

CORPORATE LIABILITIES OF DIRECTORS UNDER SECTION 64 OF THE MALAYSIAN ANTI-TRAFFICKING IN PERSONS AND ANTI-SMUGGLING OF MIGRANTS ACT 2007

With the persistent demand for rapid development, the need for foreign workforce in numerous sectors has been growing by day, especially for hard-labour jobs.[1] Some corporations, seeking to save cost, resort to hiring undocumented migrants. This practice not only raises ethical concerns but also places these corporations at risk of criminal liability.

I. Liability of Directors under Section 64 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM")

In such situations, criminal liability does not solely fall on the corporation. Under the Malaysian legal framework, Section 64 of the ATIPSOM also holds, amongst others, the directors liable once the body corporate is found to have committed an offence under ATIPSOM. Rooted in the principle that those in leadership positions should be accountable for the actions of the entities they oversee, this provision seeks to enhance responsibility and deterrence from contemporary slavery practices.

To invoke Section 64 of the ATIPSOM, the court in ***Public Prosecutor v Kee Yeoh Seong***[2] – the only case which has ventured into Section 64 of the ATIPSOM at the time of writing this article – explained that two elements must be proven: (i) a body corporate[3] had (ii) committed an offence under the ATIPSOM.

II. Defence

Notably, directors can avail themselves to the defence that is enshrined in the same provision. This burden of proof falls squarely upon the directors. There are two limbs that must be established for directors to avoid criminal liability in such instances, which are:-

(i) The director did not know, consent, nor connive to the commission of the offence; and

(ii) The director had exercised all diligence to prevent the commission of the offence which he ought to have exercised in his capacity as a director.

• **Absence of knowledge, consent, or connivance**

Public Prosecutor v Kee Yeoh Seong concerns a charge under Section 29A of the ATIPSOM for the smuggling of one migrant to a fish factory owned by the accused. The prosecution pleaded, among others, that as the accused was in charge of the management of the fish factory, he had therefore assisted the illegal migrant to exit Malaysia unlawfully. Reliance was also placed on the fact that the accused was present at the fish factory when the migrant got into an altercation with the accused's staff after being denied the opportunity to request his departure from the fish factory. To establish liability against the accused, the prosecution also invoked Section 64 of the ATIPSOM, contending that the accused as the manager should be convicted alongside his fish factory.

The High Court acquitted the accused as the prosecution was unsuccessful in establishing a *prima facie* case against the accused. It was held that the accused's job scope in managing the fish factory at the material time does not ipso facto suggest he had consented to the migrant's stay at the fish factory.

Additionally, the accused's mere presence at the scene of the scuffle also did not suggest that he had known or must have known about the act of the smuggling of the migrant.[4] The High Court then went on to decide that Section 64 of the ATIPSOM was inapplicable in this case as the fish factory, being a partnership firm, does not fall within the definition of a body corporate.

This case illustrates the extraneous burden on the prosecution to prove the knowledge or consent of the enabling body to attribute the guilt for the relevant offence.

• **Due Diligence**

Directors must also show that they have exercised due diligence to prevent the commission of offence under ATIPSOM, that they reasonably ought to exercise given their position as directors. In exercising care, skill and diligence, directors must do so with the knowledge, skill and experience which may reasonably be expected of a director in the same position and with other additional attributes that they have.[5]

Thus far, local case laws do not have the opportunity to delve into what such due diligence would entail. Nor did our local legislations prescribe requirements for body corporates to comply with to combat modern slavery. Reference may be made to various sources to understand what amounts to due diligence to prevent the systemic smuggling of migrants from occurring within corporations.

The International Labour Organisation, in collaboration with Malaysian Employers Federation, published a guide for employers on how to address and mitigate the risks of forced labour within corporations. Among the extensive due diligence practices that were suggested include providing clear and transparent contracts to the migrant workers, ensuring fair and equal treatment among local and migrant workers, and paying wages on time.[6] In the United Kingdom, the Modern Slavery Act 2015 requires certain commercial organisations to prepare and publish a slavery and human trafficking statement at the end of each financial year.[7] The statement should outline the approaches, or the lack thereof, that had been taken by the organisations to deal with slavery and trafficking risks in their supply-chains and businesses. It may also include the company's risk assessment and management, due diligence processes, as well as any training conducted in relation to slavery and human trafficking. The Australian Modern Slavery Act 2018 embodies similar requirements, i.e., the obligation on corporations to report on the risks of modern slavery in their organisations and the actions taken to address said risks.[8]

III. Additional Risks

Apart from legal implications, corporations may also be exposed to reputational and operational risks should they fail to address slavery and trafficking risks. In 2020, Sime Darby Plantation Berhad ("**Sime Darby**") made headlines over suspected use of forced labour.[9] Among the allegations are that there had been physical threats and abuse asserted on the workers, various and inconsistent deductions in wages, varying conditions of accommodation, mistreatment of migrant workers, etc.[10]

These prompted the United States Customs and Border Protection ("**CBP**") to bar oil imports of Sime Darby's palm oil. In the same year, Top Glove Corporation Berhad ("**Top Glove**") was slapped with a Withhold Release Order ("**WRO**") by the CBP on suspicion of using forced labour in manufacturing their goods.

Top Glove, within 14 months, remediated the forced labour indicators in their businesses by compensating its workers and improving their working and living conditions, which caused the WRO to be revoked.[11] Thus, as directors are the key personnels in the decision-making of a company, they are obligated to take active measures, so as to ensure that their corporations are free from human trafficking and slavery practices.

Conclusion

Directors should be dedicated in adopting a robust mechanism of risk assessment and countermeasures to address the risk of trafficking or smuggling of migrant workers.

Consultations and legal advice tailored to the Malaysian legal context may be needed should corporations wish to build a solid defense strategy in combatting slavery and

trafficking practices. Ultimately, proactive compliance measures, due diligence and ethical corporate governance must be performed, not only to reduce the risks of such illegal activities from occurring within organisations, but also to shield directors from unwarranted legal repercussions under Section 64 of the ATIPSOM.

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1. Md Nor, Noranifitri, Harliana Halim, Siti Sarawati Johar, and Nur Azah Razali. 2023. "Isu Kemasukan Pekerja Asing Terhadap Kesejahteraan Hidup Masyarakat Malaysia". Human Sustainability Procedia 3 (2):11-15. <https://penerbit.uthm.edu.my/periodicals/index.php/hsp/article/view/13969>.
 2. [2016] 10 CLJ 556.
 3. The court in PP v Kee Yeoh Seng explained that a body corporate is created by statute and includes companies incorporated under the Companies Act and foreign companies.
 4. See Wong Nyet Wah v. PP (1962) 1 MLJ 312.
 5. Section 213(2) of Companies Act 2016.
 6. Miaw Tiang Tang, Business responsibility on preventing and addressing forced labour in Malaysia: A must-read guide for Malaysian employers, Malaysia: International Labour Organization, 2019. Accessible at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_717944.pdf.
 7. Section 54 of the United Kingdom Modern Slavery Act 2015.
 8. Section 14 of the Australian Modern Slavery Act 2018.
 9. Ananthalakshmi. 2022. "U.S. says sufficient evidence of forced labour at Malaysia's Sime Darby Plantation". Reuters. <https://www.reuters.com/world/asia-pacific/us-says-sufficient-evidence-forced-labour-malysias-sime-darby-plantation-2022-01-28/>.
 10. Chen, Julia. 2020. "Anti-trafficking group urges US ban on Sime Darby Plantation goods over alleged child, forced labour". MalayMail. <https://www.malaymail.com/news/malaysia/2020/07/08/anti-trafficking-group-urges-us-ban-on-sime-darby-plantation-goods-overall/1882532>.
 11. U.S. Customs and Border Protection. 2021. "CBP Modifies Forced Labour Finding on Top Glove Corporation Bhd.". <https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-forced-labor-finding-top-glove-corporation-bhd>.

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