

BEHIND BARS IN THAILAND FOR A NEGATIVE HOTEL REVIEW?

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For most travellers, pre-Covid 19 travel meant researching and investigating hotels, restaurants, attractions, airlines and cruise lines on a range of websites. TripAdvisor is perhaps the most well-known and prominent, but recently other sites offering similar review-based content have become more well-known and used. So pervasive is the influence of reviews by other travellers that online travel agencies ("OTAs") have also expanded to include reviews in their online booking platforms.

"This case raises the question of whether the risk of criminal prosecution will force websites and platforms to more proactively moderate and police reviews and remove or redact reviews."

An American resident of Thailand recently posted less than favourable reviews on several platforms on his experience at a hotel on Koh Chang Island. There is some controversy and dispute over the events in question and steps taken to address the review. Ultimately, the hotel filed criminal charges against the American for defamation and breaches of Thailand's Computer Crimes Act (2007). The accused American faces a maximum sentence on conviction for criminal defamation of imprisonment for two years and/or a fine of THB200,000 (approximately US\$6,335). The accused American also appears to have been charged for posting allegedly false information online in breach of the Computer Crimes Act. The maximum sentence on conviction is imprisonment for maximum five years and/or a fine of THB100,000 (approximately US\$3,200).

Thailand allows for both criminal and civil defamation proceedings. Procedurally, once criminal defamation charges are filed, the accused must be arrested and apply to be released on bail. For foreigners in Thailand, this can require that they surrender their passports. This can make daily life extremely difficult as foreign residents are required to produce their passports frequently as the only acceptable proof of their identity and Thai immigration laws require foreigners to carry their passports at all times. It can be extremely difficult to obtain permission to leave Thailand for foreigners and Thai citizens on bail.

Criminal defamation proceedings can take years to conclude and an accused remains on bail for the duration of the proceedings. Even in circumstances where an accused agrees to plead guilty to a lesser offence, this may nevertheless result in a conviction and a criminal record. For foreign residents of Thailand, a criminal record may jeopardise their residency and employment in Thailand and complicate international travel. For individuals who are directors or professionals, a criminal conviction may prevent them from continuing to serve in these capacities. Against a backdrop of global media focus and attention on the criminal charges and potential imprisonment, efforts are being made to resolve the dispute.

While this case highlights the potential criminal consequences of a less than favourable online review for individuals, the current media focus does not address a larger and more significant issue: whether the risk of criminal prosecution will force websites and platforms to more proactively moderate and police reviews and remove or redact reviews considered potentially in breach of laws such as Thailand's defamation under the Criminal Code and the Computer Crimes Act. Thailand is not the only country/territory with civil and criminal laws affecting publication of content. For OTAs, websites and platforms, which have taken a global rather than local approach to such issues, this case may serve to highlight the need to continually monitor developments, particularly where content can result in criminal charges.

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Most, if not all, users of OTAs, platforms and websites would be dubious about hotels, restaurants, attractions, airlines and cruise lines which only had positive and favourable reviews and would typically expect a balanced and fuller view across a range of reviews. Many users will look to negative reports and the responses of hotels, restaurants, attractions, airlines and cruise lines to see how they deal with problems which may arise on their trips. Realistically, problems and issues will arise during travel and reviews which demonstrate that the hotel, restaurant, attraction, airline or cruise line took steps to address and rectify the problem to the satisfaction of the traveller/s can be a better advertisement than a series of positive reviews.

OTAs, websites and platforms may now need to more finely balance the need for objective and independent reviews with their exposure to criminal charges. More proactive vetting of reviews posted on OTAs, websites and platforms is likely to result in a more cautious and conservative approach to reviews and content and OTAs,

websites and platforms would need to devote greater resources to moderating reviews and the comments on and reactions to reviews as these could also breach Thailand's Criminal Code and the Computer Crimes Act.

Under Thai law, a director can be charged and prosecuted for defamation committed by the company. Conviction of directors tends to focus on their involvement in website content. The greater the level of involvement of directors in website content, the greater the risk of conviction. Although directors who can demonstrate that they were not involved in the selection and publication of the defamatory article have good grounds to expect such charges to be dismissed, the risk of conviction would increase if the accused director was involved in reviewing and vetting reviews or was responsible for the team which did so.

For OTAs, websites and platforms with no operations in Thailand, the greatest risk may be that their directors are charged and that they only become aware of this when the director is arrested on arrival in Thailand. The accused director would need to apply for bail and may not be permitted to leave Thailand until judgment. The process could take several years. It is not unusual for an accused to be invited to plead guilty to a lesser charge. Whilst this may be a tempting way to bring the criminal proceedings to an end, this may require the accused to plead guilty to the lesser charge in circumstances where the accused director would only be involved because of their role as a director. As noted above, a criminal conviction may have significant repercussions for a director, particularly in relation to their continued suitability to serve as a director.

In addition, the Computer Crimes Act expressly extends its jurisdiction and criminal offences to service providers, which cooperate with, consent to or otherwise aid and abet a breach of its provisions. This would include in relation to posting false information online, which appears to be the basis of the charges against the accused American under the Computer Crimes Act. Prosecution of companies tends to focus on the owner of the website or platform rather than its directors but this would not preclude attempts to charge and prosecute directors for the acts of the company which owns the website or platform or where the company is listed and ownership is diverse and fragmented. Although the risk of criminal prosecution of offshore OTAs, websites and platforms currently appears moderate, the publicity surrounding such charges against an offshore OTA, website or platform may create more significant problems. Advertisers and hotels, restaurants, attractions, airlines and cruise lines may be less willing to be publicly associated with the OTA, website or platform charged under such legislation.

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In recent weeks, the Thai government has used its powers under the Computer Crimes Act (2007) to order websites including Facebook, Twitter and YouTube to remove content which the Thai government deems in breach of this Act. Whilst the focus remains on more political content, the powers of the government are broad and expansive and do not expressly exclude the content of travel and tourism-related OTAs, websites and platforms.

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