

LEMON LAUNDERING: CONSUMER PROTECTION ON RESALE OF RETURNED DEFECTIVE CARS WITHOUT DISCLOSING PRIOR MECHANIC PROBLEMS*

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ABSTRACT

Presently, it is undeniable that a car is forsooth crucial for people's living, especially for people who need promptness and convenience in transportation. Purchasing the car is counted as an investment because of its high price. Therefore, it is certain that a consumer will expect best qualities in performance and safety. However, as the car is composed of numerous engines and parts under complex manufacturing and assembling process by advanced technologies, the car is thus a goods which is likely to be defective, such defective car is often called as 'Lemon car', and the consumer may not be of knowledge thereof while concluding a sale contract or obtaining the car, but the defect will mostly appear after the use for a period of time.

Nowadays, in Thailand, the rights of consumer with regard to the defective goods are protected under various statutes, for instance, the Civil and Commercial Code, the Consumer Protection Act, B.E. 2522 (1979), the Consumer Case Procedure Act, B.E. 2551 (2008) and the Product Liability Act, B.E. 2551 (2008). One of the significant protections enshrined is that the consumer has a right to rescind a sale contract if the seller fail to have the defective car repaired and return the defective car to the seller; or instead of rescission, the consumer may demand the court for a replacement, the court is empowered to exercise a discretion to order the authorized dealer who is the seller and/or the manufacturer to replace a new car without any defect to the consumer. The defect which lead to rescission of sale contract or replacement for new car is mostly persistent problems or severe problems that are harmful to safety of a driver or impair efficiency and performance of its car, and cannot be completely repaired at several attempts. Once the defective car is returned, the manufacturer and authorized dealer have to bear all expense arising out of reparation thereof. Reselling such car will be difficult as it becomes a

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used car with a defect history. Nonetheless, as a serious defect is hidden inside such car, and an exterior part of a car is in a good condition and a traveled distance is few, which is different from an ordinary used car, it leads to a gap manipulated by the manufacturer and authorized dealer to resell such returned defective car to a subsequent consumer by concealing a defect history. The aforesaid conduct is called as 'Lemon Laundering' in the United State. In the worst case, the manufacturer and authorized dealer may resell the returned defective car without repairing the defects. This may be harmful to the safety of the driver, passengers and other road users.

Thus, it is foremost to study and analyze relevant Thai laws, such as the Civil and Commercial Code, the Consumer Protection Act, B.E. 2522 (1979), the Consumer Case Procedure Act, B.E. 2551 (2008), the Product Liability Act, B.E. 2551 (2008), the Motor Vehicle Act, B.E. 2522 (1979), and the Penal Code, whether there are proper and adequate legal measures to protect the Thai consumer in case that the manufacture and/or authorized dealer resell the returned defective car by concealing background of defective issues or not. Moreover, foreign laws concerning consumer protection in such event should be studied and analyzed for adopting and prescribing proper and effective legal measures in consumer protection in Thailand.

Keywords: Defective Car, Lemon car, Lemon laundering, Liability for defect

บทคัดย่อ

ในปัจจุบันไม่อาจปฏิเสธว่ารถยนต์เป็นสิ่งจำเป็นต่อการใช้ชีวิตประจำวันของประชาชนทั่วไป โดยเฉพาะผู้ที่ต้องการความเร็วและความสะดวกสบายในการเดินทาง เนื่องจากรถยนต์ใหม่เป็นสินค้าที่มีราคาสูง การซื้อรถยนต์ใหม่จึงถือเป็นการลงทุนอย่างหนึ่ง ผู้บริโภคย่อมคาดหวังว่ารถยนต์ใหม่ที่ดีขึ้นจะมีคุณภาพและมีความปลอดภัยตามมาตรฐาน แต่เนื่องจากรถยนต์เป็นสินค้าที่มีส่วนประกอบจำนวนมาก มีกระบวนการผลิตและการประกอบที่ยุ่งยากซับซ้อน รวมถึงมีการนำเทคโนโลยีสมัยใหม่ระดับสูงมาใช้ในการกระบวนการดังกล่าวด้วย รถยนต์จึงเป็นสินค้าที่มีความเป็นไปได้สูงที่จะมีความชำรุดบกพร่องและผู้บริโภคอาจไม่สามารถตรวจพบความชำรุดบกพร่องได้ในขณะทำสัญญาซื้อขายหรือในขณะรับมอบรถยนต์ใหม่นั้น ซึ่งโดยมากปัญหาความชำรุดบกพร่องมักจะปรากฏขึ้นภายหลังจากที่ผู้ซื้อรถยนต์ไปแล้ว

ในปัจจุบันผู้บริโภคได้รับความคุ้มครองในกรณีที่สินค้ามีความชำรุดบกพร่องจากกฎหมายหลายฉบับ อาทิ ประมวลแพ่งและพาณิชย์ พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 พระราชบัญญัติวิธีพิจารณาคดีผู้บริโภค พ.ศ. 2551 และพระราชบัญญัติความรับผิดชอบต่อความเสียหายที่เกิดขึ้นจากสินค้าที่ไม่ปลอดภัย พ.ศ. 2551 เป็นต้น โดยในกรณีที่ผู้ขายไม่สามารถซ่อมแซมรถยนต์ชำรุดบกพร่อง ผู้บริโภคในฐานะผู้ซื้อที่มีสิทธิที่จะเลิกสัญญาซื้อขายและส่งรถยนต์ชำรุดบกพร่องคืนให้แก่ผู้ขายได้ หรือในกรณีที่ผู้บริโภคไม่ประสงค์จะเลิกสัญญา ผู้บริโภคอาจขอให้ศาลมีคำสั่งให้ผู้ขายเปลี่ยนรถยนต์คันใหม่ที่ได้รับจากความชำรุดบกพร่องให้แก่ผู้บริโภคแทน โดยทั่วไป ความชำรุดบกพร่องที่ถึงขนาดทำให้ผู้ผลิต และ/หรือ ผู้ขาย ต้องรับผิดชอบมานั้น มักจะเป็นความชำรุดบกพร่องที่ร้ายแรงกระทบต่อความปลอดภัยของผู้ขับขี่ ไม่สามารถซ่อมแซมให้หายขาดได้ และไม่ได้เกิดจากการใช้งานตามปกติ เมื่อผู้ผลิต และ/หรือ ผู้ขาย รับคืนรถยนต์มาแล้ว ผู้ขายย่อมต้องแบกรับภาระค่าใช้จ่ายในการซ่อมแซมรถยนต์ดังกล่าว การนำรถยนต์ดังกล่าวกลับมาขายใหม่ก็ทำได้ยากขึ้นเพราะรถยนต์ดังกล่าวกลายเป็นรถยนต์มือสองที่ประวัติความชำรุดบกพร่อง อย่างไรก็ดี แม้รถยนต์ดังกล่าวจะมีความชำรุดบกพร่องร้ายแรงซ่อนอยู่ แต่ด้วยสภาพภายนอกของรถยนต์ที่ซึ้งอยู่ในสภาพดี มีระยะทางการใช้น้อย ซึ่งแตกต่างจากรถยนต์มือสองทั่วไป จึงเป็นช่องทางให้ผู้ขายอาจนำรถยนต์ชำรุดบกพร่องดังกล่าวกลับมาขายใหม่ให้แก่ผู้บริโภครายที่สอง โดยปกปิดประวัติความชำรุดบกพร่อง ซึ่งในประเทศสหรัฐอเมริกาเรียกการกระทำในลักษณะว่า Lemon Laundering ในกรณีที่ร้ายแรง ผู้ผลิต และ/หรือ ผู้ขาย อาจนำรถยนต์ดังกล่าวกลับมาขายใหม่โดยไม่ได้ซ่อมแซม ซึ่งอาจเป็นอันตรายต่อผู้ขับขี่ ผู้โดยสาร และผู้ใช้ท้องถนนรายอื่นได้

ด้วยเหตุนี้ จึงมีความจำเป็นต้องศึกษาวิเคราะห์กฎหมายของประเทศไทยที่เกี่ยวข้อง อาทิ ประมวลกฎหมายแพ่งและพาณิชย์ พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 พระราชบัญญัติรถยนต์ พ.ศ. 2522 พระราชบัญญัติวิธีพิจารณาคดีผู้บริโภค พ.ศ. 2551 รวมถึงประมวลกฎหมายอาญา ว่ามีมาตรการคุ้มครองผู้บริโภคจากการนำรถยนต์ชำรุดบกพร่องที่ผู้ผลิตหรือผู้ขายรับคืนมาจากผู้บริโภคแรก แล้วนำมากลับมาขายให้แก่ผู้บริโภครายอื่น โดยปกปิดประวัติความชำรุดบกพร่องที่เหมาะสมและเพียงพอหรือไม่ พร้อมทั้งศึกษาวิเคราะห์กฎหมายของต่างประเทศที่เกี่ยวกับการคุ้มครองผู้บริโภคในประเด็นดังกล่าวด้วย เพื่อที่จะนำเสนอมาตรการคุ้มครองผู้บริโภคที่มีประสิทธิภาพและเหมาะสมกับประเทศไทยต่อไป

คำสำคัญ: การซ่อมแซม خودروยนต์, ความรับผิดชอบเพื่อความปลอดภัย, รถยนต์ชำรุดบกพร่อง

INTRODUCTION TO LEMON LAUNDERING

The word “lemon” is generally used to describe an undesirable or unsatisfactory thing.¹ The term “lemon” has been applied particularly to motor vehicles for at least one hundred years, especially in the United States (the “US”), to describe a defective car (often new car) that is found to have numerous or severe defects which substantially impair the safety, value or use of its car. And such defects do not occur from normal wear and tear usage and cannot be corrected after a reasonable number of attempts. For instance, the failure of braking, steering, transmission or electronic system.²

In order to protect the right of the consumer purchasing a car that turned out to be “lemon”, a number of foreign laws require the manufacturer and/or dealer to repurchase the defective car and refund a purchase price to the consumer or to delivery a substituted car to the consumer. The consumer in Thailand is also under protections of the Civil and Commercial Code (the “CCC”), the Consumer Protection Act B.E. 2522 (1979) and the Consumer Case Procedure Act B.E. 2551 (2008). The consumer has a right to rescind the sale contract if the seller fail to have the defective car repaired and return it to the seller³; or instead of rescission, the consumer may demand the court for a replacement, the court is empowered to exercise a discretion to order the authorized dealer who is the seller and/or the manufacturer to replace a new car without any defect to the consumer.⁴ In some case, the manufacturer and/or dealer may voluntarily agree to settle the case by repurchase or replacement before the case are taken to the court to avoid litigation costs, adverse effects to their reputation and credibility.

In Thailand and foreign countries, the number of defective cars or lemon cars that were returned to the manufacturers or its authorized dealers due to repurchase and replacement each year is unclear. It is because the manufacturers or its authorized dealers often decline to provide details and neither of them are required by law to release such information. However, the Consumer for Auto Reliability and Safety, a consumer group practicing in the US, estimates that there are 25,000-60,000 defective cars returned to the manufacturers or its authorized dealers due to repurchase and replacement every year.⁵ These returned defective

¹ Commonwealth Consumer Affairs Advisory Council, *Consumer Rights Reforming Statutory Implied Conditions and Warranties Final Report* (2009) 91-2.

² *ibid*

³ Thai Civil and Commercial Code, Section 215, 387 and 391

⁴ Thai Consumer Case Procedure Act B.E.2551 (2008), Section 41

⁵ Andrea Adelson, 'Consumer Advocates Seek Uniform Faulty-Car Laws' (*Nytimes.com*, 2017) <<http://www.nytimes.com/1996/08/27/business/consumer-advocates-seek-uniform->

cars are often driven in slight mileage, their exterior part are in good condition, but they often have a history of serious life-threatening safety defects, not occurring from wear and tear usage, such as brake failure, steering locks up during operation of the car, transmission suddenly fails to shift out of first or second gear, or electronic malfunction that makes the car stall in traffic.⁶

In fact, the returned defective cars are seldom destroyed regardless of how serious mechanic problems of the cars are, but the cars are brought back to market to use as demonstrator car, spare parts, or to resold to another consumer instead.⁷ However, once the defective car is returned, the manufacturer and/or its authorized dealer have to bear all expense arising out of reparation thereof. Resale of such car will be difficult as the car become a used car with a defect history. Nonetheless, as the serious defect is hidden inside such car, but an exterior part of a car is in a good condition with a low mileage, which is different from an ordinary used car, and the car's history is within knowledge of only the manufacturer and its authorized dealer. The consumer is unable to access to such information in order to examine the car's history before purchasing it. Consequently, the manufacturers and/or its authorized dealers may fail in acts of good faiths by concealing or misrepresenting the car's mechanic history when resell such car to a subsequent consumer, in the US, this practice known as "Lemon Laundering". It is because the returned defective car can be resold for more money if its defect history is concealed than disclosed. Even if the defects have been repaired, the car will still be resold for more money if the defect history is not disclosed.⁸ In the worst case, the manufacturer and its authorized dealer may resell the car without repairing or restoring the defects. This may be harmful to the safety of the consumers, passengers and other road users.

Example case in Thailand, in 2013, the first consumer bought a new Chevrolet Trailblazer car from an authorized dealer. After using for seven days, its engine sometimes stopped working while driving and gear and brake system became dysfunctional. To sharing experience, the first consumer posted the issue on a website; www.pantip.com. In eventually, the dispute of the first consumer was

[faulty-car-laws.html](#)>

access 1 November 2016.; and

Christopher Jensen, 'Their Titles Laundered, The Cars Are Still Lemons' (*Nytimes.com*, 2007) <<http://www.nytimes.com/2007/08/26/automobiles/26LEMON.html>> accessed 1 November 2016

⁶ Consumers for Auto Reliability and Safety, *Consumer Protection in the Used and Subprime Car Market* (2009).

⁷ Carolyn L Carter and others, *Automobile Fraud* (5th edn, National Consumer Law Center 2015) 18-9.

⁸ *ibid*

settled by negotiation. The authorized dealer agreed to accept return of the defective car and refund down payment to the first consumer. After that, in May, 2013, the same authorized dealer resold the returned defective car as a new car, in the amount of 1,249,000 THB, to the second consumer by concealing the defective issues and concealing the fact that the car has been sold to the first consumer. Moreover, the authorized dealer did not even repair or restore the defects of the car before reselling. After using the car for two days, the engine sometimes stopped working during driving, anti-theft and electrical system became dysfunctional. The second consumer, then, posted the issue on the same website; www.pantip.com. With the co-operation of the users from the website, it was figured out that the second consumer's car was the same car purchased by the first consumer earlier. The second consumer demanded responsibilities from the authorized dealer and manufacturer concurrently with social media continued to press the authorized dealer the manufacturer. Consequently, the authorized dealer and the manufacturer voluntarily agreed to replace a new car and pay 100,000 THB as compensation to the second consumer.⁹

The main problem which causes the consumer unable to access to the defect history due to the asymmetric information between the consumer and the authorized dealer and/or manufacturers. Namely, although all in depth information of each car, such as history of purchasing, maintenance, defects, and repairs including management of returned defective car, are recorded, the information is limited for internal use between the manufacturer and its authorized dealer. The consumer is therefore unable to access such information upon the conclusion of sale contract. Thus, the authorized dealer and manufacturer have an opportunity to take advantage by misrepresenting or concealing some information in order to persuade the consumer.

LEGAL MEASURES IN THAILAND

Under Thai laws, the specific law which protects the consumer from Lemon Laundering is absent. Thus, in such case, the general laws are to be applied comprising of various relevant statutes, for instance, the CCC, the Consumer Protection Act, the Consumer Case Procedure Act, the Product Liability Act, the Vehicle Act and the Penal Code.

(1) In case the seller is of knowledge that his car is a defective car which was returned from a previous consumer. But, he resells it by concealing such defect

⁹ 'ระวัง!!รถใหม่ป้ายแดง ซ้อมแมวขาย' (YouTube, 2017)

<<https://www.youtube.com/watch?v=Sw6OMIYWIWQ&index=1&list=PLNOtUGU9CXQ5XXfeUWVUf7Wad4iVO6xIZ>> accessed 1 August 2016.

history or misrepresenting that the car is without any defect or has never been used prior. In such case, certain issues arise as follows:

(1.1) As the seller has an obligation under a sale contract to inform the consumer of detail of the car which includes a history of reparation and a condition of car as to whether it is a new car or a used car. A seller's concealment or misrepresentation of information inconsistent with the fact shall constitute fraud under Section 159 of the CCC. This is because, should a consumer knows thoroughly correct information, he would not buy such car. Therefore, the sale contract is voidable and the consumer is entitled to avoid it which will invalidate such contract *ab initio*; and the parties shall restore to their former condition prior to a conclusion thereof under Section 176 of the CCC, whereby the seller shall refund the consumer the purchase price of the car and the consumer shall return the car to the seller.

Furthermore, in such case, the seller shall be held criminally liable for the offence of cheating and fraud under Section 341 of the Penal Code as well. And since this constitutes the criminal offence of cheating and fraud, it shall not constitute the offence of selling goods by fraudulent and deceitful means under Section 271 of the Penal Code.

(1.2) In case the concealment of the facts or misrepresentation of the seller does not affect a decision of the consumer to buy the car, namely, even the consumer is of knowledge that the car is defective or used car, he would still willingly buy such car, but, feasibly, with a lower price. In such case, the seller's action constitutes only an incidental fraud under Section 161 of the CCC, not causing the sale contract voidable. However, the consumer is entitled to claim compensation, for instance, a difference of a price claimed from the seller. And the seller shall be criminally liable for an attempt of the offence of cheating and fraud.

(2) In case the seller is not of knowledge that his car is a defective car which was returned from a previous consumer; or a used car, not resulted from the seller's negligence. For instance, the previous consumer purchased a defective car from the Dealer A. Subsequently, the court ruled a decision that the manufacturer replaces a new car without any defect to the previous consumer. When such defective car was returned to the manufacturer, it was delivered to the Dealer B afterward without informing him the defect history of such car. Together with the fact that the Dealer B could not examine the car's history from any source which causes the Dealer B to believe in good faith that such car is new and without any defect; or in case the consumer concludes a hire-purchase contract with the financial institute which is not aware of a history of a car's defect, in such cases the seller and the consumer are under mistakes as to quality of the car causing the sale contract

voidable under Section 157 of the CCC. Therefore, the consumer is entitled to avoid the contract which will invalidate such contract *ab initio*; and the parties shall restore to their former condition prior to a conclusion thereof under Section 176 of the CCC, whereby the seller shall refund the consumer the purchase price of the car and the consumer shall return the car to the seller.

(3) In case the consumer did not avoid the voidable sale contract in accordance with item (1)-(2) as mentioned above and subsequently the defect becomes apparent, the consumer has the following rights:

- The consumer has a right to refuse to accept the defective car pursuant to section 320 of the CCC.
- The consumer has a right to demand the seller to have defective goods repaired. If the seller fails to do so, the consumer may have defective goods repaired at the seller's expenses pursuant to section 213 of the CCC.
- The consumer is entitled to compensation pursuant to section 215 and 222 of the CCC.
- Since the sale contract qualifies as a reciprocal contract, the consumer is entitled to refuse to make a payment pursuant to section 369 of the CCC. If the defects are discovered after the delivery of the car, the consumer is entitled to withhold the purchase price or part of it still unpaid, unless the seller places proper security, pursuant to section 488 of the CCC.
- The consumer has a right to rescind the sale contract according to the principles of contract contained in Section 386-389 of the CCC. In this case, both parties shall be bound to restore the other parties to former conditions, namely that the consumer must return the defective car to the seller and the seller must refund the consumer's payment pursuant to Section 391 of the CCC.
- Instead of rescission of the sale contract, the consumer may demand for replacement and the court is empowered to exercise a discretion to render a judgment ordering the seller to replace a new car without any defect to a consumer pursuant to Section 41 of the Consumer Case Procedure Act.
- In case that the returned defective car causes damage or injury to the consumer. The consumer is entitled to claim actual damages,

mental suffering damages and punitive damages from the dealer and manufacturer under the Product Liability Act.

- Prior to file a lawsuit to the court, the consumer can demand the Consumer Protection Board to test or verification the defective car which may be harmful to well-being and/or mental health of the consumer. If the test or verification results that the car may be harmful to the consumer, the Consumer Protection Board has a power to prohibit the sale of such car, recall, repair such car or replace or compensate to the consumers, according to Section 36 of the Consumer Protection Act.

Although the consumer in Thailand is under protections enshrined in various statutes as mentioned above, from a thorough consideration, most of such protections are considered as remedial measures. Namely, it must firstly constitute Lemon Laundering, the consumer then can bring an action against the seller to hold him liable. However, even in present, the consumer case proceedings are conducted with conveniently, speedy and easily for the consumer. It cannot be denied that, in litigation, not only wasting a consumer's time spent, numerous consumers are also not used to such legal proceedings and lacked of cognizance pertaining to their own entitlements. Therefore, a consumer is afraid to initiate such implementation to protect his own right.

(4) Although a used car is prescribed as a label-controlled product under the Notification of the Committee on Labels No. 35, B.E. 2556 (2013), such notification however does not set forth any duty for the businessman to provide information with regard to the car's defect or to indicate that the car was returned to the manufacturer or dealer due to its defect in the label. In light of a hire-purchase of car which is a contracted controlled business pursuant to the Notification of the Committee on Contract, B.E. 2555 (2012), in which the businessman is not obliged to provide any of the referred information in the contract as well.

Furthermore, according to the Vehicle Act directly promulgated in order to safeguard a car usage, it also provides that neither a businessman shall inform the Office of Land Transport, nor that he shall have a returned defective car inspected to ensure a safety before being reused. Therefore, a record of a history of a car's defect in the database of the Office of Land Transport and a vehicle registration certificate is not kept. As a result, such information is only in knowledge of a manufacturer which increases a risk that he may present fault information; or conceal certain information to have a consumer conclude a contract with them.

LEGAL MEASURES IN UNITED STATES

In the US, the law specifically dealing with the protection of the consumer's right in connection with defect of car has been enacted, which is called 'Lemon Law'. Lemon Law of each state provides the significant principles in common. It however may differ in minor details. Lemon Law of every state, excepting Delaware, Kentucky, Missouri, Tennessee and Wyoming, have provisions stipulating duties and liabilities of the manufacturer and dealer in case concerning Lemon Laundering.¹⁰ Before reselling the defective car which was returned from a previous consumer, the manufacturer and/or dealer have obligations as follows:

- (1) Disclose the fact that the car was once returned to the manufacturer due to its defects and the details of its defect in writing to the consumer who is a subsequent buyer. Such disclosure may be provided in a sale contract or a separate document, or be attached with a part of a car;
- (2) Notify the state's Department of Motor Vehicles (the "DMV") or relevant authorities of the detail of the car and the reason that the car was returned in order to record such information in the authority's database. And submitting the existing certificate of title of the car to the state's DMV or relevant authorities in order to be inscribed or stamped with warning;
- (3) Provide the consumer who is a subsequent buyer for warranty at least 12 months, 1 year or 12,000 miles; and
- (4) Prohibit to resell in case that the returned defective car has a serious defect which is likely to cause death or serious bodily injury if such car is driven.

As Lemon Law is the law regarding the public policy, therefore, the parties to a contract cannot agree otherwise to waive or disclaim a protection enshrined in such law.

From a delicate consideration, the obligations in item (1) and (2) above are prescribed so that the consumer is able to receive precise and sufficient information before deciding to buy the car, which is a fundamental right of the consumer. Prescription of a duty to notify the DMV or relevant authorities and inscribing or stamping the car's certificate of title with warning would store a car's history systematically and accessible in the certificate of title of such car permanently, regardless of a transfer of an ownership. In case the manufacturer and dealer neglect

¹⁰ *Carter and others* (n7) 193

to inform the car's history, the consumer can still examine via a registration or from relevant authorities. Furthermore, the obligations in item (3) and (4) above are prescribed by a reason of safety in driving. Although the law of some state of the US does not clearly stipulate that the manufacturer or dealer has a duty to have a car repaired prior to resale, prescription of the manufacturer's duty to provide the consumer who is a subsequent buyer a warranty implicitly obligates the manufacturer to proceed with reparation and having a car's condition inspected prior to resale thereof.

In case the manufacturer or dealer violate the obligations set forth in item (1)-(4) as mentioned earlier, the manufacturer or dealer shall be liable for actual damages, attorney fees relevant expenses and shall be fined in amount stipulated under each state's Lemon Law. Furthermore, in several states, the violation of such obligations shall constitute the offence under the state's Deceptive and Unfair Trade Practices Act as well, which empowers the court to hold the manufacturer or dealer liable for consequential damages, damages for mental suffering and punitive damages. Moreover, in some states, if the dealer intentionally or negligently prevents a consumer from examining the car's information recorded in the certificate of title, and sign therein prior to a purchase of car, a ground for a suspension or a revocation of the dealer's license may arise.¹¹

LEGAL MEASURES IN GERMANY

In German laws, it does not provide specific law to protect a consumer from Lemon Laundering. Hence, the general law with respect to liability for defect under the German Civil Code (the *Bürgerliches Gesetzbuch* or the "**BGB**") shall be applied to a case concerning Lemon Laundering. Even consumers in Thailand and Germany are under the protection from legal principles on liability for defect in sale contract which is the remedial measure (Should Lemon Laundering occurs, the consumer shall have the right to being an action against the seller to claim a compensation according to the law, of which the Court's decision shall bind only parties), the BGB however sets forth clearer and more beneficial provisions for a consumer than Thai CCC as follows:

(1) The term 'Defect': Under Thai laws, Section 472 of the CCC does not define the term 'defect'. Unlike German laws, Section 434 of the BGB¹² providing means to determine as to whether or not the goods is defective as follows:

¹¹ *Carter and others* (n7) 196-7.

¹² German Civil Code, Section 434:

- Primarily, the terms with respect to a quality of the goods under a sale contract shall be taken into a consideration;
- Should the terms with respect to a quality of the goods in a sale contract is absent, an intent to use the goods under a sale contract shall be subsequently considered; and
- Eventually, a consideration on a usual quality of such goods, which is mainly based on information given by the seller or manufacturer, either from a public statement or an advertisement.

Furthermore, German laws also expands the scope of the term ‘defect’ to cover an installation of the goods and a manual thereof as well. Namely, regardless of the goods’ defect, should the seller fails to install the goods or in case a buyer installs himself but a manual provides wrong information resulting in malfunction of the goods, it is deemed defective. And the scope of the term ‘defect’ covers a delivery of the goods in amount less that agreed.

(2) The Rights of Buyer: Under Thai laws, Section 472 of the CCC merely prescribes that the seller shall be liable for the goods’ defect, but it does not provide any detail as to how the seller is liable thereof. Thus, the legal principle regarding the contract and obligation shall be applied, which causes problem in an interpretation as to whether or not the buyer is entitled, especially, to a replacement of the goods. Whatsoever, even Section 41 of the Consumer Case Procedure Act provides a provision concerning a replacement of the goods, it is subject to the Court’s discretion, not the right of the consumer. Unlike German laws, Section

“(1) The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects

1. if it is suitable for the use intended under the contract,

2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing.

Quality under sentence 2 no.2 above includes characteristics which the buyer can expect from the public statements on specific characteristics of the thing that are made by the seller, the producer (section 4 (1) and (2) of the Product Liability Act) or his assistant, including without limitation in advertising or in identification, unless the seller was not aware of the statement and also had no duty to be aware of it, or at the time when the contract was entered into it had been corrected in a manner of equal value, or it did not influence the decision to purchase the thing.

(2) It is also a material defect if the agreed assembly by the seller or persons whom he used to perform his obligation has been carried out improperly. In addition, there is a material defect in a thing intended for assembly if the assembly instructions are defective, unless the thing has been assembled without any error.

(3) Supply by the seller of a different thing or of a lesser amount of the thing is equivalent to a material defect.”

437¹³ to Section 441 of the BGB which explicitly provides the rights of a buyer as follows:

- The right to demand the seller for reparation or replacement of the defective goods;
- The right to rescind a sale contract, return the defective goods to the seller and claim for a paid purchase price;
- The right to reduce a purchase price, in case the buyer does not wish to rescind a contract; and
- The right to claim for damages and other expenses.

(3) Burden of proof: Under German laws, Section 476 of the BGB¹⁴ provides a presumption regarding the existence of defect in favor of the consumer as a buyer. Namely that any defect become apparent within six months after the date of a delivery, it is presumed that the goods was already defective at the date of a delivery, causing the burden of proof upon the businessman's side. Unlike Thai laws, Section 29 of the Consumer Case Procedure Act is subject to the Court's discretion to determine the burden of proof upon a businessman's side, in case the Court is of opinion that information to be examined is in knowledge thereof.

CONCLUSION

In order to protect the consumer from the Lemon Laundering or the practice that the defective car which has been returned to authorized dealer or manufacturer is resold to another consumer by concealing or misrepresenting of the car's history, the US provides the protection in different characteristic form those of Germany and Thailand. Namely, the US provides specific law dealing with Lemon Laundering in form of the preventive measures, while Thailand and Germany do not provide specific law, therefore, the general law which is remedial measure is to be applied in order for the protection upon a consumer.

¹³ German Civil Code, Section 437:

"If the thing is defective, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified, 1. under section 439, demand cure, 2. revoke the agreement under sections 440, 323 and 326 (5) or reduce the purchase price under section 441, and 3. under sections 440, 280, 281, 283 and 311a, demand damages, or under section 284, demand reimbursement of futile expenditure."

¹⁴ German Civil Code, Section 476:

"If, within six months after the date of the passing of the risk, a material defect manifests itself, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the nature of the thing or of the defect."

Prior to resale of the returned defective car, the US laws prescribes the obligations on the manufacturer and/or dealer to inform a consumer who is a subsequent buyer of a car's history in writing, to notify the Department of Motor Vehicles or relevant authorities of the car's history in order to proceed with recording such information in the authority's database and inscribing or stamping the car's certificate of title with a warning, to provide a consumer for a warranty at least 12 months or 12,000 miles, and in case the returned defective car has a serious defect which is likely to cause death or serious bodily injury if such car is driven, in some state, such car is prohibited to resell. These legal measures not only mitigate asymmetric information between the seller and the consumer which mainly constitutes Lemon Laundering and cause the consumer receive precise and sufficient information, but also concern the safety in driving. Unlike Thai laws, it is presently lacked of preventive measures as the US laws. Although Thai Laws provides a legal measure concerning product testing under Section 36 of the Consumer Protection Act empowering the Consumer Protection Board to test or prove the goods which is likely to harm a consumer; and to issue an order prohibiting a sale or disposing such goods, the author is of opinion that it is not adequate to protect the consumer from Lemon Laundering. Moreover, the relevant laws such as the Notification of the Committee on Labels No. 35, B.E. 2556 (2013) on Determining a Used Car as a Label-Controlled Goods, the Notification of the Committee on Contract, B.E. 2555 (2012) on Determining the Hire-Purchase of Car and Motorcycle Business as the Contract-Controlled Business and the Vehicle Act, B.E. 2522 (1979) do not prescribe any obligation on the manufacturer or dealer in this regard.

While the consumers in Thailand and Germany are under the protection from legal principles on liability for defect in sale contract which is the remedial measure, namely that in case the Lemon Laundering occurs, the consumer shall have the right to bring an action against the seller to claim a compensation according to the law, of which the Court's decision shall bind only parties. However, the BGB sets forth the provisions regarding to the definition of defect, the rights of buyer, and the presumption regarding the existence of defect in favor of the consumer clearer and more beneficial for the consumer than the CCC.

In conclusion, the consumer protection on Lemon Laundering in both forms of preventive and remedial measures is indeed significant; it cannot be lacked of any of the said measures. However, the author is of opinion that, nowadays, Thailand is still silent in providing effective preventive and sufficient measure to endure the protection of the consumer from Lemon Laundering. Therefore, an amendment of relevant laws should be impelled in order for additional protection from Lemon Laundering, by adopting preventive measures under the US laws, for

instances, a disclosure of the car's defect history in writing prior to resale, providing a warranty and inscribing the car's certificate of title with warning, and adjusting them in an amendment as appropriate to context and structure of Thai laws. Furthermore, in light of the remedial measures, although Thai laws provides the remedial measures which can be applied to Lemon Laundering, it is still inferior than German laws, the author hence is of opinion that if the provisions concerning liability for defect in sale contract under the CCC is amended by adding the definition of defect, the rights of buyer, and the presumption in respect to the burden of proof in favor of the consumer in accordance with the BGB of German laws, it would be indeed beneficial for the consumer.

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