separately provided in the second paragraph.</li> </ul> <p>“A fine from one time but not exceeding two times the damages incurred or the benefits gained”</p>
No express provision on corporate criminal liability and whose act constitutes corporate criminal liability.	Expressly specify the definition of ‘associated persons’ whose acts the juridical person shall be criminally liable for.

## 4.2 Analysis

### 4.2.1 Comparison approach on corporate criminal liability in Thailand and foreign countries

#### 4.2.1.1 Types of provisions concerning corporate criminal liability

From the study of Thai laws and foreign laws of corporate criminal liability, the author summarizes types of provisions into 2 groups.

##### 1. No express provision on corporate criminal liability

In this type, the law does not separate the offence of natural persons from those of juridical persons. The same article is applicable to both natural persons and juridical persons. The law of Thailand and France is of this type; however, the sanction to be imposed on juridical persons is separately specified.

##### 2. Express provision on corporate criminal liability is provided

In this type, the law separates article of offences and sanctions to be applicable to natural persons apart from those to be applicable to juridical persons. This type of provision results to clarification of the purposes of law to punish the offender and causes clarity of law applied to the fact of each case. The countries having this type of law are the USA and the UK in FCPA and the UK Bribery Act, respectively.

#### 4.2.1.2 Declaration of intention of juridical persons

As juridical person is a person assumed by law, juridical person itself does not have its own spirit and mind. The declaration of intention of juridical persons is a significant problem for consideration of corporate criminal liability.

##### 1. The intention of juridical person is expressed through its representative

In Thailand and France, corporate criminal liability is the primary liability. To consider whether a juridical person shall be liable for criminal offences, the action and intention of its representative have to be considered as the action and intention of the representative is presumed to be those of juridical persons.

In Thailand, the intention of a juridical person is expressed through its representative according to Article 70 of the Civil and Commercial Code. Also, Thai judgment decisions are in line with this principle.

In France, juridical persons are criminally liable for some offences such as offences relating to peace and order or those offences affecting to the economy. To consider the intention of juridical persons in French laws, the intention of its representative must be considered, same as in Thailand.

## **2. Juridical person shall be liable for offences committed by its representative**

The principle that juridical persons shall be liable for the acts of their representatives is similar to the responsibilities for other's action in tort law, not the general principle of criminal law.

In the UK, juridical persons shall be liable for the acts of their representatives, not only its authorized directors but also employees, officers or staffs. Though this principle is effectively deterring bribery offences; when considering from the juridical persons' side, it is quite broad to make juridical persons be liable for the acts of others, especially in a big company with thousands of employees. To make the company liable for the action of all thousand employees is quite unfair to the company and not in line with the principle of criminal law that the sanction should be imposed to the one who committed the crime, not others.

In the USA, the Issuers (U.S. and foreign public companies listed on stock exchanges in the US or which are required to file periodic reports with the Securities and Exchange Commission) shall comply with the Foreign Corrupt Practices Act 1977 (FCPA). FCPA provides the principle for consideration of the Issuers' intention by that of their representatives, including its officers, directors, staffs or shareholders acting on behalf of the Issuer, for effective enforcement of FCPA.

In Thailand, Article 123/5, paragraph 2 of the third amendment to OACC, is influenced by the Foreign Corrupt Practices Act 1977 and UK Bribery Act 2010 which the definition of 'associated persons' includes employees, officers or staffs of the juridical person. However, the author opined that this may cause too heavy duties to the company and it is quite impracticable for big companies to control the action of

all hundreds or thousands of their 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.

#### **4.2.1.3 Sanctions**

##### **A. Criminal sanction**

In the UK, any juridical person having no internal adequate procedures to prevent bribery shall be subject to a fine upon the consideration of the court. The law of UK does not provide the scale of fine and let the court freely exercise his consideration to each case.

In the USA, juridical persons committing bribery offences according to the FCPA shall be subject to a fine of not over 2,000,000 US Dollars and may be subject to a civil fine amounting to 16,000 US Dollars per one violation.

In France, the law separates the sanction to be inflicted upon juridical persons to not over five times of the fine applicable to natural persons. Therefore, for bribery to public officials, juridical persons shall be subject to a maximum of 750,000 Euros.

In Thailand, the criminal sanction to juridical persons committing bribery offences is provided in Article 123/5 paragraph 2 of the OACC which is a fine of at least 1 time but not over twice the number of damages occurred or the benefits gained. However, it would be more effective for deterrence of bribery offence if the maximum of the fine is higher to five times the number of damages occurred or the benefits gained. The higher ceiling of the fine rate will let the judge to be more flexible to exercise his consideration to each case considering based on the profits and income of each juridical person.

##### **B. Other sanctions**

Apart from criminal sanction, several countries provide other optional procedures to be enforced to juridical persons:

In the USA, apart from fine, 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 cease of using business license, etc.

In France, the court can also sanction juridical persons by order for dissolution, prohibit from doing some business, forfeit properties intended to be used for committing the offence, etc.

In Thailand, in line with the law of the UK, fine is the only sanction to be inflicted upon the juridical persons committing bribery offences.

#### **4.2.2 Problems on corporate criminal liability for bribery offences in Thailand**

Nowadays, business operations are widely operated by juridical persons. To commit the offences by juridical persons, the methods used are also changed to a more complex and transnational type which affect economics and society greatly. The recent trend of Thai laws as explained in the previous part indicates the significance of juridical persons' roles affecting society as some criminal provisions specify separate sanctions to be especially applied to juridical persons. However, the author considers that there are some problems on corporate criminal liability for bribery offences in Thailand which will be explained below.

##### **4.2.2.1 Problem on application of the law**

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

The legal system of Thailand is based on civil law system with the code of law influenced by codified systems such as France, Germany and Japan and also customary laws of Thailand. The law of France which is considered a model of civil law countries is selected to be studied for its notion on corporate criminal liability in Chapter 3.

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 depends 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.

Providing a specific corporate criminal liability for juridical persons, adding high rate of fine and adding administrative sanction are the obstacles for foreign business units and may cause reluctance to those companies which are deciding to invest in Thailand due to strict provision on corporations resulting high cost of business operation to prevent bribery within the organization. However, in contrary, the author opined that this will attract interests of business entities which operating business honestly to invest in Thailand due to express and strong domestic laws against bribery. Also, strict provision and high ceiling of the fine amount will result in the achievement of criminal punishment's purpose on deterrence of bribery offences, decrease harm to economics and society, increase living quality of Thai people due to less bribery cases, causing high quality of public services and social welfares. Additionally, it would fulfill the obligation of Thailand under UNCAC, Article 26 that the sanction to be applied to juridical persons should be effective, proportionate and dissuasive which increases credibility of Thailand in international aspects. This will result in more advantages to Thailand both in economy and social viewpoint and international aspects compared to the foreseeable disadvantages.

## 2) The definition of the term ‘internal adequate procedures’

In the second paragraph of Article 123/5 of the Organic Act on Counter Corruption B.E. 2542 (Amendment No. 3), there is no definition of the term ‘internal adequate procedures’ which is the defense for juridical person if it can prove that it has ‘adequate procedures’ in place for preventing bribery.

From the study of UK Bribery Act 2010, Article 9 introduces the guidance issued by the UK Ministry of Justice which consists of 6 principles that juridical person needs to do to meet the required standard of ‘adequate procedures’. The guidance sets out 6 principles as follows:

i) Risk Assessment – legal entity should regularly assess the nature and extent of bribery risks associated with its business market. Deficiencies in employee knowledge and training should be monitored. For large organization, it may need an external risk assessment professional.

ii) Top Level Commitment – Top level managers such as owners or directors should be personally involved in developing and disseminating a code of conduct and a zero tolerance policy towards bribery. A statement of commitment to counter bribery should be published to warn employees of the risks and consequences of breaching the policy.

iii) Due Diligence – juridical person should accurately identify bribery risks associated with all parties to normal business operations of the organization. The main areas to focus for due diligence are location (country risk), business opportunity (transaction risk) and business partners (partnership risk).

iv) Communication – Organization should communicate its anti-corruption policies to its employees which must be clear, accessible, enforceable, and documented.

v) Monitoring and Review – Organization must provide an effective compliance program which requires on-going maintenance and review to ensure compliance with anti-bribery policies. Auditing and financial controls should be put in place for large organizations.

vi) Record Keeping – Organization should be able to demonstrate compliance with its published procedures when any incident occurs. It needs to decide on the location and on what media these records should be kept and regularly checked

in order to ensure appropriate compliance of these requirements. In such situation, organization will be requested to cooperate with the investigating body; the willingness of cooperation will influence the decision of the investigating body.

The author opined that the guidance for adequate procedures should be implemented in Thailand for accurate compliance of juridical person.

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

Juridical persons are persons assumed by law established for the advantages of business operation, and thus juridical persons cannot be an offender in this offence. In fact, the person committed the offence is a natural person doing any act for benefits of juridical persons.

The principle that juridical persons shall be liable for the acts of their representatives is similar to the responsibilities for other’s action in tort law, not the general principle of criminal law.

In the UK, juridical persons shall be liable for the acts of their representatives, not only its authorized directors but also employees, officers or staffs. Though this principle effectively deters bribery offences; when considering the juridical persons’ side, it is quite too broad to make juridical persons liable for the acts of other people, especially in a big company having thousands of employees. To make the company liable for the action of all thousand employees are quite unfair to the company and not in line with the principle of criminal law that the sanction should be imposed to the one who committed the crime himself, not others.

In the USA, the Issuers (U.S. and foreign public companies listed on stock exchanges in the US or which are required to file periodic reports with the Securities and Exchange Commission) shall comply with the Foreign Corrupt Practices Act 1977 (FCPA). FCPA provides the principle for consideration of the Issuers’ intention by that of their representatives, including its officers, directors, staffs or shareholders acting on behalf of the Issuer, for effective enforcement of FCPA.

In Thailand, Article 123/5, paragraph 3 of the third amendment to the OACC, is influenced by the UK Bribery Act 2010 which the definition of ‘associated

persons' includes employees, officers or any staff of the juridical person. However, the author opined that this may cause too heavy duties to the company and it is quite impracticable for big companies to control the action of their all hundreds or thousands of 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 employees, agents, representatives, authorized persons from the juridical person and 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 opined that the advantages from the amendment the definition of 'associated persons' exceed the disadvantages.

#### **4.2.2.2 Problem on improper sanctions for bribery offences committed for undue advantages of juridical persons**

##### **1) Improper amount of fine**

###### **1.1) Bribery offences committed for monetary benefits**

To comply with the provision of UNCAC, Thailand enacted the third amendment of OACC which established corporate criminal liabilities for bribery offences; however, the number of bribery cases in Thailand is still increasing as shown in the Corruption Perception Index. This reflects that the law amendment could not effectively deter bribery offences, especially bribery offences committed for juridical persons. The sanctions provided in Article 123/5 of the OACC may not cause

deterrence which is the purpose of criminal sanction. The author views that it is not proportionate to the level of damages affecting to other people and society. Also, it does not affect the 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, especially those legal entities having very high profit such as in the case of In Vision Technologies, Inc.<sup>131</sup>, or the case of two executives of Film Festival Management, Inc. (FFM)<sup>132</sup>, and the case of ex-executive of Nishimasu Construction Company<sup>133</sup> that occurred in Thailand which dealt with a large amount of bribe. This caused losses of budget unnecessarily and causing economics damages in total much higher than bribery committed by natural persons.

The applicable law is inconsistent with damages occurred or undue advantages that juridical persons gain from bribery, and the punishments are also not proportionate to the negative impacts occurred.

The author opined that the scale of fine to juridical persons should be higher as the maximum of five times of the damages occurred or of benefits gained from bribery offence to let the court be able to exercise his consideration to each case

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<sup>131</sup> In Vision Technologies, Inc. appointed Patriot company which is a distributor for selling dynamite investigation machine in passengers' bags in Thailand proposed money calculated from the difference between the price of products of Cage company and the price sold to Airports of Thailand Public Company Limited to an influential official in Airports of Thailand Public Company Limited and Thai Government in the amount of 603 million Baht in order to let Patriot company be the distributor. In Vision company entered into a sale and purchase contract for dynamite investigation products with Airports of Thailand Public Company Limited which valued about 2003 million Baht without a bidding process.

<sup>132</sup> Department of Justice of the United States, 'Film Executive and Spouse indicted for paying bribes to a Thai Tourism Official to obtain Lucrative Film Festival Management Contracts' (January 17 2008)  
<<http://www.usdoj.gov/usao/cac/pressroom/pr2008/004.htm>> 21 April, 2016

<sup>133</sup> The case of ex-executive of Nishimasu Construction company which is a top construction company in Japan disclosed during the investigation of the prosecutor on 7 July 2008 that around September 2003, Nishimasu Construction company allowed Nishimasu Construction, Thailand branch gave bribe to a high-ranked official of Thai government and bidding management official for the project, amounting to about 400 million Yen or 125 million Baht, to enter into drainage tunnel for Ladprao and Sansaeb canals construction contract. This project is valued around 6,000 million Yen or 1,875 million Baht.

to accomplish the purpose for the punishment of juridical persons. So that the fine amount will be effective, proportionate and dissuasive sanction, especially for those companies having very high profit.

### **1.2) Bribery offences committed for non-monetary benefits**

Sometimes, bribery is done 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.

According to the sanction provided for juridical persons in Article 123/5, paragraph 2 of the third amendment of OACC, the amount of fine shall be equal to or not over twice the number of damages or benefits gained. However, the scale of fine in this provision may not be applicable in the case of bribery committed for non-monetary benefits as mentioned above. In the event where the bribe is paid for a business license, the benefit the juridical person gained is only a piece of paper which has no monetary value.

The author opined that the sanction to be inflicted upon juridical persons should be amended to cover this kind of bribery as well, by stipulating the scale of fine in the rank of fix amount up to five times of the amount to be inflicted upon a natural person, same as the rank for fine provided in the law of France. The reason is to allow the judge to exercise his consideration to set the suitable amount of fine in each case of bribery. If the rank of fine is too narrow, it reduces flexibility of the judge to exercise his considerations which may result in improper amount of fine which cannot effectively deter bribery offence of juridical persons.

### **2) No provision expressly provides administrative sanctions**

In Thailand, there are no other optional measures or administrative sanctions to be inflicted upon juridical persons committing bribery offences.

Apart from fine, several countries provide other optional procedures to be enforced to juridical persons such as 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

cease of using business license, etc., in France, the court also can sanction juridical persons by order for dissolution, prohibit from doing some business, forfeit 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 which is like a pass for doing business and getting profit. The administrative sanctions are mostly affect the opportunity to operate business of juridical person which should be effectively deterring 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.

## **CHAPTER 5**

### **CONCLUSION AND SUGGESTIONS**

#### **5.1 Conclusion**

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 which countlessly affects to 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.

#### **5.2 Recommendations**

##### **5.2.1 Legislation viewpoint**

As explained in the previous part, 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 provided in the Penal Code of Thailand specifying the conditions as to what circumstances that juridical persons shall be criminally liable therefor, same as the provision in the Penal Code of France.
- ii. The application of law should be based on civil law-system juristic method. The Thai court should apply only the written laws to the case, especially for criminal law which the significant principle is "no crime nor punishment without law." Therefore, in the event where juridical persons should be liable for a criminal offence, the legislative council should consider specifying it in written law to prevent indistinctness of law's interpretation 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 bad effects

occurring to juridical persons and whether they are suitable and effectively prevent crimes committed by juridical persons.

iv. The definition of the term ‘internal adequate procedures’ which is the defense for juridical person should be clarified same as the UK where a guide on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs is provided.

v. The definition of ‘associated persons’ whose act will cause juridical persons to be liable provided in Article 123/5 paragraph 2 should be limited to those having directing mind and will of the companies according to the Identification doctrine which are directors or authorized representatives acting on such juridical persons’ behalf to limit the criminal liability of legal persons from too broad liabilities for other’s 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.

### **5.2.2 Law enforcement viewpoint**

After expressed provision on corporate criminal liability is established, the law enforcement then becomes more suitable. The application of law by the judges will be in line with the juristic method of civil law system. Also, it would solve the judge-made-law problem which occurred in Thailand.

### **5.2.3 Sanction viewpoint**

From the legal problem concerning criminal liabilities of juridical persons, the author suggests to amend provisions concerning bribery offence by the followings:

**i) Other penalties apart from fine should be added in the Article 123/5, Paragraph 2 of the third amendment of the Organic Act on Counter-Corruption (OACC) of Thailand, B.E. 2558**

For example, forfeiture of properties, revocation of business license, and ban from entering into contracts with government agencies or even cease of business

and prohibition to do business in a period should be considered to be added to this provision based on the level of damages occurred from the bribery offence and frequency of commitment.

Besides, the legislation should be analyzed further in order to be amended to 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 consideration; for example, in the case that the company paid a bribe in return for a business license or with the intention of expediting the governmental process. We have to consider suitable punishments other than fine up to twice the number of damages or the amount of benefits gained as the term 'number of damages or the amount of benefits' may cause interpretation problems.

Types of punishment similar to that of the US should be applied to juridical persons in Thailand such as probation and forfeiture of properties since they are the punishment that affects the high-valued assets of juridical persons which would be resulting in the effectiveness of bribery prevention and suppression.

Furthermore, other administrative punishments should be applied to juridical persons in Thailand such as forfeiture of properties, revocation of business license, and ban from entering into contracts with government agencies or even cease of business and prohibition to do business in a period of time since 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) The scale of fine to be applied to juridical persons should be higher**

To specify the scale of fine to be suitable with a juridical person, it should be separately specified from the fine applied to natural persons, for example, in Foreign Corruption Practices Act of 1977 or FCPA specifying juridical persons shall be criminally liable in term of fine with the maximum amount of 2 million US Dollars. For natural persons, officers, directors, shareholders, employees or representatives, the amount of fine shall not exceed 100,000 US Dollars or 5 years

imprisonment or both. The general prosecutor or SEC may punish both juridical persons and natural persons to be liable for a civil fine amounting to not exceeding 10,000 US Dollars.

According to the recent amendment, the provision prohibits any offence done for undue advantages of juridical persons. The punishment for juridical persons which violate this law mentioned in this amendment is a fine up to twice the amount of undue advantages it gained from bribery. However, the scale of the fine which actually charges to a juridical person is still under the consideration of the court for each case. It should be considered that the penalties specified for juridical persons in this law are suitable or not, especially, in case of bribery done by a large company such as in case of Rolls Royce and PTTEP.

The penalty of twice the benefits gained may not effectively prevent high-profit juridical persons from recommitting the offence when compared to the scale of risk whether the bribery will be detected or not. Therefore, 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 increase the flexibility to the judge in exercising his considerations to each case properly e.g. in the bribery case committed by high-profit company, the increased amount of fine will then cause deterrent effect to such company and will effectively prevent this problem in the future, compared to lower amount of fine.

In conclusion, the author suggested amending Article 123/5, Paragraph 2 and 3 of the third amendment of the Organic Act on Counter-Corruption (OACC) of Thailand, B.E. 2558 as below:

“ .....

In cases where an offence is committed by an associated person and is committed to the interest of such juristic person, such juristic person shall be deemed guilty of the offence under this Article and shall be liable for a fine at the minimum equal to and at the maximum five times the number of damages incurred or benefits gained, unless it can be proven that the juristic person has in place an appropriate internal control measures to prevent the offence. In the event where the number of

damages incurred or benefits gained cannot be calculated in monetary value, such juristic person shall be liable for a fine at the minimum equal to and at the maximum five times the fine applicable to natural persons. In addition, under the court's perusal, such juristic persons may be punished by one or more of the following penalties:

- 1) Dissolution;
- 2) prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;
- 3) placement under judicial supervision for a maximum period of five years;
- 4) permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the same offences;
- 5) disqualification from public tenders, either permanently or for a maximum period of five years;
- 6) prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;
- 7) prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;
- 8) confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it;
- 9) posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

An associated person according to paragraph two includes employee, representative, subsidiary or any person who acts for or on behalf of such juristic person; provided that, such person shall have authorized power for doing so or the authorized persons of such juristic person know or should have known the commitment of such act.”

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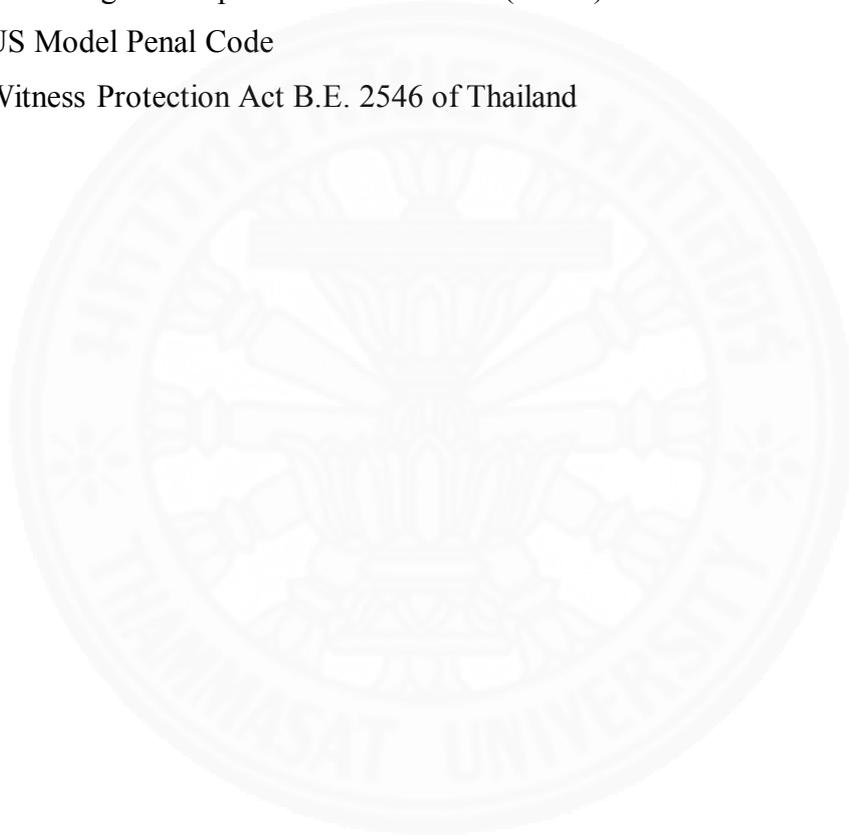
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