

PROBLEMS ON LIABILITY OF INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS*

*Pawita Boonliang***

Abstract

It is true that each time people pursue their own interests; they interfere with the prospective economic advantage of others. Nevertheless, if they only gently outbid, or offer the attractive interests to induce the others' potential customers or would-be contracting party not to enter into the future relationship, with such party and enter into contract with them instead, the inducers' acts are totally lawful. However, if the interferer's conduct engaged in improper means or abuse of right, there should have any measures to eliminate the culpable conduct and any compensation to award the injured person.

Multiple jurisdictions have, both expressly and impliedly, recognized the liability of unlawful interference with economic relations allowing a person who suffered as a result of the unlawful interference with his business expectancy to sue for damages notwithstanding the absence of the existing contract. Thai law does not have specific provision regarding this liability. Lack of specific requirement may create the flexibility on a case-by-case basis but it may also generate an inconsistency in the jurisprudence.

The right of "prospective economic relations" may be regarded as the right to compete or the right to pursue reasonable interests without undue interference. Under Thai tort law, the interpretation of "other right" under 420 can cover this kind of right. Even if there is no express provision regarding this kind of liability, section 420 (general provision), section 423 (civil defamation),

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**Graduate Student of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University

section 421 (abuse of right) and section 5 (good faith principle) is sufficient to cope with this area of law. Hence, it may be better to leave the court using the discretion based on a case-by-case basis than to stipulate the specific provisions relating to this area of law.

Keywords: Intentional Interference with Prospective Economic Relations or Business Expectancy, Tortious Interference, Interference with Future Contract

บทคัดย่อ

แต่ละครั้งที่บุคคลแสวงหาผลประโยชน์เพื่อตน การกระทำของเขาย่อมแทรกแซงผลประโยชน์ที่บุคคลอื่นควรจะได้รับ อย่างไรก็ตาม หากบุคคลนั้นเพียงแต่เสนอราคาหรือผลประโยชน์ที่ดีกว่าที่มุ่งใจให้ลูกค้าของกลุ่ม หรือคนที่เขาเข้ามาเป็นคู่สัญญากับกลุ่ม ไม่เข้าทำสัญญากับกลุ่มและเข้าทำสัญญากับคนแทน การกระทำเช่นนั้นถือว่าชอบด้วยกฎหมาย แต่หากในการแทรกแซงนั้น ผู้กระทำใช้วิธีการอันมิชอบด้วยกฎหมายหรือใช้สิทธิโดยมิชอบแล้ว สมควรที่จะมีมาตรการเข้ามาควบคุมพฤติกรรมที่ไม่เหมาะสมนั้น รวมทั้งมีการชดเชยค่าเสียหายให้แก่บุคคลที่ต้องเสียหายอันเนื่องมาจากการแทรกแซงโดยมิชอบ

หลายประเทศยอมรับหลักการในเรื่องความรับผิดชอบในการแทรกแซงการเข้าทำสัญญาหรือการได้มาซึ่งผลประโยชน์ของบุคคลอื่น ซึ่งอนุญาตให้บุคคลที่ถูกแทรกแซงในการประกอบธุรกิจหรือในการเข้าทำสัญญาสามารถฟ้องร้องบุคคลที่เข้ามาแทรกแซงได้ โดยไม่จำเป็นต้องมีสัญญาเป็นองค์ประกอบในการฟ้องร้อง กฎหมายไทยไม่มีกฎหมายเฉพาะในเรื่องดังกล่าว แม้ว่าการไม่มีบทบัญญัติที่ชัดเจนจะส่งผลดีให้เกิดความยืดหยุ่นในการบังคับใช้กฎหมาย แต่ขณะเดียวกันย่อมก่อให้เกิดความขัดแย้งหรือไม่เป็นอันหนึ่งอันเดียวกันในการบังคับใช้กฎหมาย

สิทธิในผลประโยชน์ที่อาจคาดหมายได้ อาจถือได้ว่าเป็นสิทธิในการแข่งขันหรือสิทธิในการได้มาซึ่งประโยชน์ใดๆ ที่สมควรได้ โดยปราศจากการแทรกแซงที่ไม่เป็นธรรม เมื่อพิจารณากฎหมายละเมิดของไทย “สิทธิอย่างหนึ่งอย่างใด” ตามมาตรา 420 ของประมวลกฎหมายแพ่งและพาณิชย์สามารถตีความให้ครอบคลุมสิทธิดังกล่าวได้ แม้ว่ากฎหมายไทยจะไม่มีบทบัญญัติเฉพาะในความผิดนี้ แต่ มาตรา 420 (บทบัญญัติทั่วไป), มาตรา 423 (หมิ่นประมาททางแพ่ง), มาตรา 421 (การใช้สิทธิโดยไม่ชอบ) และมาตรา 5 (หลักสุจริต) ของกฎหมายละเมิดของไทยอาจสามารถนำมาพิจารณาปรับใช้กับกรณีดังกล่าวได้ ด้วยเหตุนี้ จึงไม่มีความจำเป็นต้องมีการบัญญัติมาตราเฉพาะเพื่อมาแก้ไขปัญหาดังกล่าว แต่ควรนำหลักกฎหมายละเมิดมาปรับใช้แทนโดยให้เป็นดุลพินิจของศาลในการพิจารณาคดีต่อไป

คำสำคัญ: การแทรกแซงการได้มาซึ่งผลประโยชน์หรือการประกอบธุรกิจ, การแทรกแซงโดยละเมิด, การแทรกแซงในการเข้าทำสัญญา

I. Introduction

As long as an individual interferes with the economic expectancy of others and not with an existing interests or contract, it will be deemed as competitive activity. Nonetheless, if he interferes with another's existing contract, he can be held liable for inducement tort as called in the common law world. When the contract is formalized and if any party breached the contract due to the third party's interference, the other party may claim for damages incurred from the breaching party as well as the third party who interferes. However, the major limitation of this principle of liability is that only interference with interests under an existing contract can be grounds for claiming damages. Consequently, is there legal protection against an act of interference in a reasonable business expectancy which has not yet evolved into a contract, but is not far too remote so as to be unrealistic? Can this interest be protected and how?

In the common law world, a claim for intentional interference with economic relations¹ has been recognized in many jurisdictions even its basis varies widely from jurisdiction to jurisdiction. This claim enables an individual who suffered from the third party's interference with their interests to sue for damages notwithstanding the absence of contract. Unlawful interference occurs when the defendants commits an unlawful act which interferes with the

¹Intentional interference with economic relations is variously known as “unlawful interference with economic relations”, “interference with a trade or business by unlawful means”, “interference with prospective economic relations”, “interference with prospective contract”, “interference with economic opportunities”, “intentional interference with business expectancy” and other similar terms. (Larry Watkins, “*Tort Law – Tortious Interference with Business Expectancy – A Trap for the Wary and Unwary Alike*”, 34 U. Ark. Little Rock L. Rev. 619 (2012), available at [http://lawrepository.ualr.edu/lawreview/vol34/iss3/6/.](http://lawrepository.ualr.edu/lawreview/vol34/iss3/6/))

For the purpose of this Article, the term “unlawful interference” will be used in a way that includes all synonymous terminology.

plaintiff's trade or business interest² Likewise, it also incurs in case that the defendant causes the third party not to enter into a business relationship with a plaintiff that would probably have occurred as well as any acts of the defendant which hinder the plaintiff from establishing or maintaining relationships with the third party.³ Usually, the false claims and accusations are made against a business's reputation for the purpose of driving their customers away.⁴

II. History of Liability of Intentional Interference with Prospective Economic Relations

The origin of the tort of interference reaches back to the Roman law concepts of the *manus and patria potestas*⁵ which concerns the protection of interference in familial relation.⁶ It allowed a master to bring a suit against violence done to his household's members.⁷ The common law also recognized such liability in fourteenth century and expanded to cover the act of driving away a business's customers or a church's donors.⁸ But a cause of action under common law was strictly limited and only applies to a case which improper mean or actual violence were employed. For centuries, the common law continued to allow civil actions for interference with one's customers or other prospective business relationship; however, the actor's conduct must be tortious in character or engaged in violence, fraud, or defamation.⁹

²Duhaime's Law Dictionary,
<http://www.duhaime.org/LegalDictionary/U/UnlawfulInterferencewithEconomicInterests.aspx>

³Restatement (Second) of Torts, §766B

⁴Lyn L. Stevens, "Interference with Economic Relations: Some Aspects of the Turmoil in the Intentional Torts", 12 **Osgoode Hall Law Journal**. 595 (1974), available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol12/iss3/5>

⁵Peter H. Eulau, "Inducing Breach of Contract: A Comparison of the Laws of the United States, France, the Federal Republic of Germany and Switzerland", 2 **B.C. Int'l & Comp. L. Rev.** 41 (1978), available at <http://lawdigitalcommons.bc.edu/iclr/vol2/iss1/3>

⁶Eulau, *supra* note 5, at 44.

⁷George C. Christie et al., **Advanced Torts, Cases and Materials** (2004).

⁸*Id.*

⁹*Id.*

Furthermore, it involves with the employer's protection against inducement of his servant or laborer.¹⁰ The threshold of tort of interference appears in English case *Lumley v. Gye* (1853).¹¹ In this case, the defendant persuaded an opera singer who had contract with the plaintiff to sing at the plaintiff's theatre to break her contract and sing at his theater instead. Even if the plaintiff had a direct claim against the singer and can sue her for breach of contract, the defendant became liable for inducing a breach of contract.¹² Pursuant to this famous case, it is laid that the person procuring a breach of contract can be held liable as accessory to the liability of the contracting party.¹³ A main limitation of inducement tort is that if there is no existing contract, a person is not entitled to recover from such tort.

History of tort of unlawful interference differs from tort of inducing of breach of contract. It originates in the case of *Garret v. Taylor*¹⁴ in 1620. In such case, the defendant drove customers away from the plaintiff quarry by threatening them with violence and vexatious action. Besides, in the case of *Tarleton v. M'Gawley*¹⁵ in 1790, the defendant was held liable on the grounds of deterring the plaintiff from trading with natives (plaintiff's prospective customers) by shooting its cannon to the natives' canoe. The defendant's liability does not depend upon any other wrong conduct (no existing contract is breached). It is primary liability for injuring the plaintiff's interest by interfering with the liberty of the others.¹⁶ Even if the loss of the plaintiff was the decision of the potential customers not to trade with the plaintiff, the potential customers did not trade because of the

¹⁰Eulau, *supra* note 5, at 44.

¹¹*Lumley v. Gye* [1853] EWHC QB J73, (1853) 118 ER 749 (cited in Steven F. Rosenhek & Brad Freelan, "The Torts of Good Faith Bargaining, Inducing Breach of Contract and Intentional Interference with Economic Interests", FASKEN (Apr. 2006), <http://www.fasken.com/en/torts-of-duty-of-good-faith-bargaining/>)

¹²*Id.*

¹³*Id.*

¹⁴*Garret v. Taylor* (1620) Cro Jac 567, 79 ER 485 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

¹⁵*Tarleton v. M'Gawley* (1793) 170 ER 153 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

¹⁶*OBG Ltd v Allan* [2007] UKHL 21, at 3.

defendant's disruption.

III. Rationale of this Liability (Notion of Free Market and Fair Competition)

Exactly, a free market is significant and no liability should be imposed in the course of competition; however, there should be a rule of the game to control and ensure the fair competition. Although the predominant motive while committing the conduct may be for the purpose of advancing his own business or gaining his living, a person is not entitled to disrupt with another's business by using illicit means. While claim for breach of contract may not be available due to lack of privity, this liability may provide a valuable remedy especially in the aggressive competition.¹⁷

Nevertheless, some argue that this liability may restrain the free market system by giving the interesting example that supposing you love a beautiful girl and she is neither married nor have a steady boyfriend, but you know that another man is in love with such girl, do you have to wait until that man fails to win her heart before you can approach the girl?

The answer for the above scenario is absolutely not. Here, there is no existence of a relationship, no marriage and no contract. This is a free market where everyone can pursue his own interests and compete with others. No one is more justified or more privileged under this situation. However, supposing you are competing based on fair rule, you give her precious gift and taking care about her but your competitor uses the philter to lure and entice her, or simply drug her.

You may think that this is not fair and wonder how you can recover from this grievance. In this situation, it may be difficult to award any damages because of its nature and it may be hard to identify that you have reasonable expectancy to be her boyfriend. But, this example merely aims to demonstrate that if the competition is fair, no one should be liable in any circumstances because competition is not a tort; everyone can use every trick in the book to

¹⁷Adam D.H. Chisholm, "*Shine a Light: New Perspectives on Intentional Interference with Economic Relations*", MCMILLAN, <http://www.mcmillan.ca/102040> .(last visited Jul. 17, 2015)

be the winner provided that the action must be legitimate. However, there should be measures to protect against the use of blameworthy means and provide a remedy for any damage which may arise therefrom.

This liability is designed to draw the boundaries between the acceptable and blameworthy competitive conducts. In the course of doing the business or any dealings, the individual desires to be ensured that he can run the business or conduct his dealings without any undue disruption. This tort can serve as a protection of a person's dealing without unlawful interference. As Lord Hoffmann's statement, the purpose of this right of action is to enforce basic standard of civilized behavior in economic competition.¹⁸

Simply, not every act that disturbs a prospective contract or business expectancy is actionable. If the interferer only gently persuades, outbids, or offers the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the interferer does not commit any unlawful act unless he engaged in unlawful conduct or commit the conduct with an intention to injure others or abuse of right are employed.

IV. Liability for Intentional Interference with Prospective Economic Relations in Foreign Countries

Unlawful interference emerges in the area of economic torts and has appeared to be the issue of increasing legal comments in many countries. Each country offers different approaches and various requirements to constitute the cause of action. It may be useful to explore foreign laws to see the development of this liability in each country and to see how foreign laws cope with this matter. In this article, laws of Canada, France, Germany, the United Kingdom and the United States will be studied.

As to the basic concept of this liability in foreign jurisdictions, the common law system which is based on judge-made law will be reviewed. First of all, regarding UK jurisdiction which is the origin of

¹⁸ SJ Berwin LLP. "*Claims without Contract: Economic Torts Come of Age*", LEGAL 500 (Mar. 2009), <http://www.legal500.com/developments/6629>

this claim, the UK court recognized the tort of “causing loss by unlawful means or interference with trade or business by unlawful means”¹⁹, which is separable from the inducement tort. The House of Lords clarified the basis of this tort in *OBG* case (2007)²⁰. The unlawful interference tort enables a plaintiff to file suit against a defendant for economic infliction resulting from the defendant’s unlawful conduct notwithstanding the absence of an existing contract.

Secondly, referring to Canadian jurisdiction, the Supreme Court of Canada, followed the UK court, recognized tort of “unlawful interference with economic interests” where there was no breach of contract.²¹ The claim permits a plaintiff to bring a suit against a defendant for economic loss resulting from the defendant’s unlawful interference despite the absence of the existing contract. The basis of this kind of liability remained novel for long period of time until in 2014 where the decision of *A.I. Enterprise* was released; the Court laid the principle of unlawful interference which was narrowed and clarified.²²

Thirdly, in the case of the United States, the *Lumley v Gye* Principle of the UK law has been widely accepted in the US and the English case of *Temperton v Russel*²³ had a deep impact on the evolution of the tort in the United States which leads to the protection of commercial expectations.²⁴ This liability is officially recognized in Restatement (Second) of Torts as well as state case law. Most states formally recognized this liability in various ways. Some states follow

¹⁹*OBG Ltd v Allan* [2007] UKHL 21 at 3.

²⁰*Id.*

²¹Brandon Kain & Anthony Alexander, “*The Unlawful Means Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?*”, MCCARTHY,

https://www.mccarthy.ca/pubs/The_Unlawful_Mean_Element_of_the_Economic_Torts_Does_a_Coherent_Approach_Beyond_Reach.pdf (last visited Jan. 17, 2016)

²²David S. Morritt et al., “*Canada: Supreme Court clarifies “Unlawful Means” Requirement in Tort of Unlawful Interference with Economic Relations*”, OSLER (2014), <https://www.osler.com/en/resources/regulations/2014/supreme-court-clarifies-unlawful-means%E2%80%9Drequireme>. (See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177)

²³*Temperton v Russell* [1893] 1 QB 715

²⁴Hazel Carty, **An Analysis of the Economic Torts** (2010).

the principle suggested by the Restatement while other states create their own criteria to evaluate the claim.

Likewise, the civil jurisprudence whose case is based on the codified law is also explored and briefed. Primarily, with respect to French approach, Article 1382²⁵ which is the general provision of French tort law has generous view to protect all rights and interests except illegal interests. When a person who has already known of the existing relations between the parties engaged in negotiation thereof and this conduct leads to the failure of execution of the contract, it may not be deemed as a fault based on competition notion unless it is done by an intention to cause loss or is accompanied by fraudulent misrepresentation.²⁶

Next, under German tort law, the prospective interests may be protected under section 826 BGB.²⁷ The person's wealth is protected based on this section. Even if the scope of section 826 BGB seems to be at first glance wider than section 823(1) BGB²⁸ to the extent that its application is not limited to the violation of specific interests but provides for compensation even of pure economic loss, it is narrower as it is available only in case of willfully inflicted damage.²⁹ Even if it seems to be broad in nature, the German courts have applied this section in the case similar to English torts, such as intimidation, inducing breach of contract and deceit.³⁰

It is apparent that all three common law countries recognized the unlawful interference with economic relations claim separate from the claim of inducing a breach of contract; however, the underlying principle for the cause of action is different; they use various approaches or different causes of action when applying this kind of claim and the extent of their applicability. The UK court

²⁵Article 1382 of *Civil Code* "Any act of a person which causes injury to another obligates him by whose fault it occurred to make reparation."

²⁶Raymond Youngs, **English, French and German Comparative Law** (1998)

²⁷Section 826 BGB "a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage."

²⁸Section 823 BGB "a person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising there from."

²⁹Gerald Spindler & Oliver Rieckers. **Tort law in Germany** (2011)

³⁰Youngs, *supra* note 26.

recognized the claim but its application is limited. The UK practice is followed by the Canadian court while the US law has a specific provision and state case law also creates its own rule. Moreover, the US law goes beyond the UK law which is the origin of this tort.

The civil law system has no specific provision regarding this area of law. However, the general provision of tort can be applied, for example, the general and very wide basis of Article 1382 of French tort law can apply if the defendant engaged in wrongful conduct or acted with the intention to cause loss. Under Thai law, the interests protected under this claim should be regarded as “other right” under section 420 so that the plaintiff is allowed to sue for damages if other requirements are satisfied. Also, if the defendant’s conduct was committed for the sole intent to cause loss, he may be subject to liability and abuse of right.

V. The Substantial Requirement to Establish the Liability for Intentional Interference with Prospective Economic Relations

1) Existence of Business Expectancy

Generally, the tort protects non-formalized or anticipated business relationships³¹ which are reasonably certain to occur, but which are nonetheless prospective.³² This tort protects expectancies engaged in ordinary commercial dealings. In the United States, some states have provided some guidance to determine economic relation that it is “something less than a contractual right, something more than a mere hope and exists only when there is a reasonable probability that a contract will arise from the parties’ current dealings.”³³

The scope of prospective interests is so broad that the entire

³¹The terms “business advantage”, “business expectancy”, “business interests”, “business relations”, “economic advantage”, “economic interests”, “economic relations” and any others similar terms are interchangeably used.

³²ABA Section of Antitrust Law, **Business Torts and Unfair Competition Handbook**, 2nd ed. (2006)

³³Zachary G. Newman & Anthony P. Ellis, “*Navigating the Nuances of Tortious Interference Claims*”, 18 **ABA Sec. Litig.**1, 20 (2011), available at http://www.hahnhausen.com/uploads/39/doc/2011_06_zgn_ae_navigatingnuances.pdf

specific interests protectable under this claim cannot be enumerated, instead, only the general outline or main basis to determine the interests can be given. However, the scope of prospective advantage may summarily refer to an ability to obtain the favorable interests in the general commercial dealings e.g., ability to obtain the contract, sell of business, sell of goods, provide services, employ the employees, as well as any other similar activities. Furthermore, the scope of interests should also protect interest expected to obtain from the bid if the plaintiff has a reasonable expectancy to get the bid but lost the bid because the winning bidder engaged in unlawful act.³⁴

After contemplating the concept of interests in different countries, the proposed scope of prospective interests should cover two principal areas; prospective contract and trade or business expectancy. It is reasonable that the scope of economic advantage should include the reasonable probability to enter into the contract regardless of the types of contract, as well as the potential to establish the business relation or to reasonably acquire any interest protected by law.

The business interest can be broadly identified as appeared in the previous topic; however, the degree of certainty must also be considered. It is quite difficult to determine what degree of business expectancy can establish the elements of unlawful interference. However, some factors can be deemed as existence, for example, the length of the relationship if the relationship remained for long period of time, or regular prior dealings in similar matters. There are two divergent approaches given in defining the existence of business expectancy. The first one relates to the lenient approach of allowing the expectation in general; it is not required to identify the specific

³⁴See *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* 234 Cal.App.4th 748 (Cal. App. 2d Dist., 2015) (the California Court of Appeal concluding that a second-place low bidder on public works projects may sue the winning bidders for intentional interference with prospective economic advantage. In this case, the defendant can win the bid because of failure to pay its worker the prevailing wage. The appeal court ruled that the relationship between the plaintiff and the public agency that had awarded the contracts existed and it is adequate to maintain the cause of action for intentional interference with prospective economic advantage. See also, *Korea Supply Co. v. Lockheed Martin Corp* 29 Cal. 4th 1134 (2003)

reasonable business expectancy. The second approach involves the stricter rule of requiring the plaintiff to identify the specific potential customers.

Indeed, where specific prospective customers do not exist, it is too remote to count as a business expectancy. When the specific customers are not required to be identified, it may not maximize competition. However, in case the action is perpetrated against people in general as presented in the first above case where no actual customer can be identified, how can the plaintiff recover his loss? It may be useful to apply the lenient approach to leave open to the court to decide based on case-by-case basis. Regarding the unidentified prospective customers, the plaintiff has to show some evidence to reasonably establish that the relationship is certain to occur, e.g. in the case of redeeming coupons.

However, noting that even if the requirement of existing business expectancy is fulfilled, it does not mean that the claim can be sustained because there are other requirements left to be satisfied like unlawful means.

2) Unlawful Conduct

Preventing others from obtaining economic interests or business expectancy can be justified on the grounds of competition or acquisition of one's own interest even if it causes economic loss to others. However, if the interference involves improper conduct, the interferer should be liable under some legal principles. After exploring the concept of unlawful means in different countries, each jurisdiction copes with this matter in various ways.

With regard to the common law system, under the English law, to satisfy the unlawful requirement, the defendant's act must be directed towards the third party and actionable by that third party; and ultimately interferes with the third party's liberty to deal with the plaintiff.³⁵ Like the UK law, the Canadian courts follow the concept of the UK law and spelled out that the plaintiff can constitute the tort only when the defendant's act give rise to a civil action by the third

³⁵Kain & Alexander, *supra* note 21 at 88. (See *OBG Ltd v Allan* [2007] UKHL 21, at 3)

party³⁶; however, it does not mention whether the interference must affect the third party's liberty to deal with the plaintiff as appeared in UK law. Although these two common law countries recognize this claim but the application is narrow. This reflects the common law perspective which is reluctant to support fair competition.

As regards US law, even if the United States derives this liability concept from UK law, the US admits and applies this claim in the broader manner than its origin because it does not restrict the defendant's act to be directed at the third party, otherwise it only focuses on the nature of the defendant's act whether it is improper or not. The basis of this liability is expressly provided in Restatement (Second) of Tort as well as in state case law. Many states like California and Texas refuse to apply such basis due to lack of clear explanation and create its own rules that the conduct must amount to independent tort.³⁷ In other words, the defendant's act must violate other recognized tort apart from the act of interference³⁸

With reference to civil law system, the blameworthy conduct is based on the general provision of tort. In France, the defendant's action must fall within the definition of a fault requirement pursuant to Article 1382. Any breach of the law constitutes a fault under this section.³⁹ Under German law, section 826 BGB can be considered to protect prospective interests. Even at first glance, this section is wider than section 823 because it allows recovery of pure economic loss or people's wealth but its application is limited that the defendant's act must be against good moral or public policy.

Additionally, in civil law system, there is the development of

³⁶Bradley Phillips, "*Claims Against Competitors for Business Interference Must Meet Strict New Supreme Court Test to Succeed*", BLANEY MCMURTRY (2014), <http://www.blaney.com/articles/claims-against-competitors-business-interference-must-meet-strict-new-supreme-court-test> (See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177)

³⁷See *Wal-Mart Stores, Inc. v. Sturges* 52 S.W.3d 711 (2001) ("By 'independently tortious' the court means conduct that would violate some other recognized tort duty."³⁷ Simply, it means conduct that is already recognized to be wrongful under the common law or by statute.")

³⁸See *Della Penna v. Toyota Motor Sales, U.S.A., Inc* 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 902 P.2d 740 (1995)

³⁹Youngs, *supra* note 26.

good faith principle and abuse of right concept that no one should suffer damage from others' exercise of right. Even the defendant does not engage in unlawful conduct, he may be liable if motivated by malicious intent or sole purpose to cause loss to others. Conversely, the abuse of rights concept is not readily recognized in the common law systems.⁴⁰

VI. Liability for Intentional Interference with Prospective Economic Relations in Thailand

The Constitution of the Kingdom of Thailand B.E.2550 (2007), section 43⁴¹, ensures a person's liberty to trade or gain interests; freedom to make a living or trade is confirmed. When the defendant induces the customers not to purchase the goods from any shop or undermines the plaintiff's business so that the plaintiff cannot operate the business, the defendant should be liable.⁴² This right may be regarded as a right to compete or a right to pursue reasonable

⁴⁰Michael Byers, "*Abuse of Rights: An Old Principle, A New Age*", 47 **McGill LJ.** 389 (2002), *available at*

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5574&context=faculty_scholarship

⁴¹Section 43 "A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition."

⁴²Nopparat Sananpanichkul. "Any Right Pursuant to Section 420: Study on Historical Dimension and Comparative Law." Master's thesis, Thammasat University, Laws, 1995.

(นพรัตน์ สนั่นพานิชกุล. "สิทธิอย่างหนึ่งอย่างใดตามบทบัญญัติมาตรา 420: ศึกษาในแง่ประวัติศาสตร์และหลักกฎหมาย

เปรียบเทียบ." วิทยานิพนธ์ปริญญาโทบัณฑิต, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2538) With regard to

the decision of the Supreme Court no. 809/2487, in the event the defendant hindered the plaintiff from operating its business and gaining his interests, the defendant can be liable.⁴² As to the fact of this decision of the Supreme Court no. 809/2487, the plaintiff was a temple conducting the amusement. On the night of the amusement, the defendant thwarted the performance of Thai traditional southern dance (Norah) by using weapon and the performance fell through. The plaintiff lost profit from collecting money from the audience. The defendant's conduct directly injured the right of the plaintiff's freedom according to law. The court held that the defendant's conduct interfered with the business operation's freedom of the plaintiff given by law so that the plaintiff lost any prospective economic advantage. Therefore, the plaintiff was entitled to recover damages. The court held based on section 420 and awarded damages pursuant to section 438 and 446.

interests without undue disruption.

In accordance with Thai law, the term “any right” pursuant to section 420⁴³ of Thai Civil and Commercial Code must be interpreted in the broader manner than section 823(1) BGB of German law because in Thai law, there is no specific provision as appeared in section 826 BGB. In relation to any other right under Section 420 of Thai Civil and Commercial Code, Professor Jitti Tingsaphat⁴⁴ opined in case of any other right according to section 420 that it must be broadly interpreted and must include the case that a third party persuades a contracting party to breach a contract.⁴⁵ No comments were given in terms of interference with prospective contract or business expectancy. In this author’s view, the prospective interests under this claim may also be deemed as other right for the purpose of this section.

When glancing at Thailand Civil and Commercial Code, there are four main approaches to be taken into account to settle the issue, which are general tort provision, good faith principle civil defamation and abuse of right. As to good faith principle, it is prescribed in section 5⁴⁶ which provides that in the exercise of right, the individual must act in good faith. This provision lays a very wide and general basis. Consequently, if applying this section with the case, vagueness will arise and the case can be interpreted in different ways. However, it should be used when no specific provisions can be applied.

Regarding general tort provision pursuant to section 420, if the actor’s conduct is against the law and results in damages of prospective economic advantage of another, he should be liable under this section even it fits into a particular type of tort i.e. defamation, misrepresentation of trade secrets or bribery. However, liability under tort law does not have the express stipulation to determine which

⁴³Section 420 “a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation there for.”

⁴⁴Jitti Tingsaphat, **Civil and Commercial Code Part II section 354-452 Relating to Source of Obligations** (1983)

(จิตติ ดิงศภัทัย. ป.พ.พ. บรรพ 2 มาตรา 354 – 452 ว่าด้วยมูลหนี้ (2526))

⁴⁵*Id.*

⁴⁶Section 5“Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.”

conduct is unlawful. In other words, if the individual's conduct injures the rights of a person, which are the rights to life, body, health, freedom, property or any other right, the perpetrator can be held liable under tort law. Next, as to committing an act willfully or negligently, it means any act committed with consciousness and awareness that such act may result in injury to others. If being conscious that the conduct may injure the others' right, it can be deemed as willful act. Then, relating to damage suffered by another, if no damage occurs then there is no liability. Damage must occur to the person protected under the law and must be certain. Finally, the causation between conduct and damage must be considered.

If, in the course of competition, conducting business or dealing, the rival competitor asserts any untrue statements which injure the person's reputation even if he does not know of its untruth, but he ought to know it, he may be liable under section 423.⁴⁷ However, if the defamatory statement is true, he will not be liable under this section despite the fact that it may cause loss to others. Likewise, if he does not know that such statement was untrue and he has rightful interest in it, he will not be subject to liability. However, when applying this section in case of unlawful interference, it can only apply to the specific area of defamation in the course of competition, if it occurs outside this scope, the general provision must be taken into account.

Lastly, in terms of abuse of right, a person has the right to exercise but such exercise causes any detriment to others to the extent not permitted by law. Abuse of rights involves the conduct that intentionally injures another, exercising the right without gaining any interests or damage which occurs to another person is greater than the benefit that the person will acquire. Therefore, although the person has a legitimate right to pursue his own interests, he has to be aware

⁴⁷Section 423. "A person who, contrary to the truth, asserts or circulates as a fact that which is injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it. A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a rightful interest in it."

not to exceedingly use his right that can cause loss to person more than it should occur in the reasonable course of business, otherwise, he may liable under section 421.⁴⁸

In brief, the liability for unlawful interference may rely upon the general tort law under section 420 if the interference is wrongful itself or the defendant's conduct satisfies the cause of action requirement. Likewise, if the defendant's conduct is lawful but done with the pure malice or sole intent to injure the plaintiff or against the *bona fide* principle, his conduct may be wrong under section 5. Similarly, if the defamatory statement causing harm to others' reputation, credit, earning or prosperity was asserted, the person asserting the statement may be liable for civil defamation under section 423. Moreover, in case of improperly exercising the right or abuse of right, even if there is no malicious intent to cause harm, if the person uses the right in the manner that cause loss to another more than it should be, the liability may also be imposed pursuant to section 421.

By examining Thai law, in spite of lack of specific provisions as appeared in US or any basis given as appeared in UK and Canadian court, the general tort provision of Thai tort law can be applied in this situation. In this author's opinion, to satisfy the unlawful requirement, it should be classified into two types. Firstly, the defendant's act must be independently unlawful which means it is against the law apart from the act of interference itself under section 420, the defendant's conduct must breach a statute or is in violation of any law. The violation of industry standard or ethical practices should not be sole grounds for a cause of action to avoid any uncertainty in this area of law. Secondly, if the conduct of the defendant is not against the law, but is committed with the sole intent to injure the plaintiff and satisfies the abuse of right requirement, the perpetrator should be liable for his malicious intent under section 421.

As for independent wrongful conducts, such as; defamation, conspiracy, bribery, threat or assault, the defendant may act directly

⁴⁸Section 421 "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

against the plaintiff in order to ruin the plaintiff's business by means of illegal conduct like defamation or acts directly to the third party and it then results in plaintiff's injury. For instance, the defendant threatens the third party (plaintiff's potential customers) that he will hurt them, if they still buy goods from the plaintiff. Such threat may be actionable by the third party based on assault but it would not be actionable by the plaintiff, therefore allowing this claim may be a valuable remedy for the plaintiff.

Regarding abuse of right, the doer has liberty to commit but he abuses his right and cause damages to others pursuant to section 421. In addition, if person only gently persuades, outbids, or offers the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the inducer does not commit any unlawful act unless the improper means or abuse of right are employed. For instance, the double of the value of coupon issued to other's potential customer can be deemed as pursuing its own business interests but it can be regarded as exercising the right to cause loss to others, which is abuse of right.⁴⁹

The following hypothetical case is demonstrated to describe how the claim handles with this issue.

When A offers to sell a used car to B for the amount of 320,000 baht, but before B accepts such offer within the specified time, C offers A to purchase such car for the amount of 350,000 baht. A therefore sells such car and delivers it to C.⁵⁰ Due to the fact that B's acceptance has not reached A, the contract between A and B does not yet occur. Hence, A will not be liable to B under the contract. However, A's sale of the car to C infringes the provisions of law as

⁴⁹Big C v. Lotus Case (Tesco Lotus announced that it will take the coupons valued 80 baht issued by Carrefour and will double the value of the coupon to be 160 baht provided that the customer shall purchase the goods in Tesco Lotus supermarket. Tesco's operation is obviously to scramble for Big-C's customers. In 2013, the court of first instance held that Tesco Lotus's conduct was wrongful against section 421.)

⁵⁰Paijit Punyanan,, "*Precontractual Liability and Concurrent Liability*", 47 **Dullapaha**. 3 (2000).

(ไพจิตร ปุญญพันธุ์, "ความรับผิดก่อนสัญญากับความรับผิดซ้อนกัน", 47 **ดูลพาท**. 3 (2543))

set forth in section 354 of Thailand Civil and Commercial Code⁵¹ on the grounds that A cannot withdraw his offer within the specified time. Although A does not breach the contract with B because when A sells and delivers the car to C, the contract between A and C is not established yet, A's conduct may be deemed as a wrongful act under section 420.⁵²

In such case, is there any liability against C? Can C's inducement be deemed as interference with future contract which B reasonably expects to enter into? Ability to obtain the reasonable prospective contract may be deemed as one genre of potential interests in the meaning of "any other right" under section 420. In light of absence of existing contract, this is exactly free market where an individual can compete with others for gaining his own benefits.

It is clear that C's action interferes with B's prospective economic interests by offering A the better price while it is in the specified duration for B to accept the proposal. In this case, C's conduct is lawful; however, the law will verify the intention of C, not only look at his conduct. If C knows the existence of negotiation between A and B that A already makes an offer and it is during the time for acceptance by B, C's conduct may be against the *bona fide* principle and may be liable for abuse of right if C has malicious intent or ill will under section 421. Besides, if C employs any unlawful conduct, for instance, threatens A to offer him the deal, or C may disseminate false claims about A, C's act is independently unlawful and should be liable for the unlawful interference under section 420.

VII. Conclusion and Recommendation

It is acceptable that a person has the right to compete for his own interests or financial gain even exercising such right may cause damage to another. Interference with others' prospective economic advantage is justified so long as it does not involve any unlawful conduct and the interference is not performed for the sole purpose of

⁵¹Section 354 "An offer to make a contract in which a period for acceptance is specified cannot be withdrawn within such period."

⁵²Paijit, *supra* note 50.

injuring others. The liability for intentional interference with prospective economic relations is designed to draw the line between fair and culpable competitive activities. It does not restrain free market system because if the improper conduct is ignored, it actually ruins the competition.

The right of “prospective economic relations” may be regarded as the right to compete or the right to pursue reasonable interests without undue interference. Under Thai tort law, the interpretation of “other right” under 420 of Thailand Civil and Commercial Code can cover this kind of right. Even if there is no express provision providing liability on interference with prospective economic advantage, section 420, section 421 (abuse of right) and section 5 (good faith principle) is sufficient to cope with this area of law. Hence, it may be better to leave to the court to exercise its discretion on a case-by-case basis rather than to stipulate the specific provisions relating to this area of law. Nevertheless, this Article will propose the outline for two essential elements required to constitute this liability as follows:

- 1) Despite the absence of a contract, the prospective interests of a person should be protected from unlawful conduct. The prospective interests, or any similar term, should refer to an ability to obtain benefits from general commercial dealings. This prospective advantage should be regarded as a protectable right under the term “other right” under section 420 of Thai tort law.

- 2) Regarding the defendant’s conduct in the course of interference, the defendant’s act must be independently unlawful which means it is proscribed by some laws apart from the act of interference itself. Besides, the defendant’s act should not be limited only to the act directed at the third party as suggested by the UK and the Canadian courts.

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