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**THAMMASAT BUSINESS LAW JOURNAL**

**VOL.7: 2017**

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## THAMMASAT BUSINESS LAW JOURNAL

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### OBJECTIVES AND SCOPE

The Faculty of Law, Thammasat University, publishes the *Thammasat Business Law Journal* with the aim to disseminate scholarly legal articles in English. The main scope of the *Thammasat Business Law Journal* is to publish articles relating to business law.

### PUBLICATION PERIODS

The *Thammasat Business Law Journal* is published annually.

### PUBLICATION PROCESS

The *Thammasat Business Law Journal* uses blind review, which means that both the reviewer and author identities are concealed from the reviewers, and vice versa. The following names are our distinguished scholars who reviewed articles in this volume.

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**EDITOR'S NOTE**

The *Thammasat Business Law Journal* has continued its primary objective to be a forum for publication of the research of students in Master of Laws Program in Business Laws (English Program). In this volume, 18 articles present a diversity of perspectives on the current and controversial issues in relation to business law.

This volume could not have been published without the support of many members. In particular, I would like to thank all steadfast scholars for their insightful comments on the papers. I am also indebted to the Advisory Board and the Editorial Board for their guidance and support. I am immensely grateful to the Manager and the Managerial Staff for their countless working hours to ensure that this year's journal lives up to the high expectations set by past editorial boards.

Lalin Kovudhikulrungsri

*Editor-in-Chief*

*Thammasat University*

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# THAMMASAT BUSINESS LAW JOURNAL

VOL.7: 2017

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## CONTENTS

The Liability of Employers for the Acts of Their Employees: A Comparative Analysis of Section 425 of the Thai Civil and Commercial Code and Vicarious Liability in English Tort Law.....	<i>Adam Reekie</i>	1
Lemon Laundering: Consumer Protection on Resale of Returned Defective Cars Without Disclosing Prior Mechanic Problems.....	<i>Benjarat Binloy</i>	15
The Rise of Blockchain: An Analysis of the Enforceability of Blockchain Smart Contracts.....	<i>Boonyaorn Na Pombejra</i>	32
Comparative View on the Market Access Supervision over Foreign Banks in China and Hong Kong.....	<i>Chengzhi Yang</i>	49
Legal Measures Concerning Marketing of Breast-Milk Substitutes in Thailand.....	<i>Jareewan Rittitak</i>	60
The Interpretation of “Accident” which Triggers an Air Carrier’s Liability for Passengers’ Death or Injury under the Thai International Carriage by Air Act B.E. 2558.....	<i>Jetsada Cheewahirun</i>	83
Corporate Criminal Liability for Bribery Offences: A Comparative Study of Thai Laws and Foreign Laws.....	<i>Kornkaew Luangthanakun</i>	98
The Possibility of Adopting Other Exceptions to the Independence Principle in Letters of Credit in the Philippines.....	<i>Mary Jean M. Kuda</i>	120
Legal Issues on Creditors’ Rights and Protections in Single Member Companies.....	<i>Natcha Rattaphan</i>	135
Proof of Use of Trademark under Section 7 of Trademark Act Concerning Acquired Distinctiveness by Comparative Approaches between Thai and Foreign Trademark Laws.....	<i>Nedprawee Rodson</i>	148
A Comparative Study of Legal Measures on Meat Safety in Thailand, the United States, and Singapore.....	<i>Orapat Traimongkolkul</i>	169

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# THAMMASAT BUSINESS LAW JOURNAL

VOL.7: 2017

---

---

## CONTENTS

Building Pro Bono Culture in Thailand's Legal Business as a Contribution to Sustainable Development.....	<i>Pavitra Sakulchaimongkol</i>	190
Export Control of Dual-Use Items: A Comparative Study of Thai and Foreign Laws.....	<i>Piyanat Umduang</i>	207
Implementation of Laws Concerning the Compulsory Use of Child Car Seats on Personal Motor Vehicles and Safety Standards for Child Car Seats and Isofix Systems.....	<i>Supantachart Jantachote</i>	229
Transparency in Transfer of Value to Non-Physician Healthcare Professionals.....	<i>Suwapitcha Sinutok</i>	247
Divestiture under Competition Law: A Comparative Study of Foreign and Thai Laws.....	<i>Thanapont Thongnoi</i>	265
Sustainability Claims and Labelling in Thailand.....	<i>Wongploi Tongsup</i>	292
Class Action in Competition Law: The Problems of Counsels for Plaintiff.....	<i>Yanin Pichiansoontorn</i>	310

**THE LIABILITY OF EMPLOYERS FOR THE ACTS OF THEIR  
EMPLOYEES: A COMPARATIVE ANALYSIS OF SECTION 425  
OF THE THAI CIVIL AND COMMERCIAL CODE AND  
VICARIOUS LIABILITY IN ENGLISH TORT LAW\***

*Adam Reekie\*\**

**Abstract**

The doctrine of vicarious liability in English common law confers strict liability on one person for the wrongful act of another. The classic example is where an employer is held liable when an employee commits a tort in the course of their work. Since the turn of the 21<sup>st</sup> century, vicarious liability has been significantly developed by the courts in response to a line of challenging cases which did not easily fall within the previous tests. Now that the doctrine has been materially expanded, there remains some uncertainty over its application.

Section 425 of the Thai Civil and Commercial Code (TCCC) confers liability on an employer for the wrongful acts of an employee in materially similar circumstances to the historic English law test. This provides an opportunity for a fruitful comparative exercise on how these similar legal concepts have been interpreted in fundamentally different legal systems.

The comparative exercise performed in this article reveals a similar enterprise risk theory concept underlying both English law vicarious liability and Section 425 of the TCCC. However each system aligns more closely with this theory in different aspects. This provides the opportunity to make recommendations that each system adopt some features of the other, to bring the two legal concepts into closer alignment with the identified policy basis.

**Keywords:** Vicarious Liability, Employer's Liability, Tort Law, Section 425, Comparative Law

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\* This article is summarized and arranged from the thesis "The Liability of Employers for the Acts of Their Employees: A Comparative Analysis of Section 425 of the Thai Civil and Commercial Code and Vicarious Liability in English Tort Law" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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**บทคัดย่อ**

ในระบบกฎหมายคอมมอนลอว์ของประเทศอังกฤษ หลักเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น ก่อให้เกิดความรับผิดเด็ดขาดของบุคคลในการกระทำละเมิดของบุคคลอื่น ตัวอย่างเช่นเมื่อนายจ้างต้องรับผิดเพื่อละเมิด เมื่อลูกจ้างกระทำละเมิดในทางการที่จ้าง ตั้งแต่ยุคเปลี่ยนผ่านสู่ศตวรรษที่ 21 เป็นต้นมา ความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น ได้รับการพัฒนาอย่างมีนัยสำคัญโดยศาล เพื่อที่จะตอบสนองต่อคดีซึ่งยากและไม่สามารถใช้หลักเกณฑ์เดิมที่มีได้ ปัจจุบันหลักเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่นนี้ ได้ขยายออกไปอย่างมาก แต่อย่างไรก็ดี ยังมีความไม่แน่นอนชัดเจนในการปรับใช้

มาตรา 425 ของประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทย ก่อให้เกิดความรับผิดของนายจ้างเพื่อการกระทำละเมิดของลูกจ้าง ในสถานการณ์ที่คล้ายกันเป็นอย่างมากกับกฎหมายของอังกฤษในอดีต จึงก่อให้เกิดโอกาสในการศึกษาเปรียบเทียบเกี่ยวกับแนวคิดทางกฎหมายที่คล้ายคลึงกันของทั้งสองประเทศ ซึ่งได้รับการตีความที่แตกต่างกัน

การศึกษาเปรียบเทียบในบทความนี้แสดงให้เห็นว่าทั้งหลักกฎหมายเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น ของทั้งประเทศไทยและประเทศอังกฤษมีความคล้ายคลึงกัน ในด้านทฤษฎีรากฐานคือ “enterprise risk theory” อย่างไรก็ดี แต่ละระบบกฎหมายนั้นมีความสอดคล้องกันทฤษฎีนี้ในแง่มุมที่ต่างกัน ซึ่งเป็นโอกาสอันดีที่จะเสนอข้อเสนอนี้ต่อกฎหมายของแต่ละประเทศ เพื่อให้รับเอาลักษณะบางประการจากอีกระบบกฎหมายหนึ่งมาใช้ เพื่อปรับปรุงให้ระบบกฎหมายทั้งสองระบบนั้นสอดคล้องกันโดยชอบอันเป็นรากฐานมากขึ้น

**คำสำคัญ** ความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น, ความรับผิดของนายจ้าง, กฎหมายละเมิด, มาตรา 426, การศึกษาเปรียบเทียบ

## Introduction

The English common law notion of vicarious liability is an example of an unusual<sup>1</sup> concept in tort law, especially judicially developed tort law, in that it confers strict liability on one person<sup>2</sup> for the wrongful act of another. The classic example is the case of an employer being held liable to pay compensation for a wrongful act committed by an employee.

Traditionally, two elements have been required to confer vicarious liability in English law: first, there is a requirement for an employment relationship between D1 (employee) and D2 (employer); second, there is a requirement that the relevant tortious act be committed in the course of employment. However, since the turn of the 21<sup>st</sup> century, vicarious liability has undergone significant development. Following the landmark decision in *Lister*<sup>3</sup> there has been a line of cases which did not easily fall within the previous legal test. The courts have responded by expanding the application of the doctrine, entailing a re-examination of its principle and policy basis.

Now, English law vicarious liability will also confer liability in relationships which are “sufficiently akin to that of employer and employees”<sup>4</sup> that it is “fair, just and reasonable”<sup>5</sup> to confer vicarious liability on the defendant. Furthermore, rather than the act being committed ‘in the course of employment’, the courts will now look at whether there is a sufficiently ‘close connection’ between the tortious act and the field of activities assigned to D1 by D2 to make it just to impose liability.<sup>6</sup> Two Supreme Court cases in 2016<sup>7</sup> have addressed these two elements of vicarious liability, but uncertainty about how the doctrine will be applied in the future remains.

Section 425 of the Thai Civil and Commercial Code (TCCC) states:

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<sup>1</sup>As Lord Nichols put it, speaking in the House of Lords, “Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.” *Majrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34, 8

<sup>2</sup>This defendant is often referred to as D2, where D1 is the actual tortfeasor and D2 is liable through the doctrine of vicarious liability, not having committed the tortious act herself.

<sup>3</sup>*Lister v Heselley Hall Ltd* [2002] UKHL 22

<sup>4</sup>*Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56 at [60]

<sup>5</sup>*ibid* at [34]

<sup>6</sup>*Lister* (n 3) at 230

<sup>7</sup>*Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11



“An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment.”<sup>8</sup>

This provision contains elements which are materially similar to English law vicarious liability before the most recent line of cases: (i) the requirement for a particular relationship, that of Employer-Employee,<sup>9</sup> and (ii) the requirement that the wrongful act be committed in the course of employment.

This similarity presents the opportunity for a fruitful comparative study, in the hope that much may be gained by the detailed examination of how a similar rule has been interpreted and applied in two systems which differ fundamentally in terms of their traditional legal categorisation (common law and civil law)<sup>10</sup>, geographical position (West and East), and standard economic classification (developed and developing<sup>11</sup>).

This article examines the principle and policy justifications for the concepts represented by English law vicarious liability and Section 425 of the TCCC, and then compares the two required elements in both systems - (i) the nature of the required relationship between D1 and D2, and (ii) the nature of the acts which will confer vicarious liability within that relationship - and how they align with the principle and policy justifications. Consequently, it makes recommendations for the future development of the law in each system.

### **Principles and policy basis for vicarious liability**

The potential principle and policy justifications may be gathered into three types:<sup>12</sup> fault and identification; victim compensation and loss distribution; and risk and deterrence.

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<sup>8</sup> TCCC, Section 425, translation from Sandhikshetrin, *The Civil and Commercial Code Books I-VI and Glossary* (2008)

<sup>9</sup> In this article, the capitalised terms Employer and Employee are used for the Thai legal terms from the TCCC, *nai jang* and *lug jang* respectively.

<sup>10</sup> English judges and academics in this area already often take into account other decisions and developments in other common law jurisdictions. In particular, the Canadian Supreme Court judgment in *Bazley v Curry* [1999] 2 SCR 534 is often quoted and extremely influential in *Lister* and subsequent cases.

<sup>11</sup> For example, as regards the WTO, Thailand is a member of the Asian Group of Developing Members, see communication WT/GC/COM/6 issued 27 March 2012. Thailand has therefore classified itself, for WTO purposes at least, as developing. The UK has classified itself as a developed country for WTO purposes.

<sup>12</sup> This categorisation is adopted by Giliker, *Vicarious Liability in Tort: a Comparative Perspective* (2010) 228ff.

### **Fault and identification**

The argument regarding fault is that the wrongful act of the employee is evidence of the fault of the employer: the employee would only have been able to cause damage to the victim because the employer selected the wrong person to employ, or did not properly supervise the employee in carrying out the task which led to the injury. The argument regarding identification is that the employer is held liable for the tortious acts of the employee because the acts of the employee are attributed to the employer. Importantly, unlike other systems which strongly influenced the drafting of the TCCC,<sup>13</sup> the strict liability nature of Section 425 suggests that fault is not the policy basis of the concept.

### **Victim compensation and loss distribution**

In circumstances where the person who committed the wrongful act does not have sufficient resources to pay damages to the victim, who should suffer the loss? Should it be the victim or should it be the employer? The argument based on victim compensation is that it is better that the employer should be liable, since the employer took care to put trust and confidence in the employee: the victim is a stranger and has no way of vetting the trustworthiness of the employee.<sup>14</sup>

### **Enterprise risk and deterrence**

The argument regarding enterprise risk is essentially that the employer should take the risk of harm because: (i) she takes the benefit of the activity which causes the risk; and/or (ii) she has created the risk by choosing to carry on the activity as a business. The connected argument regarding deterrence is that the employer has the opportunity to increase standards of safety, for example, by better methods of selecting and supervising employees, and is well incentivised when she is exposed to liability for their wrongful acts. The English courts have explicitly favoured enterprise risk theory in the most recent line of cases.

Although it appears that there is no single policy basis that explains all the features of either English law vicarious liability or Section 425 of the

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<sup>13</sup> German and Japanese law: s.831 of the German Civil Code and s.715 of the Japanese Civil Code. Here, the employer can escape liability if they can demonstrate that they acted with proper care, or that the damage would have occurred even if they had done so.

<sup>14</sup> This is a very old concept in English law vicarious liability. In *Hern v Nichols* (1709) 1 Salk 289, Holt CJ expressed this concept as follows: “for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger.”

TCCC, it is hoped that a comparative analysis will reveal the policy mix in the systems and examine how well the legal regimes align, or may be amended to better align, with such policies.

### **The nature of the relationship**

#### **English law**

The first limb of vicarious liability in English law traditionally asked whether D1 was an employee of D2, i.e. operating under a ‘contract of service’ rather than a ‘contract for services’ which governs the relationship between independent contractors and will not confer liability vicariously. The classic test for whether a worker is an employee focused on control,<sup>15</sup> the distinction being that in a contract for services the ‘employer’ only controls *what* is to be done; in a contract of service, the employer controls the method of working, i.e. *how* it is done.

However, this control test presented a problem particularly when applied to situations involving skilled professionals over whom an employer is unlikely to have a high degree of practical control in relation to the performance of their duties. The conclusion of English law for some years was that hospitals, for example, were not liable for the negligence of doctors under the doctrine of vicarious liability due to the lack of practical control by hospital management.<sup>16</sup> By the middle of the 20<sup>th</sup> century, however, the courts saw the need to modify this rule and in four key cases<sup>17</sup> it was stated that professionals working full-time for hospitals could be treated as employees. This conclusion cast doubt on the universality of the control test.

Although the control test was not quickly replaced, the recent case of *Various Claimants v Catholic Child Welfare Society*<sup>18</sup> has finally sent a clear message that the law has moved on. In this case, the Supreme Court applied vicarious liability outside a formal employer-employee relationship, conferring liability on an unincorporated religious institution for physical and sexual

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<sup>15</sup> See *Short v J & W Henderson Ltd* [1946] QB 90 per Lord Thankerton

<sup>16</sup> *Hillyer v Governors of St Bartholomew’s Hospital* [1909] 2 KB 820 (discussed below)

<sup>17</sup> *Gold v Essex CC* [1942] 2 KB 293 (radiographer); *Collins v Hertfordshire County Council* [1947] KB 598 (resident junior house surgeon); *Cassidy v Ministry of Health* [1951] 2 KB 343 (assistant medical officer and house surgeon); and *Roe v Minister of Health* [1954] 2 QB 66 (anaesthetist).

<sup>18</sup> [2012] UKSC 56

abuse of its members while teaching at a school. In doing so, they approved<sup>19</sup> a test based on how thoroughly D1 was integrated into the organisation of D2.

The Supreme Court took the opportunity to clarify the approach in 2016 with the case of *Cox v Ministry of Justice*<sup>20</sup> which followed the approach in *Various Claimants*. It is now clear that the doctrine of vicarious liability will apply outside of traditional employment relationships where the following criteria are met:

(a) the individual carries on activities as an integral part of the business activities carried on by a defendant; and

(b) for its benefit (in the sense of advancing its objectives, not necessarily connected to profit) rather than entirely attributable to an independent business of her own or a third party.<sup>21</sup>

For new situations there is a caveat that the judge should consider whether it is “fair, just and reasonable” to impose liability, taking into account the policy basis of the doctrine.

### **Thai law**

To determine the existence of the Employer-Employee relationship under the TCCC, there are two questions:<sup>22</sup>

(i) Manner of remuneration: is the worker paid remuneration for the whole time that she works rather than on the basis of completion of the work? This requirement stems from the definition of ‘hire of services’ contract (the Thai term for which is *wajangraengngan*) in Section 575 of the TCCC; and

(ii) Control: does the Employer/Hirer have the power to control the manner, time and place of work of the worker, enforced by the power to dismiss the worker? This requirement comes from a Dika Court decision<sup>23</sup>

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<sup>19</sup> The court approved the approach of Rix LJ in the Court of Appeal case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2005] EWCA Civ 1151 [2016] UKSC 10

<sup>21</sup> “a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.” *ibid* at [24]

<sup>22</sup> Pengniti *Explanation of the Civil and Commercial Code on Wrongful Acts* (BE 2552) para 148

<sup>23</sup> 3825/2524

connecting Section 425 with Section 583 which grants the Employer such powers over an Employee.<sup>24</sup>

From the Dika Court jurisprudence, it seems that the analysis of the first question may, in some circumstances, be connected to the second question since it seems that even payment calculated on a 'per task' basis may be considered remuneration on the basis of time where the Employer has sufficient control over the Employee for the duration of the work: the 'per task' basis can be seen simply as a manner of calculation of quantum of remuneration.<sup>25</sup> Regarding the second question, it appears that the analysis rests on the *right to* control the manner, time and place of the worker rather than the amount of control that is exercised in practice.

### **Comparison**

There are two areas which highlight the differences of approach in the two jurisdictions: the attitude to the control test and situations where there are multiple employers.

### **Control**

As discussed above, the English law conception of control historically took a narrow approach, focusing on whether the employer has effective day-to-day control and supervision of the particular tasks of an employee. This approach ran into difficulty when applied to skilled professionals, and over time seems to have proven less and less applicable to modern workplaces and large corporations. Thai law also focuses on control as essential to establishing the Employer-Employee relationship. However, rather than requiring actual day-to-day oversight of a worker's task, pursuant to Section 583 of the TCCC, control is merely the *right to* control the method, time and place of work of a worker.

The distinction between the two approaches may be best shown by application to the same facts. The leading case in the area of hospitals' vicarious liability for the negligence of doctors in England, under the control test, was *Hillyer v Governors of St Bartholomew's Hospital*.<sup>26</sup> In this case, the English law control test found that a hospital was not the employer of a surgeon

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<sup>24</sup> See also Punyaphan, *Explanation of the Civil and Commercial Code: Wrongful Acts (BE 2553)* para 81

<sup>25</sup> A revealing example of this is Dika Court judgment 3834/2524. In this case, a sufficient level of control over the Employee led the Court to conclude that the 'per trip' basis of remuneration was merely a manner of calculation. The worker was an Employee. See Pengniti (n 22) para 157

<sup>26</sup> [1909] 2 KB 820

because the hospital management did not have a high level of control of the manner of work of a surgeon. Thai law would likely come to a different conclusion, since it is likely that a hospital's management will have the *right* to control the method, time and place of work of a full-time doctor. The application of Thai law to skilled workers can be seen by cases such as 769/2485, where the hirer of a boat was held to have the *right* to control the method, time and place of work of a ship's captain, and thus be considered an Employer, in spite of lacking the knowledge required to direct the captain's manner of work. Therefore the concept of control in Thai law is significantly broader, and better able to apply to skilled professionals, and thereby may avoid some of the issues associated with the historic English law control test.

### **Multiple Employers**

Traditionally, under English law, only one party may be held to be an employer for vicarious liability. This position was overturned in the *Viasystems* case which held that more than one party could be held as an employer would be where the employee in question "is so much a part of the work, business or organisation of both employers that it makes it just to make both employers answerable for his negligence."<sup>27</sup>

Conversely, under Thai law, the Dika Court has consistently<sup>28</sup> been willing to find several parties liable as Employers, even where such parties are not directly remunerating or controlling the Employee. Once a worker has been identified as an Employee based on the remuneration and control test, all those directly benefiting from her activities may be held liable as Employers under Section 425.

Although in some cases these tests may produce the same results, they are based on fundamentally different concepts. In English law, the integration/organisation test must be run against each potential employer separately. Under Thai law, once Employee status has been established, all those directly benefiting from the Employee's activities will be held liable: a much simpler test to satisfy. Furthermore, it remains to be seen how willing the English courts will be to hold multiple parties liable, given their historical reluctance to confer liability on multiple employers.

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<sup>27</sup> *Viasystems* (n 19) at [79]

<sup>28</sup> For other examples, see cases 1576/2506, 450/2516, and 4070/2533.

## **The nature of the act**

### **English law**

Before the latest line of cases, the long established test was whether the tort was committed in the course of D1's employment. An act was considered "in the course of employment" where it was either a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer.

This test, however, was challenged by a line of cases starting with *Lister* which concerned physical and sexual abuse committed by employees. The House of Lords in *Lister* found that acts which were the antithesis of the task assigned to an employee did not easily fit into the test of an 'unauthorised mode' of doing an authorised act. Therefore, the English law test, as approved by the recent *Mohamud* case, is as follows:

(i) What is the "field of activities" assigned to D1 by D2?

(ii) What is the connection between the field of activities and the wrongful conduct? If it is sufficiently close to make it just to impose liability, then D2 will be held liable. Mere opportunity is not sufficient: the risk of committing the tort must be created or enhanced by the relationship. The question of whether it is 'just' is answered by reference to an enterprise risk theory basis of the doctrine.

### **Thai law**

Section 425 of the TCCC states that an Employer will be jointly liable with an Employee for the consequences of a wrongful act committed "in the course of employment". An act will be considered in the course of employment even where it is not part of her usual duties,<sup>29</sup> or where it is prohibited by the employer<sup>30</sup> or an intentional wrongful act.<sup>31</sup> A key distinction that runs through the case law is that between an action committed for the benefit of an Employer and one which is considered to be an Employee's personal business.<sup>32</sup> Where the line is drawn is a very much a question of the degree of deviation from the Employee's duties or the unusual nature of the Employee's behaviour: the greater the deviation or the more extreme the behaviour of the Employee, the less likely the act will be committed in the course of

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<sup>29</sup> Pengniti (n 22) para 158

<sup>30</sup> Punyaphan (n 24) para 85 and 2171-2173/2517

<sup>31</sup> *ibid* para 84 and 2499/2524

<sup>32</sup> *ibid* para 85 and 3078/2533

employment.<sup>33</sup> However, the Thai law test uses a concept which is broader than under the historic English law test. The Dika Court appears to take a broader view of the duties assigned to an Employee, and is willing to confer liability on an Employer in certain circumstances for acts which are prohibited, incidental, or even when deviating from a task to an extent which English law would consider sufficient to place them outside of the course of employment.

### **Comparison**

An interesting area of comparison is how the two legal systems treat acts involving insults and violence. This was the subject of the most recent English Supreme Court case, *Mohamud*, which involved a petrol station shop attendant employee verbally abusing and assaulting a customer based on racial motivations. The facts are similar to Thai Dika Case 1942/2520 which concerned the driver and conductors of a bus who had a quarrel with a customer who complained about the driver's performance, which resulted in a violent confrontation. The Dika Court decided that the violent confrontation was not in the course of employment. Indeed, this is consistent with other cases where the Court has refused to confer liability for insults and violence, since these are usually considered personally motivated. Applying this approach to the facts of *Mohamud*, it is likely that the Dika Court would not confer liability on the employer.

By contrast, using the new 'close connection' test, the Supreme Court decided that the employee's field of activities was dealing with customers, and that the violent altercation with a customer was therefore sufficiently closely connected to confer liability. It was not simply the fact that the opportunity for violence was created (which would not confer liability) but rather that by assigning this role to this employee the employer had materially increased the risk of the wrongful act. Applying this test to the facts of Dika Case 1942/2520, it seems that the Supreme Court would likely be able to confer liability in the case of the bus conductors, whose role was to deal with passengers (and therefore also passenger complaints). Perhaps in the case of the bus driver, a confrontation with a passenger may be considered not sufficiently closely connected with his field of activities (i.e. driving the bus).

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<sup>33</sup> Compare 2060/2524 and 2739/2532, where fleeing a scene of an accident is in the course of employment but deciding to hide the victim of an accident in a waterway is considered personal business.



Therefore it seems that the new English law test of 'close connection' would likely confer liability in situations where the current interpretation of Section 425 of the TCCC would not: to personally motivated, extreme or violent acts which have a connection to the field of activities assigned to the employee. In particular, addressing the cases which have provoked the development of English law, these were personally motivated acts of physical and sexual abuse: as such, these are likely to be considered outside of the course of employment in Thai law, and therefore Thai law would not be able to confer liability on an Employer, in the same way that the previous English law tests could not.

### **Comparison of principles and policy bases**

The analysis of the policy and principles in the two systems' approaches demonstrates recognition of enterprise risk theory, but to different extents. In English law, there is now recognition that an enterprise should be liable for the risks it creates through assigning anyone (not just employees) to perform tasks, and that assigning an individual to perform a particular task creates certain risks both in and outside the course of performing that particular task, including personally motivated wrongful acts which are the antithesis of the task.

By contrast, Thai law retains a focus on the extent to which a worker is controlled by an Employer to establish the required relationship (more suggestive of a fault and identification basis than enterprise risk) and whether the Employee is acting for the benefit of the Employer. This displays a narrower view of the relationship and kinds of acts which confer liability than English law. However, it is only the *right* to control that confers Employee status, rather than a level of in practice control which English law required under the previous test. A focus at this level, it is argued, suggests that a distinction is being made on status: i.e. this determines whether the individual is working for herself or for another party. This is consistent with enterprise risk theory, but more narrowly construed than in English law.

However, the comparison reveals that Thai law's attitude to holding multiple parties liable for the actions of an Employee is better aligned with enterprise risk theory than English law. English law requires D1 to be integrated into the organisation of each D2; by contrast, once the status of Employee has been established, Thai law will confer liability on all those who

benefit directly from the Employee's actions: where a party benefits from a business activity, they should bear responsibility for the risks associated with that activity.

### **Conclusions and recommendations**

From the comparative exercise performed, the following conclusions and recommendations can be drawn.

First, although the recent development of English law has materially brought it into better alignment with enterprise risk theory than under the previous tests, English law is still deficient in its approach to conferring liability on multiple employers. Thai law is much better aligned with enterprise risk theory in this regard. Therefore it is recommended that the English courts should adopt an approach similar to the Thai Dika court when analysing whether multiple parties may be held vicariously liable for tortious acts. Specifically the English courts, like the Dika Court, should look at the economic reality of the arrangements and hold all parties who directly benefit from an employee's activities vicariously liable for the risks.

Second, although Thai law has a broader interpretation than the previous English law tests, Thai law will not be sufficiently flexible to confer liability where an Employee abuses a position that she has been assigned to carry out in a personally motivated act, particularly an extreme or violent act, in the same way as current English law. This is not well aligned with enterprise risk theory, since an enterprise may have created a risk by assigning a particular role to an Employee. Therefore Thai law should be amended to address this. Since currently Section 425 of the TCCC may not allow sufficient room for an interpretation to cover such situations, the provision could be amended to include a concept from the English law test as follows (amendment in bold):

“Section 425: An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment **or a wrongful act which is sufficiently connected with the field of activities assigned to such employee to justify conferring joint liability on the employer**”

This additional wording would provide the flexibility and authority for Thai judges to hold Employers responsible for a broader range of wrongful acts of their Employees, in alignment with enterprise risk theory.

## References

### Books and Articles

- Giliker, *Vicarious Liability in Tort: a Comparative Perspective* (2010)
- Pengniti *Explanation of the Civil and Commercial Code on Wrongful Acts* (BE 2552)
- Punyaphan, *Explanation of the Civil and Commercial Code: Wrongful Acts* (BE 2553)
- Sandhikshetrin, *The Civil and Commercial Code Books I-VI and Glossary* (2008)

### English Cases

- Cassidy v Ministry of Health* [1951] 2 KB 343
- Collins v Hertfordshire County Council* [1947] KB 598
- Cox v Ministry of Justice* [2016] UKSC 10
- Gold v Essex CC* [1942] 2 KB 293
- Hern v Nichols* (1709) 1 Salk 289
- Hillyer v Governors of St Bartholomew's Hospital* [1909] 2 KB 820
- Lister v Hesley Hall Ltd* [2002] UKHL 22
- Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34
- Mohamud v WM Morrison Supermarkets* [2016] UKSC 11
- Roe v Minister of Health* [1954] 2 QB 66
- Short v J & W Henderson Ltd* [1946] QB 90
- Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56
- Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2005] EWCA Civ 1151

### Thai Cases

- Dika case 1576/2506
- Dika case 450/2516
- Dika case 2171-2173/2517
- Dika case 2060/2524
- Dika case 2499/2524
- Dika case 2739/2532
- Dika case 3078/2533
- Dika case 4070/25

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

*Benjarat Binloy\*\**

**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 leads 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

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\* This article is summarized and arranged from the thesis "Lemon Laundering: Consumer Protection on Resale of Returned Defective Cars Without Disclosing Prior Mechanic Problems" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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reparation thereof. Reselling such car will be difficult as it becomes a 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 ผู้บริโภคย่อมคาดหวังว่ารถยนต์ใหม่ที่ตนซื้อจะมีคุณภาพและมีความปลอดภัยตามมาตรฐาน แต่เนื่องจากรถยนต์เป็นสินค้าที่มีส่วนประกอบจำนวนมาก มีกระบวนการผลิตและการประกอบที่ยุ่งยากซับซ้อน รวมถึงมีการนำเทคโนโลยีสมัยใหม่ระดับสูงมาใช้ในกระบวนการดังกล่าวด้วย รถยนต์จึงเป็นสินค้าที่มีความเป็นไปได้สูงที่จะมีความชำรุดบกพร่องและผู้บริโภคอาจไม่สามารถตรวจพบความชำรุดบกพร่องได้ในขณะทำสัญญาซื้อขายหรือในขณะที่รับมอบรถยนต์ใหม่นั้น ซึ่งโดยมากปัญหาความชำรุดบกพร่องมักจะปรากฏขึ้นภายหลังจากที่ผู้รถยนต์ไปได้ระยะหนึ่งแล้ว

ในปัจจุบันผู้บริโภคได้รับความคุ้มครองในกรณีที่สินค้ามีความชำรุดบกพร่องจากกฎหมายหลายฉบับ อาทิ ประมวลแพ่งและพาณิชย์ พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 พระราชบัญญัติวิธีพิจารณาคดีผู้บริโภค พ.ศ. 2551 และพระราชบัญญัติความรับผิดชอบต่อความเสียหายที่เกิดขึ้นจากสินค้าที่ไม่ปลอดภัย พ.ศ. 2551 เป็นต้น โดยในกรณีที่ผู้ขายไม่สามารถซ่อมแซมรถยนต์ชำรุดบกพร่อง ผู้บริโภคในฐานะผู้ซื้อที่มีสิทธิที่จะเลิกสัญญาซื้อขายและส่งรถยนต์ชำรุดบกพร่องคืนให้แก่ผู้ขายได้ หรือในกรณีที่ผู้บริโภคไม่ประสงค์จะเลิกสัญญา ผู้บริโภคอาจขอให้ศาลมีคำสั่งให้ผู้ขายเปลี่ยนรถยนต์คันใหม่ที่ปราศจากความชำรุดบกพร่องให้แก่ผู้บริโภคแทน โดยทั่วไป ความชำรุดบกพร่องที่ถึงขนาดทำให้ผู้ผลิตและ/หรือ ผู้ขาย ต้องรับรถคืนมานั้น มักจะเป็นความชำรุดบกพร่องที่ร้ายแรงกระทบต่อความปลอดภัยของผู้ขับขี่ ไม่สามารถซ่อมแซมให้หายขาดได้ และไม่ได้เกิดจากการใช้งานตามปกติ เมื่อผู้ผลิต และ/หรือ ผู้ขาย รับคืนรถยนต์มาแล้ว ผู้ขายย่อมต้องแบกรับภาระค่าใช้จ่ายในการซ่อมแซมรถยนต์ดังกล่าว การนำรถยนต์ดังกล่าวกลับมาขายใหม่ก็ทำได้ยากขึ้น เพราะรถยนต์ดังกล่าวกลายเป็นรถยนต์มือสองที่ประวัติความชำรุดบกพร่อง อย่างไรก็ตาม แม้รถยนต์ดังกล่าวจะมีความชำรุดบกพร่องร้ายแรงซ่อนอยู่ แต่ด้วยสภาพภายนอกของรถยนต์ที่ยังอยู่ในสภาพดี มีระยะทางการใช้งานน้อย ซึ่งแตกต่างจากรถยนต์มือสองทั่วไป จึงเป็นช่องทางให้ผู้ขายอาจนำรถยนต์ชำรุดบกพร่องดังกล่าวกลับมาขายใหม่ให้แก่ผู้บริโภครายที่สอง โดยปกปิดประวัติความชำรุดบกพร่อง ซึ่งในประเทศสหรัฐอเมริกาเรียกการกระทำในลักษณะว่า Lemon Laundering ในกรณีที่ร้ายแรง ผู้ผลิต และ/หรือ ผู้ขาย อาจนำรถยนต์ดังกล่าวกลับมาขายใหม่โดยไม่ได้ซ่อมแซมซึ่งอาจเป็นอันตรายต่อผู้ขับขี่ ผู้โดยสาร และผู้ใช้ท้องถนนรายอื่นได้

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

**คำสำคัญ:** การซ่อมแซมมาขายรถยนต์, ความรับผิดชอบเพื่อความชำรุดบกพร่อง, รถยนต์ชำรุดบกพร่อง

## INTRODUCTION TO LEMON LAUNDERING

The word “lemon” is generally used to describe an undesirable or unsatisfactory thing.<sup>1</sup> 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.<sup>2</sup>

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 seller<sup>3</sup>; 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.<sup>4</sup> 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

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

<sup>2</sup> *ibid*

<sup>3</sup> Thai Civil and Commercial Code, Section 215, 387 and 391

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

every year<sup>5</sup> These returned defective 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.

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

<sup>6</sup> Consumers for Auto Reliability and Safety, *Consumer Protection in the Used and Subprime Car Market 2009*

<sup>7</sup> Carolyn L Carter and others, *Automobile Fraud* 5th edn, National Consumer Law Center 2015 18-9.

<sup>8</sup> *ibid*



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](http://www.pantip.com). In eventually, the dispute of the first consumer was 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](http://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.<sup>9</sup>

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.

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<sup>9</sup> 'ระวัง!!รถใหม่ป้ายแดง ซ้อมแมวขาย' )YouTube, 2017<<https://www.youtube.com/watch?v=Sw6OMIYWIWQ&index=1&list=PLNOtUGU9CXQ5XXfeUWVUf7Wad4iVO6xIZ>> accessed 1 August 2016.

## 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 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 know 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.<sup>10</sup> 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

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<sup>10</sup> *Carter and others* (n7) 193

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 reselling 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 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.<sup>11</sup>

## 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 BGB<sup>12</sup> providing means to determine as to whether or not the goods is defective as follows:

- Primarily, the terms with respect to a quality of the goods under a sale contract shall be taken into a consideration;

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<sup>11</sup> *Carter and others* (n7) 196-7.

<sup>12</sup> German Civil Code, Section 434:

“(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.”

- 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 expand 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 fail 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 than 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 437<sup>13</sup> 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.

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<sup>13</sup> 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."



(3) Burden of proof: Under German laws, Section 476 of the BGB<sup>14</sup> 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.

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

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<sup>14</sup> 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.”

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 being 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.

## References

### Books

- Carter, Carolyn L, John W Van Alst, Jonathan A Sheldon, and Bernard Brown. *Automobile Fraud*. 5th ed. Boston, MA: National Consumer Law Center, 2015.
- Commonwealth Consumer Affairs Advisory Council, *Consumer Rights Reforming Statutory Implied Conditions and Warranties Final Report.*, 2009.
- Foster, Nigel G., and Satish Sule. *German Legal System & Laws*. 3rd ed. New York: Oxford University Press, 2002.
- Markesinis, Basil, Hannes Unberath, and Angus Johnston. *The German Law of Contract*. 2nd ed. Hart Publishing, 2006.
- Reimann, Mathias, and Joachim Zekoll. *Introduction to German Law*. 2nd ed. Kluwer Law International.
- รัตนกร, โสภณ, *คำอธิบายกฎหมายลักษณะหนี้*, กรุงเทพมหานคร: นิติบรรณการ, พิมพ์ครั้งที่ 11, 2556.
- วัจนะสวัสดิ์, เกียรติจักร, *กฎหมายอาญาภาคความคิด เล่ม 2*, กรุงเทพมหานคร: กรุงเทพฯ พิมพ์ครั้งที่ 6, 2557.
- วัจนะสวัสดิ์, เกียรติจักร, *กฎหมายอาญาภาคความคิด เล่ม 3*, กรุงเทพมหานคร: กรุงเทพฯ พิมพ์ครั้งที่ 2, 2555.
- ศุภนิษฐ์, สุขุม, *คำอธิบายกฎหมายคุ้มครองผู้บริโภค*, กรุงเทพมหานคร: จุฬาลงกรณ์, พิมพ์ครั้งที่ 6, 2556.
- โสทธิพันธุ์, สนันทกรณ, *คำอธิบายซื้อขาย แลกเปลี่ยน ให้*, กรุงเทพมหานคร: วิญญูชน, พิมพ์ครั้งที่ 7, 2559.
- โสทธิพันธุ์, สนันทกรณ, *คำอธิบายนิติกรรม-สัญญา*. กรุงเทพมหานคร: วิญญูชน, พิมพ์ครั้งที่ 18, 2557.
- สุมาวงศ์, อัครวิทย์, *คำอธิบายประมวลแพ่งและพาณิชย์ว่าด้วยนิติกรรม สัญญา*. กรุงเทพมหานคร: เนติบัณฑิตยสภา, พิมพ์ครั้งที่ 9, 2557.

### Articles

- นวตระกูลพิสุทธิ์, นนทวัชร. “ความรับผิดชอบของผู้ผลิตหรือผู้จำหน่ายรถยนต์ใหม่กับการคุ้มครองผู้บริโภค Product Liability Law V.S. Lemon Law”. *วารสารนิติศาสตร์* ฉบับที่ 2 (มิถุนายน 2553) (2553): 277-305.

### Electronic media (Website)

<http://news.voicetv.co.th/thailand.69919.htm>

<https://www.youtube.com/watch?v=Sw6OMIYWIQ>

**THE RISE OF BLOCKCHAIN: AN ANALYSIS OF  
THE ENFORCEABILITY OF BLOCKCHAIN  
SMART CONTRACTS\***

*Boonyaorn Na Pombejra\*\**

**Abstract**

In recent years, there has been an eruption of interest in ‘smart contracts’ and their underlying blockchain technology, with several business operators, both private and public, as well as law firms, began to explore and incorporate smart contract and blockchain design and development to the modern-day businesses. The hype over smart contracts is deemed by many as the future means of executing a contract, which would minimize legal costs and time, and, thus, reducing lawyers' role in intermediating commercial and contractual negotiations and disputes handling. While the issues in the business and operation perspective remains whether blockchain, the main smart contract platform, is able to accommodate and guarantee the functionality of smart contracts, the bigger issue of smart contracts for legal practitioners in any jurisdiction is whether they are legally enforceable.

This thesis aims to provide the analysis study of the enforceability of ‘smart contracts’ under the current Thai legal jurisdiction with comparative study of foreign legal jurisdictions. In order to determine whether the ‘smart contract’ is enforceable, the focal issues will be (a) formation of contract and (b) required formality. For Thailand, the thesis will explore the existing Thai legislative framework and the extent to which it can accommodate blockchain smart contracts in the area of contract formation and legal formality and written evidence requirement. Specifically, this thesis will focus on the Electronic Transaction Act B.E. 2544 (2001) and its amendment B.E.2551 (2008) as specific laws for electronic communication and the Thai Civil Commercial Code as general law of the formation of contract.

For comparative studies on foreign legal jurisdictions, the laws of the Commonwealth of Australia and the Republic of South Africa will be

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\* This article is summarized and rearranged from the thesis “The Rise of Blockchain: An Analysis of The Enforceability of Blockchain Smart Contracts” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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examined. The author chose to examine the aforementioned jurisdictions as the laws of both jurisdictions are substantially advanced and aim to encourage the business community to engage via smart contracts and electronic transactions. Thus, the thesis will aim to analyze and evaluate the existing legislations, case precedents and the developments of those two legal systems, and their impact on facilitating blockchain smart contracts.

The concluding section sets out the core question as to whether a lack of certain rules or mechanism to accommodate the implementation of this technology may leave uncertainty regarding the validity and enforceability of smart contracts under Thai law. Based on the study, it is recommended that Thai ETA will have to be amended by comparing with laws and regulations of foreign jurisdictions to facilitate the full implementation of smart contract in Thailand. The principles that should be incorporated in this specific law are: (1) the default rule to determine the time of dispatch and receipt of electronic communication; (2) the use of an automated message system; and (3) the relevant competent authorities should be compulsory to make available systems in accordance with the law for fulfilling the required formality for the contract to be registered with the competent authority electronically.

**Keywords:** Blockchain; Smart Contract; Formation of Contract; Formality Requirement

### บทคัดย่อ

ในช่วงระยะเวลาไม่กี่ปีที่ผ่านมา สัญญาอัจฉริยะ (smart contracts) และเทคโนโลยีบล็อกเชน (Blockchain) อันได้รับความสนใจมากขึ้นอย่างสิ้นหลามจากผู้ประกอบการจากหลากหลายภาคส่วน ทั้งภาครัฐและภาคเอกชน ตลอดจนบริษัทที่ปรึกษากฎหมายต่างก็เริ่มศึกษาสัญญาอัจฉริยะรูปแบบและการพัฒนาบล็อกเชน ตลอดจนการนำสิ่งดังกล่าวมาปรับใช้กับธุรกิจของตนในยุคปัจจุบันให้ประสบความสำเร็จ หลายคนมองว่าสัญญาอัจฉริยะอาจกลายเป็นช่องทางในอนาคตในการทำสัญญา ซึ่งจะเป็นการประหยัดค่าใช้จ่ายในด้านกฎหมายและเวลาเป็นอย่างมาก และอาจส่งผลต่อการลดบทบาททนายความในฐานะตัวกลางในการเจรจาธุรกิจและไกล่เกลี่ยข้อพิพาท ในด้านมุมมองทางธุรกิจนั้น มีการตั้งข้อสังเกตว่าบล็อกเชน ซึ่งเป็นเทคโนโลยีรองรับ (technology platform) จะสามารถนำสัญญาอัจฉริยะไปปรับใช้ได้จริงหรือไม่ และจะรับประกันได้หรือไม่ว่าสัญญาอัจฉริยะจะบังคับใช้ได้อย่างมีประสิทธิภาพ อย่างไรก็ตามในเชิงปฏิบัติในทางกฎหมาย ประเด็นสำคัญที่สุดของการนำสัญญาอัจฉริยะมาใช้บังคับในเขตอำนาจใดๆ คือข้อพิจารณาว่าสัญญาอัจฉริยะมีผลใช้บังคับโดยชอบด้วยกฎหมายหรือไม่

วิทยานิพนธ์ฉบับนี้มีวัตถุประสงค์จะศึกษาเชิงวิเคราะห์ในเรื่องการมีผลใช้บังคับตามกฎหมายของสัญญาอัจฉริยะภายใต้กฎหมายของประเทศไทย โดยเปรียบเทียบกับกฎหมายของต่างประเทศ อนึ่ง ในการจะชี้ขาดว่าสัญญาอัจฉริยะมีผลใช้บังคับได้หรือไม่ ประเด็นสำคัญที่ควรพิจารณา ได้แก่ (ก) การก่อให้เกิดสัญญาและ (ข) แบบสัญญาสำหรับประเทศไทยนั้น วิทยานิพนธ์ฉบับนี้จะศึกษากฎหมายไทยที่ใช้บังคับอยู่ในปัจจุบันและพิจารณารายละเอียดของกฎหมายนั้นๆ เพื่อให้รองรับการทำสัญญาในรูปแบบสัญญาอัจฉริยะบล็อกเชน ไม่ว่าจะเป็นในแง่ของการก่อให้เกิดสัญญาและแบบของสัญญากฎหมายตลอดจนข้อกำหนดในเรื่องการมีหลักฐานเป็นลายลักษณ์อักษรที่ดี วิทยานิพนธ์ฉบับนี้จะมุ่งเน้นศึกษาพระราชบัญญัติว่าด้วยธุรกรรมทางอิเล็กทรอนิกส์ พ.ศ. 2544 และฉบับแก้ไขเพิ่มเติม พ.ศ. 2551 ซึ่งเป็นกฎหมายเฉพาะทางเกี่ยวกับการสื่อสารทางอิเล็กทรอนิกส์และประมวลกฎหมายแพ่งและพาณิชย์ซึ่งเป็นกฎหมายทั่วไปว่าด้วยการเกิดของสัญญา

ในส่วนของการศึกษาเปรียบเทียบว่าด้วยการมีผลใช้บังคับตามกฎหมายของสัญญาอัจฉริยะภายใต้กฎหมายของต่างประเทศนั้น วิทยานิพนธ์ฉบับนี้จะวิเคราะห์กฎหมายของเครือรัฐออสเตรเลียและสาธารณรัฐแอฟริกาใต้ เหตุผลที่ผู้เขียนเลือกที่จะศึกษาเปรียบเทียบกับกฎหมายของทั้งสองประเทศดังกล่าวนี้ เนื่องจากกฎหมายของทั้งสองประเทศดังกล่าวมีความก้าวหน้าอย่างมากและได้พัฒนาไปในแนวทางที่มุ่งหมายที่จะสนับสนุนให้สัญญาอัจฉริยะและธุรกรรมทางอิเล็กทรอนิกส์สามารถบังคับใช้ได้โดยสิ้นเชิง ดังนั้น วิทยานิพนธ์ฉบับนี้จึงมีวัตถุประสงค์ที่จะวิเคราะห์และประเมินบทบาทนิติแห่งกฎหมายและการพัฒนาระบบกฎหมายทั้งสองระบบดังกล่าวรวมถึงผลกระทบที่บทบัญญัติเหล่านั้นจะส่งผลต่อการสนับสนุนสัญญาอัจฉริยะบล็อกเชน

ในบทสรุปของวิทยานิพนธ์ฉบับนี้ได้มีการตั้งประเด็นคำถามว่าหากไม่มีกฎหมายหรือกติกาทางกฎหมายใดรองรับการใช้เทคโนโลยีบล็อกเชนที่กล่าวมาข้างต้น อาจก่อให้เกิดความไม่แน่นอนเกี่ยวกับความสมบูรณ์และการบังคับใช้ได้ของสัญญาอัจฉริยะบล็อกเชนตามกฎหมายไทยหรือไม่ ทั้งนี้ จากการศึกษาครั้งนี้ข้าพเจ้ามีข้อเสนอแนะว่าการแก้ไขเพิ่มเติมพระราชบัญญัติว่าด้วยธุรกรรมทางอิเล็กทรอนิกส์โดยเปรียบเทียบกับกฎหมายและกฎหมายของต่างประเทศ เพื่อสนับสนุนให้สัญญาอัจฉริยะใช้บังคับได้จริงในประเทศไทย หลักการที่ควรนำมาบัญญัติไว้ในกฎหมายเฉพาะทางฉบับนี้ได้แก่ (1) หลักเกณฑ์การทำสัญญาเพื่อยกเว้นหลักกฎหมาย (default rule) ว่าด้วยการส่งและการรับสำหรับการสื่อสารทางอิเล็กทรอนิกส์ (2) การใช้ระบบข้อความอัตโนมัติ และ (3) หน่วยงานภาครัฐที่เกี่ยวข้องควรต้องจัดให้มีระบบรองรับ

การทำธุรกรรมในรูปแบบดังกล่าวตามที่กฎหมายกำหนดเพื่อให้การทำธุรกรรมนั้นสามารถมีผลสมบูรณ์ตามแบบที่กฎหมายกำหนดได้ ทั้งนี้ เพื่อให้มีการจดทะเบียนสัญญาฉบับพนักงานเจ้าหน้าที่โดยผ่านระบบอิเล็กทรอนิกส์ได้นั่นเอง

**คำสำคัญ:** บลอคเชน, สัญญาอัจฉริยะ, การเกิดของสัญญา, ข้อกำหนดเรื่องแบบของสัญญา



## INTRODUCTION

Blockchain smart contracts have received significant attention not only from startups and financial technology (FinTech) companies but also other businesses across a broad range of industry sectors<sup>1</sup>. Several business operators and tech companies have already commenced the development and implementation of smart contracts in their business operation in recent years<sup>2</sup> with the belief that blockchain technology and smart contracts would enable these businesses, and their clients, to conclude transactions in a much more time and cost-efficient manner; by foregoing intermediaries and, thus, reducing third-party fees and other associated costs.

While it is arguably inevitable that blockchain technologies and smart contracts will play a significant role in the not-so-distant future of business transactions and eventually replace the current methods, there are still questions whether smart contracts will legitimately trump traditional contracts in terms of their full enforceability under each legal jurisdiction. In Thailand, the principal question is whether, under the current legal framework, smart contracts could be considered a legally enforceable agreement giving rise to obligations for the parties involved.

## OVERVIEW OF A BLOCKCHAIN SMART CONTRACT

Smart contracts operate mainly on blockchain. Blockchain is a database technology where information is shared across a network of users who each hold a full and updated copy of the records. It refers to a distributed, decentralized ledger that, when combined with a digital transaction validation process, allows for peer-to-peer electronic transfer of an asset without the need for an intermediary, such as a bank.<sup>3</sup> With its key performance characteristics, blockchain enables decentralized transaction because its mechanism is not controlled by a single, centralized party. Blockchain is an immutable database, which means that once the information is added, it cannot be removed or changed. Each update to the blockchain is secured by hash function, which

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<sup>1</sup>Norton Rose Fulbright, 'Smart Contracts: coding the fine print' (2016) A legal and regulatory guide  
<<http://www.nortonrosefulbright.com/knowledge/publications/137955/smart-contracts-coding-the-fine-print>> accessed 23 December 2016

<sup>2</sup>Ibid

<sup>3</sup>Alan Cohn, Travis West & Chelsea Parker, 'Smart After All: Blockchain, Smart Contracts, Parametric Insurance, and Smart Energy Grids' (2017) Georgetown Law Technology Review <<https://perma.cc/TY7W-Q8CX>> accessed 19 June 2017

allows the network to immediately detect and reject any attempt to distribute and edit copy. Although blockchains are much more general, this thesis will only focus on their applicability to smart contracts due to the intense interest in smart contracts.

For smart contracts, there is no legal definition. For the purpose of this thesis, a blockchain smart contract here refers to a contract between two or more parties that is stored and digitally executed on the blockchain using computer programming code.<sup>4</sup> While human involvement is still necessary to define the contract and input the code, the actual execution of the contract is automated based on a defined parameter, such as an event or price.<sup>5</sup>

As opposed to the traditional contracts which are drafted using natural and common language, smart contracts are “drafted” by inputting computer and software codes, comparable to programming languages such as javascript, C++, Go or HTML, in which the rules and consequences would be defined according to the parties’ different circumstances in the same way as a typical contract would<sup>6</sup>. The defined code is alike to a series of “If-Then” statements, where the “ifs” are preconditions that must be met in order to trigger the “thens”.<sup>7</sup> Once the code has been validly input, the contract is then automatically “executed” by a distributed ledger system in a computer; provided that the terms and conditions of the agreement are met, and there is a set of defined inputs, the smart contract enforces its own terms.

Blockchain smart contract can be considered as a ‘paradigm shifter’ in the sphere of contracting. It allows not only automation of the process of contractual performance of both parties, but also the automatic process of contract conclusion, i.e. the contract can be concluded by electronic agents employed by the parties. The question arises as to whether smart contract can

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<sup>4</sup>Christopher D.Clark, Vikram A. Bakshi & Lee Braine, ‘Smart Contract Templates: Foundations, Design Landscape and Research Direction’ (2016) <<https://arxiv.org/abs/1608.00771>>accessed 10 December 2017

<sup>5</sup>Chamber of Digital Commerce and Smart Contracts Alliance& Deloitte (n13) Chamber of Digital Commerce and Smart Contracts Alliance& Deloitte, ‘Smart Contracts: 12 Use Cases for Business & Beyond’ (2016) 1(1) <<http://www.the-blockchain.com>>accessed 23 December 2016

<sup>6</sup>Josh Stark, “How Close Are Smart Contracts to Impacting Real-World Law?” April 11, 2016 CoinDesk <<http://www.coindesk.com/blockchain-smarts-contracts-real-world-law/>> accessed 13 December 2016

<sup>7</sup>Christopher Burniske, “Bitcoin and Ethereum: How Smart Contracts Work” May 29, 2016 < <https://ark-invest.com/research/smart-contracts-work>> accessed 11 December 2016

give rise to legally binding contractual relation and whether the contract is contained in code is sufficient to serve certain specific formalities and written evidence requirement of contract under the laws of Thailand.

## **ENFORCEABILITY OF SMART CONTRACTS: COMPARISON BETWEEN THE RELEVANT AREAS OF THAI LAW AND FOREIGN LAWS**

In analyzing the enforceability of blockchain smart contracts, the writer explores the existing Thai legislative framework and the extent to which they can accommodate blockchain smart contracts in the area of contract formation and legal formality and written evidence requirement which are the Electronic Transaction Act B.E. 2544 (2001) and its amendment B.E.2551 (2008) as a specific law for electronic communication (the “Thai ETA”) and the Thai Civil Commercial Code (the “CCC”) as general law of the formation of contract. The writer also conduct comparative studies on enforceability of smart contracts under two different jurisdictions, namely the Commonwealth of Australia and the Republic of South Africa with an aim to analyze and evaluate the existing legislations and developments of those two legal systems, namely, Electronic Transactions Amendment Act of 2011 (the “Australian ETA”) and the Electronic Communications and Transactions Act 25 of 2002 (the “ECTA”) and their impact on facilitating blockchain smart contracts, with an emphasis on contract formation and legal formality and written evidence requirements.

### **Formation of contract**

The typical approach in determining formation of contract is the offer and acceptance approach. In general, whether or not the parties have reached an agreement, the law looks for an “offer” by one party and an “acceptance” of the terms of that offer by the other. Rules on contract formation often distinguish between “instantaneous” and “non-instantaneous” communications of offer and acceptance; analogously, between communications exchanged between parties present at the same place at the same time and communications made at a distance. In both cases, a contract will be formed when an “offer” has been expressly or tacitly “accepted” by the party or parties to whom the offer was addressed.

In the case of a smart contract, although its performance is automated, such a contract still requires the presence of the intention of its parties in order to become valid. Such intention is manifested at the moment when an

individual declares to enter into such an agreement on the terms specified in advance; or in case involving electronic agents, when an individual declares to appoint such agent for conclusion of certain contracts and agrees to be bound by its actions. Similar to the appointment of a natural person as an agent, there should be a kind of fiduciary relation in smart contract whereas the trust is put into the computer algorithm instead.<sup>8</sup> The person expresses his consent to the terms of the contract and mode of their performance at the moment of the conclusion of contract.

Considering the nature of blockchain smart contract, it is arguable that both rules of instantaneous communication as well as non-instantaneous communication could be applied to blockchain smart contract as nature of instantaneous communication and non-instantaneous communication are existed in this modern mode of communication. If a person sends an offer through blockchain and opposite party replies instantly particularly in the case of follow-on contract that has been entered into by performance of a preceding smart contract, it seems to be instantaneous communication. In contrast, if a person sends an offer through blockchain but opposite party does not reply instantly; then it seems to be non-instantaneous communication in nature. In this regard, an offer is made, and could sit waiting for any amount of time for the counterparty to agree and send their confirmation transaction so an offer could be made and never accepted by the other party. Given there exists the possibility of a time lag between the transmission and the receipt of the message sent through blockchain, in the writer's opinion, it could be implied that it is a non-instantaneous transaction similarly to the declaration of intention by way of email communication as mentioned earlier. Therefore, this kind of communication will become a declaration of intent made to a person at a distance under Section 169 of the CCC and, therefore, takes effect from the time the acceptance reaches the receiver of the intention which also known as the "reception" theory. While, according to the "mailbox rule", which is traditionally applied in most common law jurisdictions including Australia, acceptance of an offer is effective upon dispatch by the offeree (for example, by placing a letter in a mailbox). In turn, South Africa adopts the "information"

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<sup>8</sup>Alexander Savlyev, 'Contract Law 2.0: 'Smart' Contracts as the beginning of the end of classic contract law' (2017) *Information & Communications Technology Law* 116

theory,<sup>9</sup> which requires knowledge of the acceptance for a contract to be formed.

### **Time of Dispatch and Receipt of Electronic Communications**

The laws of all three aforementioned jurisdictions provide rules for both time of dispatch and receipts of electronic communication which are very significant provisions since they will indicate whether the contract is formed or not with the exact time, and also help allocate the risks of the proposed transaction. It should be noted that the Thai ETA and the ECTA use the term “data message” in relation to this rule which is slightly different from the Australian ETA that uses the term “electronic communication”.

For the time of dispatch of electronic communication, the Australia ETA follows the principles set out in the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (hereinafter referred to as “UN Convention on Electronic Communication or Convention”) with the identical wording that the time of dispatch is “the time when [the communication] leaves an information system under the control of the originator or of the party who sent it on behalf of the originator”.<sup>10</sup> It also contain the provisions for the situation where the electronic communications has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, in such case, the time of dispatch is “the time when the electronic transaction communication is received by the address.”<sup>11</sup> On the other hand, the ECTA of South Africa and the Thai ETA share the same concept based on the UNCITRAL Model Law, with a similar wording that “the dispatch of a data message is deemed to occur when it enters an information system outside the control of the originator”.<sup>12</sup> But the ECTA also provides for the consequence in the scenario that the originator and addressee are in the same information system for which the time of dispatch is when the data message is capable of being retrieved by the addressee.<sup>13</sup> It is worth noting that this rule causes difficulties in terms of evidence availability for the originator to prove whether or not an electronic communication has

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<sup>9</sup>Rulich Pretorius, ‘Law of Contract: Comparison between the South African and English Law of Specific Contracts’, (Master in Mercantile Law Thesis, Faculty of Law, University of Pretoria)

<sup>10</sup>Section 14(1)(a) of the Australian ETA

<sup>11</sup>Section 14(1)(b) of the Australian ETA

<sup>12</sup>Section 22 of the Thai ETA and Section 23 of the ECTA

<sup>13</sup>Section 23 of the ECTA

already entered an information system outside the control of the originator. This is because the originator's knowledge of sending the message is limited to only when it left his/her system. Thus, new rules in Article 10 of the Convention has been set to specifically cope with these practical problems and in order to suit with the innovative electronic context. This Article 10 has been adopted by Section 14 and 14A of the Australian ETA. Thus, in order to be more comprehensive regarding time of dispatch and receipt of data message, it would be suitable for Thailand to consider adopting Article 10 of the Convention in its provision similarly to the Australian ETA.

With respect to the time of receipt of electronic communication, both Australian ETA and ECTA define a concept of receipt in a similar manner. Australia ETA uses the exact wording as provided in the UN Convention on Electronic Commerce. Despite certain discrepancies in the terms used in those two laws, they contain the rules of the Convention between delivery of message to a specially designated electronic address, the time of an electronic communication is "the time when the electronic communication becomes capable of being retrieved by the addressee" under Section 14A(a) of the Australian ETA and Section 23(b) of ECTA. While pursuant to Section 23 of the Thai ETA, the time of receipt is the time when a data message enters the addressee's information system.

Although the Thai ETA lays out the main principle of time of dispatch and receipt of data message, it is still lacking in terms of some key issues, compared to provisions of the Australian ETA and ECTA. For instance, for the time of dispatch, Section 22 does not indicate a rule for the situation where the data message has not left an information system because the parties exchange data messages through the same information system e.g. the originator and the recipient are within the same intranet. The similar situation may occur in case of smart contract as the communications will be sent in the same system environment that is blockchain network.

### **Use of Automated Message System for Contract Formation**

Currently, several automated message systems or electronic agents are being used increasingly in electronic commerce business industry, including among others a smart contract performed by purporting to enter the parties into other separate "follow-on" contracts. This growing trend has caused debates among the scholars and legal practitioners in various legal jurisdictions to re-examine traditional theories of contract formation to evaluate their sufficiency

to contract being generated and executed without human intervention.<sup>14</sup> To accommodate this proliferating form of contractual formation, the UN Convention on Electronic Communication provides a specific provision which states that a contract formed “shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract”.<sup>15</sup>

The recognition of the use of an automated message system for the contract formation appears in both the Australian ETA<sup>16</sup> and the ECTA<sup>17</sup>. They confirm the rule that the contract formed through such automated message system or electronic agent shall not be denied its validity or binding solely on the ground that such systems are used and that no natural person reviewed or intervened.

In the context of Thai law, despite the specific provision for such outspoken recognition is absent under the Thai ETA, nothing in the existing provisions seems to preclude the use of fully automated message systems. The closest application may be found in Section 13 of the Thai ETA together with the general rule on attribution in Section 15 paragraph 2(2) which could be interpreted to allow for the validity and enforceability of contracts formed through automated message systems in Thai law. Even though no amendment appeared to be needed in respect of the validity of electronic transaction as the law is already recognized the contracts formed by any electronic means, the writer considers that it would be useful to make it clear in the Thai ETA that the absence of human review or intervention in a particular transaction does not impede contract formation. Therefore, it is advisable to embody a specific provision to directly deal with the result of a contract that is formed by the automated message system or electronic agent in the Thai ETA.

### **Required formalities**

Generally, most legal systems follow the general principle of freedom of form and extend it to all contracts falling within its sphere of application

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<sup>14</sup>Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts para 208

<sup>15</sup>Article 12 of the UN Convention on Electronic Communication

<sup>16</sup>Section 15C of the Australian ETA

<sup>17</sup>Section 20 of the ECTA

including electronic contracting<sup>18</sup>. However, it is recognized that form requirements may exist under the applicable law as writing and signature or registration requirements, for example the sale of immovable properties contract. Even where form requirements as such do not exist, obstacles to the use of data messages may derive from rules on evidence that expressly or implicitly limit the parties' ability to use data messages as evidence to demonstrate the existence and content of contracts.

Under the Australian ETA, in the case where the law requires or permits a person to give information to the authority (Commonwealth entity), it is deemed that the entity's requirement has been met if it is done by way of electronic communication. In other words, by virtue of these Section 9 and 10, people may satisfy the legal requirements of filing or registering with the competent authority electronically. As such, these provisions could facilitate and get rid of potential hindrances to the operation of a smart contract in terms of formalities requirement which require dealing with the competent authorities, such as in the case of the registration of the sale or other disposition of lands.

Unlike the Australian ETA which specifically determines criteria for satisfying form requirements by means of an electronic communication in separate subsections because the nature of the provisions are fundamentally different, ECTA provides a catch-all provision in Section 19 to cover all possibilities in the context of legal requirements. Section 19 (2) of the ECTA states that "an expression in a law whether used as a noun or verb, including terms "document", "record", "file", "submit", "lodge", "deliver", "issue", "publish", "write in", "print" or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in the ECTA. In this regard, the terms under Section 19 is defined rather broadly, which the writer believes may be interpreted to cover the registration requirement under the law and; thus, the registration with the competent authority e.g. contracts where property is leased

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<sup>18</sup>United Nations Commission on International Trade Law, 'Legal aspects of electronic commerce Electronic contracting: background information' (2003) Working Group IV (Electronic Commerce) Forty-second session Vienna, 17-21 November 2003, A/CN.9/WG.IV/WP.104/Add.2 < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V03/878/97/PDF/V0387897.pdf?OpenElement>> accessed 20 June 2017



for a period longer than 10 years under the ECTA is likely possible under the existing legislation.

For the Thai ETA, in satisfying legal requirements of written documents or evidenced by writing or supported by a document which must be produced if the information is generated in the form of a data message which is accessible and usable for subsequent reference without its meaning being altered, it shall be deemed that such legal requirement has been met.<sup>19</sup> However, documents containing e-signatures (i.e. data message) must also satisfy the characteristics prescribed in Section 9 of the Thai ETA. With regard to the form requirement concerning actions to be done with the competent authority, the Thai ETA provides the legal framework in relation to this matter that if such transaction is made in a form of a data message in accordance with the rules and procedures prescribed by the Royal Decree, it would fall within the application of the Thai ETA to which it shall be deemed to have the same legal effect as the act performed pursuant to the rules and procedures described by the law on that particular matter. The Royal Decree states that the state agency shall make available a system for the documents in the form of data message where certain criteria set forth in the Royal Decree will have to be met.

In respect of the implementation of blockchain smart contracts for the transactions which require by law to be made in writing and duly registered with the competent authority, such as sale and transfer ownership of land and trademark licensing, it seems impossible that a smart contract would meet the required legal formality and thereby have the legal binding effect under the Thai law at this juncture. This is because the Land Department and the Department of Intellectual Property as the respective competent authorities for such transactions have no available procedures to accommodate the online registration of the aforementioned matters.

## **CONCLUSIONS AND RECOMMENDATIONS**

Through the comparative studies on enforceability of smart contracts under two different jurisdictions, namely the Commonwealth of Australia and the Republic of South Africa, the writer has found that the laws of both jurisdictions are substantially developed to accommodate the utilization and execution of blockchain smart contracts under their legal systems. For instance, those two legal systems provide the principle of the use of an automated

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<sup>19</sup>Section 8 of the Thai ETA

message system which is necessarily required to determine the legal status of the smart contracts. They also make available the mechanism for submission of the electronic information to the competent officials in order to minimize the obstacles arisen from the legal formality requirements.

After having analyzed the legislation concerning electronic commerce in Thailand, at present, Thai law provides certain provisions dealing with the formation of contracts by the electronic communications, namely the CCC, which is a substantive law governing the principle of the formation of a contract, i.e. offer and acceptance; and the Thai ETA, which provides the rules for the electronic communications that govern the effectiveness of offer and acceptance for purposes of contract formation, such as rules for time and place of dispatch and receipts of electronic communication. In the case of a smart contract, as a non-instantaneous communication, a contract will be formed when an acceptance reaches the offeror. However, under the existing rule for the time of dispatch and receipt, a rule for the situation where the data message has not left an information system under the control of the originator is absent under Thai law unlike in the case of Australian or South African law as earlier discussed. In the case of smart contract, where the communications will be sent through the same system environment (blockchain network), it is rather difficult to determine as to when the contract is actually formed. In this regard, Thailand should amend the Thai ETA by adding a new rule to provide legal consequence in the event the electronic communication has not left an information system using Article 10 of the UN Convention on Electronic Commerce and Section 14(1)(b) of the Australian ETA as model laws.

Moreover, a lack of rules for the use of automated electronic communications may leave uncertainty to the smart contract as to its validity and enforceability under Thai law. Although some commentators may view that Section 13 of the Thai ETA together with the general rule on attribution in Section 15 paragraph 2 (2) could be interpreted to cover a contract concluded by automated message systems or electronic agents, the writer is of the opinion that specific provisions to directly deal with the result of a contract that is formed by the automated message system or electronic agent are crucially required to eliminate the uncertainty and unnecessarily interpretation. Therefore, it is advisable to amend the Thai ETA by adding a new provision directly affirming that lack of direct human review or intervention does not preclude contract formation and a contract so formed shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated

message system or the resulting contract. (Similar to Article 12 of the Convention and Section 15c of Australian ETA) Also, the concept of the ECTA with regard to the attribution of actions of automated message systems subject to the capability of the contract terms for being reviewed by a natural person should be added. (Section 20 of the ECTA).

Additionally, for the contracts which require registration with the Government officials or execution in the presence of the government official such as sale and transfer of ownership of land, it seems impossible that a smart contract would meet such required formality and, thus, have legally binding effect under the Thai law. In this regard, although the Thai ETA makes available the principle regarding the electronic transaction or information which are required to be executed or registered by competent officials, the implementation of the law seems to be impracticable due to the relevant competent authorities still have no available procedures to accommodate the online registration of the aforementioned matters as required by Thai ETA and the Royal Decree. Thus, in order to facilitate the full implementation of smart contracts in Thailand, this practical problem should be addressed. In this regard, the relevant competent authorities should be compulsory to make available systems in accordance with the law for fulfilling those requirements electronically.

Therefore, as innovation would often come before regulations, providing recommended solutions to amend the Thai law with respect to contract formalities by pointing out the problems in practice and comparing with proceedings in foreign countries will be the guideline to facilitate the full implementation of smart contracts in Thailand. If successful, the comprehensive amendment of laws and regulations on smart contracts will play a significant role in raising and modernizing the standard of the ease of doing business in Thailand as well as attract investments, both local and foreign, in Thailand and improve the country's economy growth as a whole.

## References

### Articles

Alan Cohn, Travis West & Chelsea Parker. "*Smart After All: Blockchain, Smart Contracts, Parametric Insurance, and Smart Energy Grids*". **Georgetown Law Technology Review**. 2017. Available at <https://perma.cc/TY7W-Q8CX>.

Alexander Savlyev, "*Contract Law 2.0: 'Smart' Contracts as the beginning of the end of classic contract law*". **Information & Communications Technology Law** 116. 2017.

Norton Rose Fulbright. "*Smart Contracts: coding the fine print*". **A legal and regulatory guide** (2016). Available at <http://www.nortonrosefulbright.com/knowledge/publications/137955/smart-contracts-coding-the-fine-print>.

### Theses

Rulich Pretorius. "*Law of Contract: Comparison between the South African and English Law of Specific Contracts*". Master in Mercantile Law Thesis, Faculty of Law, University of Pretoria.

### Electronic Media

Chamber of Digital Commerce and Smart Contracts Alliance & Deloitte. "*Smart Contracts: 12 Use Cases for Business & Beyond*". 2016. Available at <http://www.the-blockchain.com>.

Christopher Burniske. "*Bitcoin and Ethereum: How Smart Contracts Work*", 29 May 2016. Available at <https://ark-invest.com/research/smart-contracts-work>.

Christopher D. Clark, Vikram A. Bakshi & Lee Braine. "*Smart Contract Templates: Foundations, Design Landscape and Research Direction*". 2016. Available at <https://arxiv.org/abs/1608.00771>.

Josh Stark. "*How Close Are Smart Contracts to Impacting Real-World Law?*", 11 April 2016, CoinDesk. Available at <http://www.coindesk.com/blockchain-smarts-contracts-real-world-law>.

United Nations Commission on International Trade Law. "*Legal aspects of electronic commerce Electronic contracting: background information*". Working Group IV (Electronic Commerce) Forty-second session Vienna. 17-21 November

2003. Available at [https://documents-dds-ny.un.org/doc/UNDOC/LTD/V03/878/97/PDF/V0387897.pdf? OpenElement](https://documents-dds-ny.un.org/doc/UNDOC/LTD/V03/878/97/PDF/V0387897.pdf?OpenElement).

**Other Materials**

United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communications Convention) (2005).

**COMPARATIVE VIEW ON THE MARKET ACCESS  
SUPERVISION OVER FOREIGN BANKS IN  
CHINA AND HONG KONG\***

*Chengzhi Yang\*\**

**Abstract**

In recent years, with the deepening of economic and financial integration in the world, more transnational banks intend to access China markets for doing business, and therefore the voices for opening China's domestic markets as well as improving foreign bank market access supervision are high. The thesis introduces mainland China's foreign bank market access supervision, including its supervisory regime, legislative pattern, legal requirements and the procedures of foreign bank market access, and then provides a comparative perspective with Hong Kong's foreign bank market access supervision. Based on such comparison between mainland China and Hong Kong, the thesis outlines four main issues of foreign bank market access supervision in mainland China, including its decentralized supervisory regime, disorganized supervisory legislative system, strict business access restrictions, and unreasonable access procedures, and proposes solutions in response to these issues by taking reference from Hong Kong's advanced experience.

**Keywords:** Foreign Bank, Market Access, Supervision

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\* This article is summarized and arranged from the thesis "Comparative View on the Market Access Supervision over Foreign Banks in China And Hong Kong" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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**บทคัดย่อ**

ในช่วงหลายปีที่ผ่านมา มีการรวมกลุ่มทางเศรษฐกิจและการเงินเกิดขึ้นมากมาย ส่งผลให้ธนาคารข้ามชาติ มีความต้องการที่จะเข้ามาทำธุรกิจในตลาดของจีนแผ่นดินใหญ่มากขึ้น(ไม่รวมไต้หวันฮ่องกงและมาเก๊า)ส่งผลให้มีผู้สนับสนุนจำนวนมากเสนอให้มีการเปิดตลาดในจีนแผ่นดินใหญ่ รวมถึงให้มีการปรับปรุงการกำกับดูแลการเข้าสู่ตลาดของธนาคารต่างประเทศ

วิทยานิพนธ์ฉบับนี้นำเสนอวิธีการกำกับดูแลการเข้าสู่ตลาดของธนาคารต่างประเทศในจีนแผ่นดินใหญ่ รวมถึงหลักการตรวจสอบ รูปแบบทางกฎหมายข้อกำหนดทางกฎหมาย และขั้นตอนการเข้าถึงตลาดของธนาคารต่างประเทศ รวมถึงนำเสนอผลการศึกษาเปรียบเทียบกับวิธีการกำกับดูแลการเข้าถึงตลาดของธนาคารต่างประเทศในฮ่องกง โดยคำนึงถึงพื้นฐานของความแตกต่างของทั้งจีนแผ่นดินใหญ่และฮ่องกง วิทยานิพนธ์นี้จะกล่าวถึงประเด็นสำคัญสี่ประการในการกำกับดูแลการเข้าถึงตลาดของธนาคารต่างประเทศในจีนแผ่นดินใหญ่ รวมถึงหลักการการกระจายอำนาจในการตรวจสอบการกำกับดูแลทางกฎหมายที่ไม่เป็นระเบียบ ข้อจำกัดที่เข้มงวดและขั้นตอนที่ไม่เหมาะสมในการเข้าถึงธุรกิจ และเสนอแนวทางในการแก้ไขปัญหาโดยอ้างอิงจากกรณีศึกษาของฮ่องกง

**คำสำคัญ :** ธนาคารต่างประเทศ, การเข้าถึงตลาด , การกำกับดูแล

## Introduction

In recent years, with the globalization of economy and trade, the integration and interdependence between financial institutions, financial instruments, and financial markets are also strengthening, which has brought not only an increase<sup>1</sup> in transnational banking institutions, cross-border transactions and international business, but also international financial turbulence, as well as a new wave of banking supervision reform.

Currently, on one side, there is a surge of transnational banks entering China's domestic financial market, while on the other; there is an outdated supervisory system hardly keeping step with this increase.

Foreign bank market access supervision refers to regulatory authorities appointed and authorized by laws, monitoring and implementing existing laws and regulations that govern foreign bank market access and also formulating relevant subordinated rules and policies to regulate how foreign banks access hosting country markets and set up an entity. Foreign bank market access supervision includes four key points: i) the hosting country's supervisory regime regarding this matter, ii) the legislative pattern, iii) the legal requirements, and iv) the application and approval procedure.

To this end, this article will introduce laws and practices regarding foreign bank market access supervision, focusing on mainland China's legislation and practice in this matter and comparing this with Hong Kong's experience, then discussing various problems of mainland China in this area before proposing constructive suggestions.

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<sup>1</sup> As of the end of 2015, 209 representative offices have been set up by 181 foreign banks from 45 countries and regions, 94 branches have been set up by 77 foreign banks from 26 countries and regions, and 37 wholly foreign-funded banks and 2 Chinese-foreign equity joint venture banks have been established by foreign banks from 14 countries and regions. The institutions of these foreign banks cover 27 provinces and 50 cities in China, an increase of 30 cities compared with 2003. Regarding performance, as of the end of 2015, the total assets of foreign bank profit-institutions in China reached 2.15 trillion RMB, up 23.60% year on year; deposit balance reached 1.32 trillion RMB, up 25.27% year on year; and loan balance reached 978.5 billion RMB, up 7.10% year on year. It turns out that foreign banks are still playing an aggressive role in China. (Annual Report 2015. China Banking Regulatory Commission. China Financial Press. 2016. 5)



## **China Laws and Practice of Foreign Bank Market Access Supervision**

### **2.1 China Banking Supervisory Regime**

There are three main regulators supervising China's banking industry and foreign bank market access: the China Banking Regulatory Commission ("CBRC"), the People's Bank of China ("PBOC"), and the State Administration of Foreign Exchange ("SAFE").

CBRC is the main authority responsible for supervision over banking institutions and operations.<sup>2</sup> It has the power to conduct the examination and approval for all banking financial institutions including foreign bank establishment, modifications, termination, and business scope<sup>3</sup>, as well as to adopt the admittance qualifications of management, directors and senior executives of all the banking financial institutions including foreign banks<sup>4</sup>.

PBOC is the central bank of China, having the power to formulate and implement monetary policies, supervise the inter-bank market, maintain the operation of payments and settlements system, and direct and dispose of anti-money-laundering.<sup>5</sup> Foreign banks are required to get approval and support from PBOC in order to access its central payment and settlement system, open a clearing account, pass the anti-money-laundering requirements, and deliver the deposit reserves, among other activities.

SAFE undertakes the foreign exchange administration functions in China.<sup>6</sup> Since one of the main businesses of foreign banks is to provide financial services to transnational enterprises, plus with frequent cross-border capital flows between foreign banks and their overseas parent banks, foreign banks will also be involved in SAFE's supervision. In addition, to access several specific foreign exchange businesses, it is necessary to acquire SAFE's approval.

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<sup>2</sup> Article 2 and 3, Banking Supervision Law of the People's Republic of China. Standing Committee of National People's Congress, 2006 Amendment.

<sup>3</sup> Article 16, Banking Supervision Law of the People's Republic of China. Standing Committee of National People's Congress, 2006 Amendment.

<sup>4</sup> Article 20, Banking Supervision Law of the People's Republic of China. Standing Committee of National People's Congress, 2006 Amendment.

<sup>5</sup> For more detailed information, please refer to article 4, Peoples' Bank of China Law. National People's Congress, 2003 Amendment.

<sup>6</sup> For more detailed information, please refer to the official website of SAFE: <http://www.safe.gov.cn/>.

## 2.2 China Banking Supervisory Legislation

Laws governing domestic banks and foreign banks in China can be separated into two systems: i) general laws governing both domestic banks and foreign banks, and ii) laws governing foreign banks only. Formulated in 1995 and amended in 2015, the *Law of the People's Republic of China on Commercial Banks* is the leading general law regulating the entire banking industry in China. In theory, it covers both domestic banks and foreign banks; however, it indicates an exception for regulating foreign banks, “unless otherwise there are provisions by laws and administrative regulations, these provisions shall prevail”<sup>7</sup>. Thus, later a series of regulations and rules were promulgated and became the special rules regulating foreign banks in China, establishing a separate supervision legislative system for foreign banks and their market access.

Regarding foreign bank market access supervision, currently, there are dozens of laws and regulations governing this matter, across both the general banking supervision legislative system and the foreign banking supervision legislative system, such as the Regulation of the People's Republic of China on the Administration of Foreign-funded Banks, the Implementation Rules for the Regulations of the People's Republic of China on the Administration of Foreign-funded Banks, the Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items concerning Foreign-Funded Banks, and the Measures for the Administration of the Office-holding Qualifications of the Directors (Council Members) and Senior Managers of Banking Financial Institutions.

### 2.3 Legal Requirements on Foreign Bank Market Access in China

The legal requirements on foreign banks market access in China can be summarized into 3 aspects: i) requirements for entity set-up, ii) requirements for business access, and iii) requirements for senior executive appointments.

#### 2.3.1 Requirements for Entity Set-up

According to China laws, foreign banks must fulfill a series of conditions required by laws covering capital adequacy, profitability, experience, reputation, risk control, and internal management, and apply for CBRC's examination and approval, in order to set up any new entities in China. Those requirements on institution access mainly focus on two aspects:

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<sup>7</sup> Article 92, Law of the People's Republic of China on Commercial Banks, Standing Committee of the National People's Congress, 2015 Amendment.

- i) requirements on the overseas parent bank or foreign shareholder, and
- ii) requirements on the to-be established institution itself.<sup>8</sup>

### 2.3.2 Requirements for Business Access

In China, a foreign bank's business access can be divided into two aspects, i) general business access, and ii) additional business access. A newly established foreign-invested bank must obtain a financial permit issued by CBRC, which will state several general businesses that the new entity can engage in, covering 12 to 13 items depending on whether the new entity is a foreign bank branch or a foreign bank subsidiary.<sup>9</sup> After formal establishment, this newly established foreign-invested bank may apply to CBRC for additional business permits on a case by case basis, such as RMB business, debt or capital instruments issuance, derivatives business, credit card business, and overseas wealth management services for clients.<sup>10</sup>

However, China sets several critical restrictions and prohibitions on foreign bank business access, such as: i) a newly established foreign bank is prohibited from engaging in Chinese Yuan business in its first year after establishment, ii) a foreign bank branch is prohibited from providing any Yuan business to Chinese citizens except for accepting fixed-term deposits in an amount of no less than one million Yuan, and iii) foreign-invested banks and domestic banks are under different treatments regarding the business application and approval process (e.g. foreign-invested banks are required to obtain more approvals and permits for engaging in certain business areas such as Yuan business permit).

### 2.3.3 Requirements for Senior Executive Appointments

The appointment of a senior executive of a to-be established foreign bank institution, such as director, senior management personnel, or chief

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<sup>8</sup> For details of those requirements, please see Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items concerning Foreign-Funded Banks, Order No. 4 [2015] of the China Banking Regulatory Commission, 2015 Amendment.

<sup>9</sup> If the new entity is a foreign bank branch, its business scope may include 12 items. If the new entity is a foreign bank subsidiary, then its business scope may include 13 items. For details of the business scope, please see Article 31 and 29, Regulation of the People's Republic of China on the Administration of Foreign-funded Banks, State Council, 2014 Amendment.

<sup>10</sup> Chapter 5, Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items concerning Foreign-Funded Banks, Order No. 4 [2015] of the China Banking Regulatory Commission, 2015 Amendment.

representative, is under the strict supervision of CBRC. Senior executives cannot assume their positions before being approved by CBRC. There are a number of conditions for senior executive appointments set by laws.<sup>11</sup>

#### **2.4 Procedure of Foreign Bank Market Access in China**

The market access procedure for foreign banks in China can be divided into two main phases: i) the establishment preparation access phase, and ii) the business commencement access phase. During these different phases, the to-be established entity and its overseas parent bank or foreign shareholder must fulfill different requirements and submit a number of application documents to CBRC respectively, while CBRC will then conduct its supervision based on the performance of the to-be established institution and its overseas parent bank or foreign shareholder as well as their submitted documents, and make a decision of approval or denial of the application for establishment preparation access or business commencement access.<sup>12</sup>

### **1. Hong Kong Laws and Practice of Foreign Bank Market Access Supervision**

In order to provide a more specific comparative view, the article will give a brief introduction to Hong Kong laws and practice regarding foreign bank market access by focusing on four main sectors: the supervisory regime, the legislative pattern, the legal requirements of business access, and the application and approval procedure.

First, Hong Kong implements a centralized supervision regime for its banking sector which is different from mainland China. Hong Kong Monetary Authority (“HKMA”) is the sole regulatory authority undertaking the duties of a central bank, supervising all banking institutions, as well as managing Hong Kong’s Exchange Fund.<sup>13</sup> In other words, all banking institutions, including foreign banks and their market access are subject to HKMA’s sole supervision.

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<sup>11</sup> For details of those requirements, please see the Measures for the Administration of the Office-holding Qualifications of the Directors (Council Members) and Senior Managers of Banking Financial Institutions.

<sup>12</sup> For details of those requirements, please see Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items concerning Foreign-Funded Banks, Order No. 4 [2015] of the China Banking Regulatory Commission, 2015 Amendment.

<sup>13</sup> For more detailed information, please refer to the official website of HKMA: [www.hkma.gov.hk/eng/](http://www.hkma.gov.hk/eng/)

Second, Hong Kong's legislation on banking supervision is highly organized. Unlike mainland China, to regulate such a huge and detailed project as market access of the banking industry, Hong Kong legislators and regulators use only one ordinance, plus one guideline, to cover all legal principles and regulatory requirements, namely, Hong Kong Banking Ordinance and Guide to Authorization. Such a highly organized and centralized banking legislative pattern provides great facilitation to apply and supervise market access of the banking industry in Hong Kong, which is a sharp contrast to the banking legislative pattern in mainland China.

Third, Hong Kong places no barrier to overseas banks operating locally in the territory, whether the transactions are conducted in Hong Kong dollars or other currencies.<sup>14</sup> In other words, in Hong Kong, foreign banks are entitled to the same treatment as local banks without any restrictions.

Fourth, compared with China, Hong Kong presents two characters regarding the application and approval procedure: i) Hong Kong sets a pre-communication and coordination process between the to-be established banking institutions and HKMA, which can improve the effectiveness for completing the application as well as shortening the time that HKMA deals with the application.<sup>15</sup> ii) Hong Kong provides a hearing and appeal process for the to-be established banking institutions in the event of being rejected by HKMA.<sup>16</sup>

## **2. The Issues and Proposed Solutions of Foreign Banks Market Access Supervision in China**

### **4.1 The decentralized supervisory regime with multi-supervisory regulators has numerous negative effects.**

First, China separates supervisory power thus resulting in low supervisory effectivity. A foreign bank must be subject to separate supervision and seek approval from CBRC, PBOC, and SAFE. Second, a decentralized supervisory regime may cause conflicts of orders made by different regulators. Although each regulator has its own scope of duty, these scopes do not stand in

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<sup>14</sup> The Three-tier Banking System, an introduction to Hong Kong's banking system, see the official website of HKMA <http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/three-tier-banking-system.shtml>

<sup>15</sup> Section 8.2-8.4, Guide to Authorization

<sup>16</sup> Section 8.17-8.19, Guide to Authorization.

sharp contrast and sometimes may result in conflicts, thus creating confusion for foreign banks. Third, supervisory power may also cause political fights for supervisory power.

Based on Hong Kong's experience in this area, the article proposes two solutions for this issue. First, China should consider integrating the current multi-regulators into one general regulatory entity, to take charge of banking supervision, undertake central bank functions, and manage the state foreign exchange. Second, China should set up a one-stop center to coordinate foreign banks within different departments of the regulator.

#### **4.2 The dual legislative pattern for domestic banks and foreign banks with scattered laws and regulations may cause significant inconveniences.**

In one aspect, a foreign bank must comply with general laws and regulations which govern the entire banking industry and also comply with laws which are formulated to regulate foreign bank market access supervision separately, which is complicated and sometimes results in loopholes. In another aspect, in the process of foreign bank market access application and supervision, both foreign banks and regulators must collect all relevant provisions from massive and scattered laws and regulations to deal with different circumstances in the application and supervision processes, which is a serious obstacle and slows effectivity.

Taking reference from Hong Kong's advanced legislative pattern, the article suggests that China should reform the current legislative pattern and simplify the laws. First, China should carry out an overall clean-up of all current laws and regulations governing foreign bank market access, to cut down unnecessary, overlapped and out-of-date provisions, and gather all the scattered and numerous provisions together and compile these into one single code. Second, China should apply legal application procedures to both domestic and foreign banks similarly, so that a foreign bank no longer needs to comply with different legal systems, both general banking laws and foreign banking regulations, at the same time when proceeding with the market access process.

#### **4.3 Several critical restrictions and prohibitions to foreign bank business access serve as obstacles to foreign banks to operate and expand business in China**

As mentioned above, there are numerous critical restrictions to foreign bank business access, such as Chinese Yuan business restriction, retail business restriction, and different treatments between domestic banks and foreign banks,

while Hong Kong sets no restrictions or prohibitions for foreign banks to operate business, whether conducted by Hong Kong dollars or other currencies. Foreign banks are entitled to the same treatment as local banks in Hong Kong.

To this end, China should cancel the restriction for foreign-invested banks engaging in Yuan business, cancel the restriction for foreign bank branches engaging in retail business, and facilitate the foreign bank market access process by providing the same treatment to foreign banks as to domestic banks, which will not negatively impact the domestic banking industry, but on the contrary, may push domestic banks to develop by introducing competition.

#### **4.4 The unreasonable procedure for foreign bank market access does not favor the protection of foreign bank benefits**

First, China regulators conduct supervision and grant approvals under a low-transparency situation, and foreign banks have difficulty making any estimations regarding their applications. Second, market access approval in China is divided into two phases, preliminary approval and formal approval, and each foreign bank must respectively submit the two applications and obtain two approvals one by one, which reduces effectivity. Third, the current procedure for foreign bank market access has no hearing or appeal process for the final decision. If the foreign bank's application is denied by the regulator, the access process will be terminated immediately.

Based on Hong Kong's practice in this area, the article suggests that China: i) improve its foreign bank market access process by introducing Hong Kong's pre-communication and coordination mechanism, ii) combine two phases of application and approval into one phase in order to shorten the time for access and to improve supervisory effectivity, and iii) set up a hearing and appeal procedure, so as to protect the foreign banks' legitimate benefits and also help prevent any mistakes made by the regulator taken together these suggestions which will make China's foreign bank market access process more just and reliable.

## References

### BOOKS

China Banking Regulatory Commission. **Annual Report 2015**. China Financial Press. 2016. 5

### Electronic Media

State Administration of Foreign Exchange < Major Functions >  
<http://www.safe.gov.cn/wps/portal/english/AboutSAFE/Major> (last visited 22 May 2017)

Hong Kong Monetary Authority <Regulatory Framework >  
<http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/regulatory-framework.shtml> (last visited 22 May 2017)

Hong Kong Monetary Authority <The Three-tier Banking System >  
<http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/three-tier-banking-system.shtml> (last visited 22 May 2017)

### Laws and regulations

Regulation of the People's Republic of China on the Administration of Foreign-funded Banks, State Council, 2014 Amendment

Implementation Rules for the Regulations of the People's Republic of China on the Administration of Foreign-funded Banks, China Banking Regulatory Commission, 2015 Amendment.

Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items concerning Foreign-Funded Banks, Order No. 4 [2015] of the China Banking Regulatory Commission, 2015 Amendment.

Administrative Measures on Appointment Qualifications of Directors (Council Members) and Senior Management Personnel of Financial Institutions in the Banking Industry. 2013 Version.

Banking Ordinance of Hong Kong (Chapter 155)

Guide to Authorization, HKMA revised on 18 November 2016.



## LEGAL MEASURES CONCERNING MARKETING OF BREAST-MILK SUBSTITUTES IN THAILAND\*

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### **Abstract**

It is widely accepted that mother's breastfeeding is one of the best ways to ensure child health growth and survival. WHO and UNICEF recommended that "mothers worldwide should exclusively breastfeed their infants for first six months to achieve optimal growth, development and health. Thereafter, they should be given nutritious complementary foods and continue breastfeeding up to the age of two years or beyond."

Even though we have known numerous benefits of breast milk for infants and young children, however the rate of breastfeeding are low, one among factors that causes to the declination of breastfeeding is marketing of breast-milk substitutes. Breast-milk substitutes are marketed directly to consumer via mass media and advertisement and indirectly via incentives, free samples, donation of formula, promotional gifted to new mothers and gifted given to health workers. The design, packaging and labeling of milk for older children, milk for mother and related products are packed and designed to look closely resemble with breast-milk substitutes and promoted in ways that cross-promote its formula product. This leads to confusions as the purpose of the product. The promotion of breast-milk substitutes and marketing influences and induce mother to believe that breast-milk substitutes are equivalent or better than to human breast-milk and finally decide to stop breastfeeding.

In 1981, the International Code of Marketing of Breast-milk Substitutes was developed and adopted by WHO and UNICEF as a 'minimum standard' to help protect and promote breastfeeding and to ensure breast-milk substitutes are used safely when necessary. Furthermore, in 2016 WHA 69th has adopted the 'Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children' which aims to promote, protect and support

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\* This article is summarized and arranged from the thesis "Legal Measures Concerning Marketing of Breast-Milk Substitutes in Thailand" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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breastfeeding, prevent obesity and non-communicable disease, promote healthy diets, and ensure that caregivers receive clear and accurate information on feeding.

In Thailand, the directly regulation controlling the marketing of breast-milk substitute is the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008. However, this regulation is not legislative or statutory law that can be enforced against the marketing of breast-milk substitutes. In addition, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) under the Food Act B.E.2522 laid down prohibitions related to advertisement. However, the announcement and its revision can restrict only an advertisement of food for infant and young children. As a result, those prohibitions do not cover the promotion and marketing instrument.

In order to comply with the International Code of Marketing of Breast-milk Substitutes, the Ministry of Public Health has been pushing forward the drafts of ‘Legal Control of Marketing of Food for Infant and Young Children’ into the national legislation to improve the measures to control the marketing of breast-milk substitutes. Currently, there are two drafts regarding the Department of Health and the Council of State no.1087/2559.

Thus, this thesis aims to study the situation and the current legal measure in Thailand concerning the marketing, advertising and labelling of breast-milk substitutes, including both of the drafts of legal control of marketing of food for infant and young children. Simultaneously, the thesis also studies the International Code of Marketing of Breast-milk Substitutes as the minimum requirement for all governments and the foreign law of the European Union, the United Kingdom and the Philippines in order to compare and seek appropriate legal measures to control the marketing of breast-milk substitutes in Thailand.

**Keywords:** Breast-milk substitute, Breastfeeding, Marketing of Breast-milk substitute, Marketing, Promotion, Advertising

### บทคัดย่อ

การเลี้ยงลูกด้วยนมแม่เป็นวิธีที่ดีที่สุดและปลอดภัยที่สุดในการให้เด็กได้รับสารอาหารที่มีคุณค่าสูงสุด องค์การอนามัยโลก (WHO) และองค์การทุนเพื่อเด็กแห่งสหประชาชาติ (UNICEF) แนะนำให้ประเทศสมาชิก ส่งเสริมการเลี้ยงลูกด้วยนมแม่อย่างเดียวนานครบ 6 เดือน และให้นมแม่ควบคู่กับอาหารตามวัยจนถึง 2 ปี หรือนานกว่านั้น

ถึงแม้ว่าจะรู้ถึงคุณประโยชน์จากนมแม่ แต่อย่างไรก็ตาม อัตราการเลี้ยง ลูกด้วยนมแม่อย่างเดิวนาน 6 เดือน กลับลดลง ซึ่งหนึ่งสาเหตุสำคัญมาจากการใช้กลยุทธ์ทางการตลาดที่แยบยลของผู้ผลิตและจำหน่ายอาหารทารก และเด็กเล็ก ผ่านการโฆษณาการตลาดและการโฆษณาบนมฟรวมถึงผลิตภัณฑ์ที่เกี่ยวข้อง เช่น การแจกตัวอย่างผลิตภัณฑ์ฟรี การบริจาคผลิตภัณฑ์ การให้ของขวัญชุดผลิตภัณฑ์แก่กลุ่มหญิงตั้งครรภ์รวมถึงแม่ และครอบครัวของทารกและเด็กเล็ก การให้ผลประโยชน์ต่อบุคลากรทางการแพทย์ การออกแบบผลิตภัณฑ์ที่ไม่ถูกห้ามทำการตลาดหรือโฆษณาหากแต่เป็นผลิตภัณฑ์แบรนด์เดียวกัน กลยุทธ์ทางการตลาดที่หลากหลายก่อให้เกิดความสับสนหลงผิด เข้าใจว่านมมีคุณค่าเทียบเท่า และสามารถใช้ทดแทนนมแม่ได้จนนำมาซึ่งการตัดสินใจหยุดการให้นมแม่

ด้วยความมุ่งมาดปกป้องทารกให้ได้รับสารอาหารที่ดีที่สุด รอดพ้นจากการทำการตลาดที่ไร้จริยธรรม สมัชชาสุขภาพโลกได้ประกาศ International Code of Marketing of Breast-milk Substitutes ในปี 1981 และ Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children ในปี 2016 เพื่อเป็นคำแนะนำให้ประเทศสมาชิกขององค์การอนามัยโลกใช้เป็นแนวทางในการ สนับสนุนและส่งเสริมการให้นมแม่ รวมถึงปกป้องทารกและเด็กเล็กที่พึ่งได้รับสารอาหารที่ดีที่สุดคือนมแม่ จากการทำการตลาดบนมฟรวมถึงผลิตภัณฑ์ที่เกี่ยวข้อง ที่ไร้จริยธรรม ของผู้ประกอบการ โดยส่งเสริมให้ประเทศสมาชิกรับเอาหลักเกณฑ์สากลดังกล่าวไปปรับใช้กับกฎเกณฑ์ในประเทศของตน

สำหรับสถานการณ์ในประเทศไทย ปัจจุบันกฎเกณฑ์ที่เกี่ยวข้องกับการควบคุมการทำการตลาดอาหารทดแทนนมแม่หรือนมผง คือ ประกาศกระทรวงสาธารณสุขหลักเกณฑ์ว่าด้วยการตลาดอาหารสำหรับทารกและเด็กเล็ก และผลิตภัณฑ์ที่เกี่ยวข้อง พ.ศ.2551 แต่อย่างไรก็ตามแม้ว่าประกาศกระทรวงฉบับนี้เป็นเพียงหลักเกณฑ์ให้คำแนะนำ และขอความร่วมมือจากภาคส่วนที่เกี่ยวข้อง หากแต่ไม่ได้มีผลกำหนด โทษต่อผู้ฝ่าฝืนแต่อย่างใด จึงไม่มีประสิทธิภาพมากพอที่จะใช้ควบคุมการละเมิดหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้องได้แต่อย่างใด นอกจากนี้แม้ประเทศไทยจะมีประกาศสำนักงานคณะกรรมการอาหารและยา เรื่อง หลักเกณฑ์การโฆษณาอาหาร พ.ศ. 2551 ซึ่งอยู่ภายใต้ พระราชบัญญัติอาหาร พ.ศ.2551 เพื่อควบคุมการโฆษณาบนมฟ แต่อย่างไรก็ตามหลักเกณฑ์นี้ใช้ควบคุมได้เพียงการทำการโฆษณาแต่ไม่รวมไปถึงการทำการตลาดหรือโปร โมชัน หลากหลายรูปแบบที่บริษัทผู้ผลิตสร้างขึ้น

ปัจจุบันเพื่อให้เป็นการดำเนินตามหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง ประเทศไทยมีความพยายามในการผลักดัน ร่างพระราชบัญญัติควบคุมการตลาดอาหารสำหรับทารกและเด็กเล็กควบคุมการทำการตลาดอาหารสำหรับทารกและเด็กเล็ก พ.ศ. ....

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาสถานการณ์การละเมิดหลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง ของไทย กฎเกณฑ์ต่าง ๆ ที่ใช้บังคับกับการทำการตลาด การโฆษณา นอกจากนี้ยังมุ่งวิเคราะห์ร่างพระราชบัญญัติควบคุมการตลาดอาหารสำหรับทารกและเด็กเล็กควบคุมการทำการตลาดอาหารสำหรับทารกและเด็กเล็ก พ.ศ. .... และนำไปเปรียบเทียบกับ หลักเกณฑ์สากลว่าด้วยการตลาดอาหาร สำหรับทารกและเด็กเล็กและผลิตภัณฑ์ที่เกี่ยวข้อง กฎหมายของสหภาพยุโรป ประเทศอังกฤษและประเทศฟิลิปปินส์เพื่อหาแนวทางที่เหมาะสมในการ

ควบคุมการตลาดอาหาร สำหรับทารกและเด็กเล็กของประเทศไทย

**คำสำคัญ:** อาหารทดแทนนมแม่, การให้นมแม่, การตลาด, โปรโมชัน, การโฆษณา

## Introduction

Mother's breastfeeding is one of the best ways to ensure child health growth and survival. Even though we have known numerous benefits of breast milk for infants and young children, the advertising and promotion of breast-milk substitutes and their use led to a decline in breastfeeding rates in developed countries. Over the following 100 years, the breastfeeding rates have been decreasing from over 70% in the 1930s to 14% in the 1970s.<sup>1</sup>

Following years of growing concern about the aggressive marketing of breastmilk substitutes, the International Code of Marketing of Breastmilk Substitutes and the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children are adopted in May 1981 and in May 2016 respectively as an international health policy framework to regulate the marketing of breastmilk substitutes in order to protect breastfeeding. In view of the vulnerability of babies in the early months of life and the risks involved in inappropriate feeding practices, the marketing of breastmilk substitutes requires special treatment.

In Thailand, breast-milk substitutes are marketed both directly and indirectly. On one hand, consumers are aware the marketing of breast-milk substitutes via mass media and advertisement. On the other hand, free suppliers and promotions to and through health workers and facilities, retailer or policy maker indirectly influence consumers. In addition, internet marketing on company websites including social media or via mobile applications is also linked to consumers' awareness. Therefore, the marketing influences social norms by creating extensive, modern and comparable images of breast-milk substitutes instead of breast milk.<sup>2</sup>

According to IHPP's research<sup>3</sup>, Thai women accepted that there are the following two promotion strategies which had impacts toward their decision-

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<sup>1</sup> Jelliffe D, Jelliffe E. *'Feeding young infants in developing countries: comments on the current situation and future needs Studies in Family Planning'* (1978) cited by e-Library of Evidence for Nutrition Actions (eLENA) of WHO <[http://www.who.int/elena/bbc/regulation\\_breast-milk\\_substitutes/en/](http://www.who.int/elena/bbc/regulation_breast-milk_substitutes/en/)> accessed 28 September 2015

<sup>2</sup> *ibid.*

<sup>3</sup> นงนุช ใจจั่น และคณะ. *ผลกระทบของการส่งเสริมการตลาดนมผงต่อ มายาคติ ทักษะคติ และพฤติกรรมของการเลี้ยงลูกด้วยนมผงของหญิงไทย*. โครงการวิจัยและสนับสนุนการส่งเสริมการเลี้ยงลูกด้วยนมแม่, สำนักงานพัฒนานโยบายสุขภาพระหว่างประเทศ, 2558 (Nongnuch Jaichuen and Kannaphon Phakdeesethakun. *Impacts of marketing communications on Thai women's breast-milk substitute myth, attitude, and behavior*. International Health Policy Program, (2015)

making to buy the formula milk. There are advertisement, especially, through television commercials (78.5%) and personal selling through suggestions by medical and public health personnel (50.8%)<sup>4</sup>

According to the report of IBFAN,<sup>5</sup> it concluded that “Thailand has no national law protecting mothers, parents, and infants against the aggressive and unethical marketing of breast-milk substitutes, but has only a number of voluntary measures.”<sup>6</sup>

Thailand obviously implements the regulation to be in accordance with the International Code of Marketing of Breast-milk Substitutes by enforcing the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008. However, this regulation is not legislative or statutory law that can be enforced against the marketing of breast-milk substitutes. In addition, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) under the Food Act B.E.2522 laid down prohibitions related to advertisements. However, the announcement and its revision can restrict only an advertisement of food for infant and young children. It does not cover the promotion and marketing instrument. This is the loophole of Thailand because there is no direct provisions to control the marketing of breast-milk substitutes. Therefore, this is one of the main factors that obstructs breastfeeding and influences mothers to choose an infant formula. Since Thailand has no national legislation controlling the marketing of breast-milk substitutes, the question arises that what should Thailand do to follow the International Code of Marketing of Breast-milk Substitutes to reach the best protection and achieve the right measures.

In this article, the author will analyze analyzes the current legal control in Thailand through the comparison of the **International Code of Marketing of Breast-milk Substitutes**, the Guidance on Ending the Inappropriate Marketing of Food for Infant and Young Children, the Regulation of the European Union, the Regulation of the United Kingdom and the law of the Philippines in the issue as follows:

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<sup>4</sup> Ibid.

<sup>5</sup> IBFAN-GIFA-Geneva Infant Feeding Association ‘*Report on the situation of infant and young child feeding in Thailand*’ International Baby Food Action Network , (2012)

<sup>6</sup> The International Code Documentation Centre, ‘State of the code by Country 2011’ <[http://www.unicef.org/lac/20160509\\_WHO\\_UNICEF\\_IBFAN\\_2016\\_Code\\_Status\\_Report\\_EN.pdf](http://www.unicef.org/lac/20160509_WHO_UNICEF_IBFAN_2016_Code_Status_Report_EN.pdf)> accessed 18 September 2015

### 5.1 The problem of scope of protection

According to the, WHO recommendation advocates that “*Exclusive breastfeeding is recommended up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to two years of age or beyond.*”<sup>7</sup> And the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children requires to ensure that all milk products intended and marketed as suitable for feeding young children up to the age of 3 years, including growing-up milk are adequately covered by national legislation.

In foreign countries, the Philippines, in spite of its full-implementation of the **International Code**, the scope of protection in the country covers only an infant which means “*a person falling within the age bracket of 0-12 months.*”

The European Union Regulation 609/2013 and Infant Formula and Follow-on Formula Regulations 2007 define ‘Infant’ and ‘Young children’ in the same definition. ‘Infant’ means a child under the age of 12 months and ‘Young children’ means a child aged between one and three years.

There are the dissenting opinions of the Pediatric Nutrition Manufacturer Association (PNMA) that the scope of controlling should cover to only infant from one day old – 1 years old by claiming that the products for infants over 12 months old, should cautiously provide useful information to customers. Moreover, the PNMA premises that “*Exclusive breastfeeding is recommended up to 6 months of age, and continued breastfeeding along with appropriate complementary foods at least to 1 year.*”<sup>8</sup> This premise is not fully conformed to the recommendation of WHO that recommends to “*continue breastfeeding along with appropriate complementary foods up to two years of age or beyond.*”

In Thailand, both of the draft law from the Department of Health and the draft law from the Council of State No.1087/2559 intend to protect 0-12 month old infant and young children at the age of 1-3 years old. Therefore, the scope of both drafts to protect infant and young children up to the age of 3 years old conforms to the recommendation of the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children.

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<sup>7</sup> World Health Organization, ‘Breastfeeding’  
<<http://www.who.int/topics/breastfeeding/en/>> accessed 13 August 2015

<sup>8</sup> Principle and standing point of the Pediatric Nutrition Manufacturer Association,  
>[http://www.pnma.or.th/files/doc1\\_th.pdf](http://www.pnma.or.th/files/doc1_th.pdf)> accessed 13 March 2016

Thus, the author agreed to specify the scope of protection to products up to 3 years following to the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children. When the draft of controlling the marketing of breast-milk substitute are enforced as the legislation, it will cover to the product which intend to feed infants and young children for up to 3 years conforming to the Guidance on Ending the Inappropriate Promotion of Food for Infants and Young Children

## **5.2 The measures to control the advertising and the marketing of breast-milk substitutes in Thailand**

According to an inappropriate marketing through advertisements, there are different measures. On one hand, the Philippines absolutely prohibits advertisement of infant formula. On the other hand, the European Union Regulation 609/2013 and the Infant Formula and Follow-on Formula Regulations, 2007 of the United Kingdom allow manufacturers to advertise under the condition of advertisements specializing in the baby care and scientific publications which they shall contain only scientific and factual nature.

In case of promotions, all of the foreign laws apply the same method. The European Union Regulation 609/2013, the Philippines, and the Infant Formula and Follow-on Formula Regulations, 2007 of the United Kingdom prohibit a sale promotion for infant formula complying with the **International Code of Marketing of Breast-milk Substitutes**.

In Thailand, there are the following two provisions controlling advertisements and promotions in Thailand: (1) the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008; and (2) the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revised (No.2) B.E.2555 (2012)

Firstly, the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008 is the most direct provision enforcing promotional tactics under the marketing instrument. However, it has the status as the regulation of the Ministry of Public Health (MOPH). Accordingly, it only requires a cooperation from the government sector under the authority of the Ministry of Public Health to support and promote breastfeeding. Therefore, this regulation cannot be a practically enforcing tool. Even if this regulation has its enforcing status as the legislation which can enforce the violation of



advertisement or the other marketing strategies, the scope of the regulation covers for only children up to 2 years old. Consequently, the regulation does not conform to the Guidance on Ending the Inappropriate Promotion of Foods for Infant and Young Children which recommends to cover the product which intend to feed infants and young children for up to 3 years old.

Moreover, this regulation provides the measure control of marketing of breast-milk substitutes which is similar to the International Code of Marketing of Breast-milk Substitutes but it has the status as the regulation of the Ministry of Public Health which does not provide any sanction to violators.

Secondly, the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 and revision (No.2) B.E.2555 (2012) can control only the advertisement of food for infant and young children products, but cannot covers the other marketing strategies as required by the **International Code of Marketing of Breast-milk Substitutes**.

In relation to the issue of domestic law, Thailand should provide the national legislation to control the violation conduct of the manufacturer, distributor and representative rather than the regulation without any sanction. Both of the drafts restrict not only the advertisements but also other forms of promotion. In case of controlling the marketing, both of the drafts restrict not only the advertisements but also other forms of promotion of designated products to the general public, including promotion methods to contact with or give free samples, support seminars, meetings, and activities to pregnant women and mothers, create the marketing in health care facilities, or provide profitable to health workers.

Furthermore, in case of advertisement, both of the drafts absolutely prohibit the advertisement of food for infant and young children, without any exception as the Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551 provide. On the contrary, the European Union Regulation 609/2013 or the Infant Formula and Follow-on Formula Regulations, 2007 has opened channel to advertisements with information of scientific and factual nature.

In the issue of allowance to advertise breast-milk substitute product, the author would agree with the channel opening for advertisement. In order to be the source of information for consumer, advertisements are supposed to contain only information of scientific and factual nature, not the absolute prohibition to advertise as the draft provide. The reason is when there is any conflict of promotions creating by manufacturers, the committee can sensor related information.

If the country approves the draft to be the law, this law will restrict not only the advertisements but also other forms of promotion of designated products to the general public, including promotion methods to contact with or give free samples, support seminars, meetings, and activities to pregnant women and mothers, create the marketing in health care facilities, or provide profitable to health workers.

### **5.3 The measure to control the marketing tactics which cause the risk of confusion to the consumer**

The Guidance to End the Inappropriate Promotion of Foods for Infants and Young Children, the recommendation No.5 prohibits the cross promotion to promote breast-milk substitutes through indirect promotions of foods for infants and young children. Similarly to the Infant Formula and Follow-on Formula Regulations 2007 of the United Kingdom No.19 and the European Union Regulation 609/2013 which requires the different labels in order to make a clear distinction to consumers between the infant formula and follow-on formula. While Thailand have already prohibited to advertise both of No.1 and No.2 which are infant formula and follow-on formula respectively as described under the current Announcement of the Food and Drug Administration Criteria for Food Advertisement B.E.2551. However, manufacturers can continue applying the cross promotion as one instrument of marketing through No.3 and No.4 and related product in the same branding, labelling, packaging or styling. Therefore, the author would apply the concept of prevention of the cross promotion with the group of forbidden to advertise or promote product (No.1 and No.2) and the group of permitted to advertise or promote product (growing-up, follow-up milk and related product).

The author would raise the arguments about the current situation in Thailand which there is a lack of the provision of avoidance of the confusion and the provision concerning the advertisement, labeling and presentation as follows:

#### **1. Advertisement**

Currently, the announcement only prohibits the advertisement regarding product No.1 and No.2 which manufactures describe on the labels that it is suitable for one day old to 12 months old infants and 6 months to 3 years old infants and young children respectively. However, product No.3 which labels specified ages of target group who are more than one year old and No.4 product which the label specify that suitable for everyone in families can be advertised under the condition. This announcement has already prohibit to

advertise both of No.1 (infant formula) and No.2 (follow-on formula) while No.3 (growing-up, follow-up milk) and related product can be advertise under the condition.

In Thailand, in order to control the risk of confusion among the products, if the scope of protection can cover only one year old infants, the manufacturer can continue to apply cross promotion tactic by promoting their infant formula product which is forbidden to promote through the product for older children which is allowed to promote.

Thus, in the author's opinion, the concept to prevent the cross promotion and the avoidance of risk of confusion should be applied to the group of forbidden to advertise or promote product (No.1 and No.2) and the group of permitted to advertise or promote product (growing-up, follow-up milk and related product) through the same branding, labelling, logo or styling.

However, if the scope of the draft covers the breast-milk substitute products up to 3 years old, the problem of making cross promotion between the infant formula or follow-on formula and growing up milk in the same brand will be eliminated because the scope of control is wider to cover No.3 which labels are specified for children who are more than one year.

## **2. Labeling**

In case of labeling, the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 requires the font size of specific terms that should be clearly featured on the packaging and its size must not be smaller than the brand name. The different block text and the different of colour scheme can avoid the risk of confusion to the consumers. In this issue, the author would separately analyze the following issues: (1) the presenting name; (2) the pictures and blocks; and (3) the color scheme of formula products.

Firstly, regarding the presenting name, the size of the specific terms on label under Thai law is controlled by the Notification of Ministry of Public Health No.367 Clause 13 (3) and Notification of Ministry of Public Health No.351 Clause 13 (3). It states about the presenting name of food that *“If the manufacturer would like to use the Trade name such name type or kind of food shall be appeared in the same line together with trade name and size of letters may be different from trade name but shall be legible”*. While the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 and the European Union Regulation 609/2013 require that *“The specific terms ‘infant formula’ and ‘follow-on*

*formula' should be clearly featured on the packaging, in a font size should no smaller than the brand name."*

In light of names of food, it is explicitly clear that the font size of the names which is bigger than the trade name can be understandable than the smaller one. It can assist consumers to differentiate each product. If the Notification of the Ministry of Public Health which controls labels imposes that the font and size of type of food (such as infant formula, follow-on formula, growing-up milk or flavored powder milk) should be no smaller than the trade name.

Secondly, regarding the pictures and blocks of text, the current law controls on label which are the Notification of Ministry of Public Health No.156 (B.E. 2537). This notification requires only the specific statement which provides necessary information about appropriate usages of the product. In addition, such a statement should not discourage breastfeeding as prescribed by Article 9.1 of the International Code of Marketing of Breast-milk Substitutes. However, the current Thai legal control has no provision to control the pictures and block of text on label as the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 which requires for the different block of text and picture between infant formula and follow-on formula which may cause to the risk of confusion among them.

With regard to the label control in Thailand, there is still a lack of requirements to control the picture and block of text, it is essential to add the different requirements between the group of forbidden to advertise or promote product (No.1 and No.2) and the group of product which are permitted to advertise or promote in order to reduce the risk of confusion to consumer. When the Notification of the Ministry of Public Health which controls on label is added the solution to prevent the confusion, it can reduce the risk of confusion through the similar picture and the position of block of text.

Thirdly, regarding the colour scheme used, there is no provision in Thailand mentioned to control the colour scheme used while the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 require that the manufacturer should ensure that *"The colour scheme used for infant formula packaging should be clearly different to the colour scheme of follow-on formula packaging. Using different shades of the same colour is not acceptable as it may lead to confusion."* Furthermore, the Regulation of European Union 609/2013 also requires the different

designs to avoidance of risk between infant formula and follow-on formula in particular as shown by the text images and colours used.

In Thai general market, without the provision to control the different of colour scheme used, it can be easily found the same and similar colour scheme used with the same branding. However, different ages of infants and young children cause the risk of confusion among infant formula (No.1), follow-on formula (No.2) and flavored milk powder which labels specified age of target group from 1 year up (No.3/No.4). In addition, other related products which are closely resembled cause manufacturers to develop the product differentiation. Nonetheless, the manufacturers can simultaneously use similar advertising and marketing in each category.

With regard to Thailand as the present case, it is important to the Notification of Ministry of public Health controlling on label or the draft to add the concept of avoidance of risk of confusion in order to assist consumers to easily distinguish products and protect the cross promotion technique of the manufacturer.

### **3. Presentation**

In the issue of presentation, the current Thai legal control does not mention about how to avoid the risk of confusion by the presentation as provided by the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007. With reference to the guidance, it requires companies' products to be ensured that they are clearly differentiated in order to avoid any risks of confusion prohibit the shelf-talker and other in store promotional devices for follow-on formula to be used in the vicinity of infant formula. In addition to the differentiation, the guidance also requires that the location of follow-on formula should be located at a different part of the store where the infant formula products are located.

Currently, Thailand does not mention to the risk of confusion through the presentation. Generally, it can be found the shelf talker with the company's logo or sale message on a shelf without professional staffs who can recommend the products. Moreover, the group of forbidden to advertise product which are No.1 and No.2 located in the same location on shelf with the grow-up milk and related product. They have the same packaging, labeling, colour scheme used and were not separated and located physically as the DH Guidance Notes of Infant Formula and Follow-on Formula Regulations 2007 has guided. For example, Dumex uses the red colour with the heart picture on label which can convey to love when mother chooses this breast-milk substitutes for her

infant, Enfa uses the shelf-talkers conveying to the consumer when they feed her infant with Enfa's product, it can make her children intelligence, healthy, happiness or well-being.

If the draft is added by the concept of avoidance of risk of confusion through the presentation of the product, it can prevent consumers from being aroused by the shelf talker as the promotional device and the consumers can distinguish the different of product by separating the location.

However, in relation to in-store presentation, this regulation should not enforce with to mini-stores which does not have enough area to locate the product in difficult location. The mini-store who are exempted should grant the pharmacist or the nutritionist to recommend customers in the area of the store in order to make a clear differentiated understanding about the product all the time.

#### **5.4 The measures and sanction to control the health worker**

The **International Code of Marketing of Breast-milk Substitutes** state that health worker should not accept financial or material inducement or give samples of infant formula to pregnant women and mothers of infants or members of their families.

The Guidance on Ending the Inappropriate Promotion of Foods for Infant and Young Children under recommendation No.6 state that health worker should not accept free products, samples or reduces-price, gifts or incentive of foods for infant and young children from companies.

In the Philippines under the Executive Order No.51 section 8, mention to health worker following to the International Code of Marketing of Breast-milk Substitutes that health worker should not accept financial or material inducement or give samples of infant formula to pregnant women and mothers of infants or members of their families. Otherwise the health worker who violates the Executive Order No.51 may be suspended or revoked their license, permit or authority in the event of repeated violations.

Currently, Thai law does not emphasize to an essential role of health workers or any prohibition to them in order to support breastfeeding. The provision is focusing only on prohibition of the manufacturer, distributor, importer and their representative to make a promotion than prefer the restriction to the health worker and who have no less important than anyone. While personal selling through suggestions by medical and health worker

(50.8%) has an impact to her decision making of purchasing breast-milk substitutes in Thailand.

Thus, Thailand legal control concerning with health worker should not only impose the duty but also the sanction to them. By following to the Executive Order No.51 of Philippines, the health worker who violated the Executive Order No.51 shall be suspended or revoked their license, permit or authority by the Ministry of Health. Because, the health worker has an important role to consumers' decision-making process.

According to the draft of the Department of Health, it imposes a sanction to the health worker in the same way to the Executive Order No.51. When a health worker violates to receive financial or material inducements to promote product or giving any samples to pregnant women or mother of infant and young children, they will be notified to their federation to be considered by the Department of Health and their federation has their own authority to consider to the violation. However, the draft from the Council of State No.1087/2559 does not impose any sanction to health worker.

If there is a sanction provided by the draft from the Department of Health to control health worker who have a close relationship with mother and pregnant women, it can protect one of the channel of promoting infant formula product through health worker as an influential person to encourage and support breastfeeding.

### **5.5 The measures to control information and the message used to promote breast-milk substitutes**

In light of Thailand, the Notification of Ministry of Public Health No.156 and No.157 require the inclusion of a clear message on the superiority of breastfeeding, and instructions for appropriate preparation, as well as warning against the health hazards of inappropriate preparation of the product. In light of foreign law, the European Union Regulation 609/2013 Article 11 and the Infant Formula and Follow-on Formula Regulations, 2007 No.24 request to clear and necessary information about breast-milk substitutes as same as the **International Code of Marketing of Breast-milk Substitutes' requirement.**

Even if the Notification of Ministry of Public Health and the draft have already required the statement of the importance of non-introducing complementary feeding before 6 months of age, it still lacks of the statement on the importance of continued breastfeeding for children who are up to two

years or beyond following to the Guidance on Ending the Inappropriate Promotion of Food for Infant and Young Children.

Thus, if there is prospective way to promote breastfeeding, especially by legal control through label, it should be continue promoting. At least, consumers who choose to purchase breast-milk substitutes will be acknowledge the recommendation by the WHO about breastfeeding. Therefore, the Notification of Ministry of Public Health and the draft should be added the message of supporting optimal breastfeeding into the compulsory statement provided by law. Moreover, the optimal statement should be conveyed in multiple forms not just only on packaged label but through advertisements, promotion and sponsorship, including brochures, online information.

In case of picture or text, the International Code of Marketing of Breast-milk substitute recommended that the informational and educational materials should not use any pictures or text which may idealize the use of breast-milk substitutes except a clear information. In addition, the Guidance on Ending the Inappropriate Promotion of Food for Infant and Young Children recommended that messages used to promote food for infant and young children should not include any image, text or other representation. Regarding the image, text or other representation, those which undermine or discourage breastfeeding, make a comparison to breast-milk, or suggest that the product is nearly equivalent or superior to breast-milk cannot use for infants under the age of six months (including references to milestones and stages).

The current Thai legal control on label of infant formula and follow-on formula which are the Notification of Ministry of Public Health No.156 (B.E. 2537) require only the specific statement which provide a clear information about the appropriate usage of the product. However, it has not mention to pictures or text which may idealize the use of breast-milk substitute following to Article 9 of the International Code of Marketing of Breast-milk substitute.

If Thailand added the solution to prohibit the picture or text which may idealize to the use of breast-milk substitutes rather than require for only statement through the Notification of the Ministry of Public Health or passing the draft from the Department of Health in part of requirement on label following to Article 9 of the International Code of Marketing of Breast-milk substitute as the author mention above, the country would have more efficient provision legislation to control various marketing strategies used through the picture or text out of the scope of protection.



### **5.6 The Problem of making a promotion with the other person other than the pregnant, mother in order to get the personal information of the targeted group**

The Article 5.5 of the **International Code of Marketing of Breast-milk Substitutes** prohibits marketing personnel from seeking direct or indirect contact with pregnant women or with mothers of infant.

In the issue of seeking direct or indirect contact with pregnant women or with mothers of infant, the foreign law and regulation do not provide any prohibition of making a promotion with other people apart from the pregnant women and mother who can be the source of personal information of pregnant women or mothers of infant.

According to the draft from the Department of Health and the draft from the Council of State No.1087/2559, there are provisions to restrict manufacturers, importers and distributors from misleading pregnant women and mothers to believe that benefits of infant and follow-on formula are as good as breast milk.

However, the drafts do not cover of the multiple techniques and channels that marketing personnel is being used to reach directly or indirectly to the target group. Therefore, the loophole of the drafts is being used to gather personal information of pregnant women and mothers such as name, contact number and the baby due. To get the crucial information, marketing personnel will offer rewards or gifts to anyone rather than pregnant women, mother and her families who is able to provide the information mentioned above to create chance to sell their products in the future. For example, Enfa provides gift voucher to any person who give them five names and personal information of pregnant women or mothers.

Therefore, if the draft is added the scope of protection to prohibit the manufacturer to make the marketing with not only the pregnant women and mothers but also anyone who can give them personal information to be the source of future connection, it can be one of measures to cease the contact between the manufacturer and the targeted group.

### **5.7 The enforcement with the violation**

In case of making the sales promotions other than advertisement under control of the Food Act, the Regulation of Marketing of Foods for Infants and Young Children and Related Products 2008 does not mention about the punishment or sanction to the violator. On the contrary to the law, it is the regulation provide by the Ministry of Public Health requesting only the

cooperation from the governmental health care organization, but does not have any legal binding.

The draft from the Department of Health specifies an administrative punishment to fine for any person who fails to perform according to the law. Moreover, this draft imposes the level of a fine which the manufacturer will be fined accumulatively that counts by the days until the actions against the law would be stop.

The draft from the Council of State No.1087/2559 specifies both of imprisonment and fine to punish any person who fails to perform according to the law per each violation similar to the Executive Order No.51 while the Infant Formula and Follow-on Formula Regulations 2007 imposes only the fine to punish the violator without any imprisonment. However, this draft does not mention about the level of a fine as the draft from the Department of Health mentioned.

If the draft are enforced as the national legislation, not only the violation of advertisement of breast-milk substitute product shall be punished but also the other instrument of marketing which the current law cannot cover such as sales promotion, give free sample of formula, contact with pregnant women or mother that are wide spread violated.

Furthermore, if the level of fine that counts by the days until the actions against the law under section 23 of the draft from the Department of Health is enforced, it will be more efficient to control the violation of the manufacturer than an exact amount of fine in each violation without level. The reason is the breast-milk substitute product has a large amount of market value. As the author mentioned that global sales of breast-milk substitutes total US\$ 44.8 billion per year and are expected to rise to US\$ 70.6 billion by 2019.<sup>9</sup> While, the market value of breast-milk substitutes in Thailand is 25 billion Baht.

Only the fixed amount of fine without the level along the period of violation may be only a few money comparing with the manufacturer's profit. An amount of fine should be varied to the large amount of benefit of breast-milk substitute product business, apart from the fixed amount of fine in each violation.

Thus, the author would agree with the issue of imposing of the level of fine as the section 23 of the draft form the Department of Health provides because the

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<sup>9</sup> WHO.UNICEF.IBFAN. *'Marketing of Marketing of breast-milk substitutes: National implementation of the International Code status report 2016.'* Geneva: World Health Organization; 2016.

fixed fine as imposed by the Philippines, the United Kingdom or the draft from the Council of State No.1057/2559 may be effective to cease the violation behavior. If the draft imposes not only the specific amount of fine but also the level of fine that counts by the days until the actions against the law, it can be more effective to enforce with the violation.

### **Conclusion and Recommendation**

Based on the study regarding the measures to control the marketing of breast-milk substitutes products in consideration of the International Code of Marketing of Breast-milk Substitutes, the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children of WHO, the regulation of European Union, the measures of the United Kingdom, the executive order No.51 of Philippines, and the measures of Thailand, it is found that Thailand lacks of the provision and restriction on controlling of the marketing of breast-milk substitutes products. Thus, the author would provide the recommendations as follows:

6.1 imposing the scope of protection to cover all commercially produced breast-milk substitutes that are marketed as being suitable for infant and young children up to the age of 3 years following to the recommendation of Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children.

6.2 Launch the national legislation to prohibit the marketing of breast-milk substitute products to control not only advertisement but also marketing and the other kind of promotion.

6.3 Launch the provision to avoid risk of confusion between the products in relation to an advertising, labelling and presentation

#### **6.3.1 Advertisement**

The draft should be added the provision to separate the difference between the breast-milk substitute products under the scope of the draft and related products in order to assist consumers and enable them to clearly distinguish the product. Consequently, an advertisement of the group of forbidden to advertise or promote product shall not similar to the group of permitted to advertise or promote product which may cause the consumers confuse to use the product under the scope of law.

### 6.3.2 Labeling

#### a. Amending the provision of label on “Presenting Name”

The provision on Presenting Name should be amended to *“If the manufacturer would like to use the trade name such name type or kind of food shall be appeared in the same line together with trade name and size of letters should no smaller than the trade name.”*

#### b. Adding the solution through picture and block of text

The Notification of the Ministry of Public Health No.156 controlling on label or the draft should be added the solution through picture and block of text between the group of product which are permitted to advertise or promote and the group of forbidden to advertise or promote product Likewise, the position on label of the name or type of food, the picture, the brand name and the recommendation to the age of usage should be laid down in the position which less confusion to consumer.

#### c. Adding the solution through Colour scheme used

The Notification of the Ministry of Public Health No.156 or the draft should require for the different colour scheme used for the group of forbidden to advertise or promote product. *The packaging should be clearly different to the colour scheme of the group of product which are permitted to advertise or promote packaging.* Furthermore, using different shades of the same colour is not acceptable as it may lead to confusion.

### 6.3.3 Presentation

The draft should add the legal control of companies. The companies must ensure that they are clearly differentiated in order to avoid any risk of confusion through presentation. However, in relation to in-store presentation, this regulation should not be enforced with the mini-store which does not have enough area to locate the product in difficult location. The mini-store who are exempted should grant the pharmacist or the nutritionist to recommend customers in the area of the store in order to make a clear differentiated understanding about the product all the time.

6.4 Impose the sanction to enforce with the health worker who receive financial or material inducements to promote product or giving any samples to pregnant women or mother of infant and young children.

6.5 In case of picture or text, it should be added the provision to prohibit the use of the picture or text on label which may idealize to the use of breast-milk substitutes between the group of forbidden to advertise or promote product

and the group of product which are permitted to advertise or promote. And in case of message on label, rather than prohibit the inappropriate message, the message on label should include the recommendation to breastfeed that is *“Exclusive breastfeeding is recommended up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to two years of age or beyond.”*

6.6 Launch the prohibition to make the promotion with the other person apart from pregnant women and mothers

6.7 Specify the level to the fines punishment

## References

### Books

Charles H. Patti and Charles F. Frazer., *Advertising: A Decision-Marketing Approach*, Chicago: The Dryden Press, (2007).

สุขุม สุภณิตย์. คำอธิบายกฎหมายเกี่ยวกับการโฆษณา. พิมพ์ครั้งที่ 2, กรุงเทพฯ: สำนักพิมพ์นิติบรรณาการ, 2550.

(Susama Supanit., *Legal Explanation of Advertisement.*, 2<sup>nd</sup> ed. Bangkok: Nitibannakan Publisher, 2008)

### Thesis

พิมพ์กมล เสริมินรา. มาตรการในการควบคุมการโฆษณาอาหารสำหรับเด็ก. วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 2258

(Pimkamil Sermnara. "Legal control of Food Adverting on Children Program." Master Degree, Thammasart University, 2015)

### Article

Ellen G. Piwoz, ScD and Sandra L. Huffman, ScD, 'The Impact of Marketing of Breastmilk Substitutes on Who-Recommended Breastfeeding Practices' *Food Nutrition Bulletin*, 36(4):373-86 (2015).

Michael C. Latham, 'A mother's right to breastfeed: Removing the obstacles' *Food and Nutrition Bulletin, The United Nations University*, vol. 20, no. 3 (1999).

Piwoz eg, Huffman SL, 'The impact of marketing of breast-milk substitutes on who-recommended breastfeeding practices' *Food nutrition bulletin*, 36(4):373-86 (2015).

Sue Ashmore, 'The Lancet Journal. Breastfeeding' *The Lancet*, Volume 387, No. 10017, 491-504, (2016).

### Research

นงนุช ใจชื่น และ กัณณพนธ์ ภักดีเศรษฐกุล. ผลกระทบของการส่งเสริมการตลาดนมผงต่อ มาชาคติ ทักษะคิด และ พฤติกรรมการเลี้ยงลูกด้วยนมผงของหญิงไทย. สำนักงานพัฒนานโยบายสุขภาพระหว่างประเทศ, (2558)

(Nongnuch Jaichuen and Kannaphon Phakdeesethakun. *Impacts of marketing communications on Thai women's breast-milk substitute myth, attitude, and behavior. International Health Policy Program*, (2015)

สำนักงานสถิติแห่งชาติ. การสำรวจสถานการณ์เด็กและสตรีในประเทศไทย พ.ศ.2555 (MICS), 2556.

(National Statistical Office. *The survey of Children and women in Thailand in 2012*, National Statistical Office 2013.)

สำนักงานพัฒนานโยบายสุขภาพระหว่างประเทศ. อิทธิพลของการส่งเสริมการตลาดตลากับการเลี้ยงลูกด้วยนมผง. 2558  
(International Health Policy Program. *Influence of the marketing of breast-milk substitutes*, 2015)

### **Electronic Media**

IBFAN-ICDC Focus 2016 ‘*Aggressive PROMOTION: Growing-up milks*’ (2016)

<<http://www.babymilkaction.org/wpcontent/uploads/2016/07/GUMs-V2-2016.pdf>>

International Code of Marketing of Breast Milk Substitutes (1981) Geneva:

World Health Organization <[http://www.who.int/nutrition/publications/code\\_english.pdf](http://www.who.int/nutrition/publications/code_english.pdf)>

United Nations Children's Fund. ‘*Breastfeeding*’

<[http://www.unicef.org/thailand/overview\\_366.html](http://www.unicef.org/thailand/overview_366.html)>

**THE INTERPRETATION OF “ACCIDENT” WHICH TRIGGERS AN  
AIR CARRIER’S LIABILITY FOR PASSENGERS’ DEATH OR  
INJURY UNDER THE THAI INTERNATIONAL CARRIAGE  
BY AIR ACT B.E. 2558\***

*Jetsada Cheewahirun\*\**

**Abstract**

Hundreds of millions of people participate in air travel each year and, despite the proliferation of airlines, air routes, and tourist destinations, it is by far the safest way to travel. At the same time, the risk of accident remains with the air transportation industry.

This article examines the term “accident” which triggers an air carrier’s liability for a passenger’s death or injury in international carriage by air in relation to significant legal instruments, namely, the Warsaw Convention 1929 and the Montreal Convention 1999. Article 17 of each Convention is one of the most important and problematic provisions, resulting in an airline’s liability when damage is sustained in the case of the passenger’s death or other bodily injury. This implies that the accident causing the death or injury has taken place onboard the aircraft or in the operation of embarking or disembarking.

Yet, the definition of the word “accident” under Article 17 is not determined in any convention. Rather, it is the duty of the national courts to define what circumstances constitute an “accident” in their point of view. There is an abundance of evidence arising from cases involving the term “accident” that have been held by courts in various jurisdictions, for instance, in the case of *Air France v. Saks*, 470 U.S. 392 (1985). In this case, the United States Supreme Court held that in Article 17 “accident” is, “*an unexpected or unusual event or happening that is external to the passenger and does not encompass an injury caused by the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft.*” Consequently, this has become the

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\* This article is summarized and rearranged from the thesis “The Interpretation of “Accident” which Triggers an Air Carrier’s Liability for Passengers’ Death or Injury under the Thai International Carriage by Air Act B.E. 2558” the requirement for the degree of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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established and universally accepted definition of “accident” of Article 17 and, subsequently, adopted and followed by the courts in other state parties. Nevertheless, it can be questioned whether the “accident” requires there be some connection with the irregular operation of the aircraft; whether it incorporates medical emergencies including a passenger’s previous medical condition; or whether it incorporates activities or behavior of fellow passengers such as sexual and other assaults, hijacking or terrorist activity like a bomb threat, etc.

Thailand enacted the law which is called “The Thai International Carriage by Air Act B.E. 2558.” However, Article 10 of this act mirrors the wording of Article 17 of the Montreal Convention 1999. This article will then analyze case law from other court jurisdictions and examine how those courts have interpreted the term “accident.” This will bring about significant consistency in applying laws imposing air carrier’s liability.

**Keywords:** Accident, Passenger’s Death or Bodily Injury, Carrier’s Liability, International Carriage by Air

**บทคัดย่อ**

ผู้คนจำนวนมากหรือล้านคนเดินทางทางอากาศในแต่ละปี และถึงแม้ว่าจะมีสายการบิน เส้นทางการบิน และสถานที่ท่องเที่ยวเพิ่มขึ้นเป็นจำนวนมาก วิธีนี้ก็ยังคงเป็นวิธีการเดินทางที่ปลอดภัยที่สุด ในขณะที่เดียวกัน ความเสี่ยงของการเกิดอุบัติเหตุก็ยังคงมีอยู่ในอุตสาหกรรมการบินทางอากาศ

บทความฉบับนี้ศึกษาคำว่า "อุบัติเหตุ" อันก่อให้เกิดความรับผิดชอบของผู้รับขนส่งทางอากาศต่อผู้โดยสารที่เสียชีวิต หรือบาดเจ็บในการรับขนทางอากาศระหว่างประเทศ ซึ่งมีความสัมพันธ์กับกฎหมายที่สำคัญ ได้แก่ อนุสัญญาวอร์ซอ ค.ศ. 1929 และอนุสัญญามอนทรีออล ค.ศ. 1999 โดยมาตรา 17 ของ อนุสัญญา ทั้งสองนั้นเป็นบทบัญญัติที่สำคัญและก่อให้เกิด ปัญหามากที่สุดบทหนึ่ง นั่นคือสายการบินต้องรับผิดชอบในความเสียหายที่เกิดขึ้นในกรณีที่ถูกโดยสารเสียชีวิตหรือเกิดความ บาดเจ็บแก่กายของผู้โดยสาร ซึ่งโดยนัยยะ คืออุบัติเหตุที่ก่อให้เกิดการตาย หรือการบาดเจ็บเหล่านี้เกิดขึ้นบนอากาศยาน หรือในระหว่างปฏิบัติการ ลำเลียงผู้โดยสารขึ้นหรือลงจากอากาศยาน

ฉะนั้น คำจำกัดความของคำว่า "อุบัติเหตุ" ภายใต้บทบัญญัติมาตรา 17 ไม่ได้ถูกกำหนดไว้ในอนุสัญญาใดๆ จึง เป็นหน้าที่ของศาลประเทศต่างๆ ที่จะวินิจฉัยว่ากรณีใดบ้างที่ถือว่าเป็น "อุบัติเหตุ" ในมุมมองของศาลเหล่านั้น ทำให้มีพยานหลักฐานทางคดีเกิดขึ้นเป็นจำนวนมากจากเหตุการณ์ต่างๆ ที่เกี่ยวข้องกับคำว่า "อุบัติเหตุ" ที่ศาลในเขตอำนาจต่างๆ ได้วินิจฉัยไว้ เช่น ในคดี Air France v. Saks, 470 U.S. 392 (1985) ในคดีนี้ศาลฎีกาสหรัฐฯ ได้พิพากษาไว้ว่า "อุบัติเหตุ" ตาม บทบัญญัติ มาตรา 17 หมายความว่า "เหตุการณ์ที่ไม่คาดคิด ผิดปกติ หรืออุบัติเหตุที่เกิดขึ้นภายนอกตัวผู้โดยสารที่ไม่ครอบคลุมการบาดเจ็บที่เกิดขึ้นจาก ปฏิกริยาภายในของผู้โดยสารต่อการทำงานอย่างเป็นปกติธรรมดา และคาดการณ์ได้ ของอากาศยาน" ผลที่เกิดขึ้นคือคำนิยามนี้ได้ถูกนำไปใช้อย่างแพร่หลายและเป็นที่ยอมรับโดยสากลว่าเป็นคำจำกัดความ ของคำว่า "อุบัติเหตุ" ตามบทบัญญัติมาตรา 17 และต่อมาถูกนำไปปรับใช้ในศาลของประเทศอื่นๆ ที่เป็นภาคีของอนุสัญญา ด้วย อย่างไรก็ตาม ก็ยังคงมีปัญหาว่า "อุบัติเหตุ" นั้นต้องมีความเชื่อมโยง กับการทำงานที่ผิด ปกติของอากาศยาน ประกอบด้วย เหตุฉุกเฉินทางการเงินการแพทย์ รวมไปถึงสภาพความเจ็บป่วยของผู้โดยสารที่มี อยู่ก่อนแล้วหรือไม่ หรือประกอบด้วย กิจกรรมหรือพฤติกรรมของผู้โดยสารอื่น อาทิ การลวนลามทางเพศ หรือการทำร้ายในลักษณะอื่น เช่น การจี้เครื่องบิน หรือ การก่อการร้ายโดยการขว้างระเบิด ฯลฯ

ประเทศไทยได้มีการตรากฎหมาย คือ "พระราชบัญญัติการรับขนทางอากาศระหว่างประเทศ พ.ศ. 2558" อย่างไร ก็ตาม มาตรา 10 ของพระราชบัญญัตินี้สะท้อนถ้อยคำของมาตราที่ 17 ของอนุสัญญา มอนทรีออล ค.ศ. 1999 บทความฉบับนี้ จะวิเคราะห์กรณีทางกฎหมายที่เกิดขึ้นจากคำพิพากษาของศาลในเขตอำนาจอื่น และศึกษาว่าศาลเหล่านั้นตีความคำว่า "อุบัติเหตุ" เช่นไร โดยจะนำมาซึ่งความสอดคล้องต้องตรงกันในการบังคับใช้กฎหมายอันเกี่ยวเนื่องกับความรับผิดชอบของผู้รับ ขนทางอากาศต่อไป

**คำสำคัญ:** อุบัติเหตุ, ผู้โดยสารเสียชีวิตหรือบาดเจ็บทางกาย, ความรับผิดชอบของผู้รับขน, การรับขนทางอากาศ ระหว่างประเทศ

## Introduction

Transportation today is greatly critical to economy both nationally and internationally. This is because transportation contributes to economic growth, the volume of trade, investment including the unloading of passengers, both local and international, especially in developed countries; they have developed the transportation system in every mode in order to develop the country's economy and to have the potential of trade competition in world trade activity.<sup>1</sup>

As the role and importance of air transport has rapidly increased in the transportation industry, thus whenever the aviation accident happens, there are serious damage to the passengers and third parties caused by the death, personal injuries, and loss of personal property. The seriousness from the accident differs from one case to another. This can be clearly seen in the case of the mysterious, baffling disappearance of Malaysia Airlines flight MH370, or the crash of Malaysia Airlines flight MH17 as part of big bulk missile found at Ukraine, for instance.

Therefore, this article will then deal with the airline's liabilities to passengers in case of death or injury during international commercial carriage by air pursuant to the Montreal Convention 1999 including the Warsaw System. In this regards, Article 17 of the Montreal Convention is one of the most important and problematical provisions. It makes the air carrier liable for any damage sustained in case of the death or bodily injury of passengers, provided that the accident causing the death or injury shall take place on board the aircraft. While the trigger for liability is the 'accident,' this term has not been defined in the convention. Rather, it is for national courts to determine whether any particular event constitutes the 'accident' in their view. Since the word is normally used to describe the accident which occurs unintentionally, the use of 'accident' within the convention gives rise to the questions whether certain intentional events fall within the scope of this provision. The courts in various jurisdictions have held, for example, that the injuries arising from passenger health issues, hijacking, sabotage, and sexual molestation are all 'accidents' which fall under the ambit of the convention.<sup>2</sup>

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<sup>1</sup> Thotsaporn Leephuengtham, “อุบัติเหตุที่ทำให้สายการบินต้องรับผิดชอบผู้โดยสารในกรณีตายหรือบาดเจ็บ,” *The Intellectual Property and International Trade Law Journal*, Judge office, The office of the Judiciary, Thailand, 2, (2542).

<sup>2</sup> *ibid.*

## **I. The Interpretation of “Accident” under International Conventions and Foreign Laws**

The meaning of the term “accident” used in Article 17 of the Warsaw Convention 1929 and the Montreal Convention 1999 is the legitimate inquiry to be settled by the court as the matter of treaty interpretation;<sup>3</sup> subsequently, the part of judges is then urgent with a specific end goal to give the intended meaning. Therefore, this section examines jurisprudence concerning the interpretation of the word “accident” which triggers the air carrier liabilities in case of death or injury of passengers. It is analyzed by the Warsaw Convention 1929 and the Montreal Convention 1999, the most recent contribution to the unification of law in this field. Also, the interpretation of the term “accident” decided by the U.S. and the U.K. courts will be discussed.

### **• The Warsaw Convention 1929**

The Warsaw Convention 1929,<sup>4</sup> nevertheless, it can be clearly seen that the word “accident,” which leads to the liabilities of passenger for passenger death or bodily injury is not given any meanings. Hence, it is concluded by the drafters of the Warsaw Convention 1929 and subsequent amendments and supplements that in case that the international laws could not be applied to the cases, the domestic laws should be applied instead.<sup>5</sup> Another word is that in case the provisions of the Warsaw Convention cannot resolve the problem arising from the international transport by air, the local or domestic law will be the essential instruments. Therefore, none of the definition of the word “accident” is appeared in the Warsaw Convention; however, it has been defined by the courts over the seventy-year history of the Warsaw Liability System. Also, as the accident, which is the key liability term, remains the same in the Montreal Convention 1999, the accepted judicial definitions of this term as used in the Warsaw Convention will continue to be valid upon

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<sup>3</sup> *El Al Israel Airlines, Ltd. V. Tseng*, 525 U.S. 155, 172 (1999); <sup>3</sup> *Air France v. Saks*, 470 U.S. 397-400 (1985) [hereinafter *Saks*]; *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 70-71 (1<sup>st</sup> Cir. 2000); *Ramos v. Transmeridian Airlines, Inc.*, 385 F. Supp. 2d 137 (D.P.R. 2005); *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 201 (D. Mass. 1998); *Schneider v. Swiss Air Transport Co.*, 686 F. Supp. 15, 16-17 (D. Me. 1988).

<sup>4</sup> The Warsaw Convention 1929 Article 17 “*The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained.*”

<sup>5</sup> See, e.g., the Montreal Convention 1999, Art. 22, para. 6, Art. 28, 29, 33, para. 4, Art. 35, 37; the Warsaw Convention 1929, Art. 22, 24, 25, 28 and 29. *Zicherman v. Korean Air Lines Co. Ltd.*, 516 U.S. 217 (1996); *Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218 (N.D. Calif. 1993).

applying the comparable provisions of the Montreal Convention 1999 to the damage claim.<sup>6</sup>

- **The Montreal Convention 1999**

As mentioned previously that there is no change in the substantive wording of Article 17 in the Montreal Convention, it includes the term “accident.” As a consequence, the former court judgments defining and applying the provision of Article 17 of the 1929 Warsaw Convention shall have equal effect in case where the passenger claims in the court applicable by Article 17 of the Montreal Convention 1999. More importantly, there is the most significant U.S. Supreme Court decision which has become the fundamental criteria for the following judgments up to the present. Such decision is the case of *Air France v. Saks*.<sup>7</sup>

- **The United States**

Regarding the interpretation of the word “accident” in the United States court, there are some intermediate appellate courts attempting to address the issue of what constitutes the “accident,” as well as those interpreted by the U.S. Supreme Court, which are mentioned here.

In *Krys v. Lufthansa German Airlines*,<sup>8</sup> “the passenger who suffered the heart attack on a transatlantic flight from Miami to Frankfurt brought suit against Lufthansa for aggravating the damage to his heart by not landing the plane, so that he could go to the hospital, before its scheduled arrival in Frankfurt. The U.S. Court of Appeals for the Eleventh Circuit concluded that “looking solely to a factual description of the aggravating event in this case – i.e., the continuation of the flight to its scheduled point of arrival – compels a conclusion that the aggravation injury was not caused by an “unusual or unexpected event or happening that is external to the plaintiff . . .” and therefore did “not constitute an “accident” within the meaning of the Warsaw Convention.”<sup>9</sup>

Significantly, in 1985 the term “accident” was defined by the Supreme Court of the United States that it was an “unexpected or unusual event or

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<sup>6</sup> George N. Thompkins, Jr., ‘*Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999*,’ 1 (2010).

<sup>7</sup> *Saks* (n 3).

<sup>8</sup> 199 F.3<sup>rd</sup> 1515 (11<sup>th</sup> Cir. 1997).

<sup>9</sup> *ibid* 1522.

happening that is external to the passenger.” An injury resulted by the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft is not the result of the accident, and therefore, it is not compensable under the Article 17 of the Warsaw Convention 1929.<sup>10</sup>

In case of *Air France v. Saks*,<sup>11</sup> “the fact in this case was that, Ms. Saks was the passenger on an overseas flight from Paris, France to Los Angeles, California. As the plane was landing, Ms. Saks experienced great pressure and pain in her left ear because of cabin pressurization change. As a result, she suffered permanent deafness. She claimed that the change in the cabin pressure during the descent caused her deafness, and thus, constituted the accident under Article 17. The Saks Court suggested that the intent and expectations of the parties were of paramount importance when interpreting the treaty.<sup>12</sup> Consequently, the High Court held that the passenger who suffered deafness in one ear as a result of the depressurization of the passenger cabin during flight could not recover under Warsaw as her case was not the accident. It was undisputed that the pressure change within the cabin was not the result of any abnormal operation or malfunction of the plane. Instead, the injury was found to be the consequence of the passenger’s own internal reaction to the normal operation of the aircraft. In addition, the U.S. Supreme Court denied the recovery because the Court found that the injury occurred to her inner ear was internally caused by sinus problems to her rather than by anything unusual about the flight. According to Justice O’Connor, the “accident” under Article 17 “arises only if the passenger’s injury is caused by the unexpected or unusual event or happening, that is external to the passenger.”<sup>13</sup>

Nevertheless, there were additionally decisions of lower courts in other jurisdictions especially the appellate court decision in the United Kingdom which held that inaction could not be the “event,” yet was the “non-event.” Such inaction ought not equivalent to the occasion that fulfilled the primary appendage of the meaning of the accident which “occurred on board the aircraft or in the course of any of the operations of embarking or disembarking,” and it was, along these lines, not the accident under Article 17. This interpretation of

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<sup>10</sup> *Saks* (n 3).

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

the term “accident” of the court in the United Kingdom will be tended to in the area underneath.

- **The United Kingdom**

There is one of the important issues, which needs to be noted in the interpretation of the term “accident” in the court of the United Kingdom; and such issue has different result with the U.S. Supreme Court decision particularly in the *Husain* case. The U.K. court decision was the decision of the Court of Appeal in the case: *In re Deep Vein Thrombosis and Air Travel Group Litigation*.<sup>14</sup>

For this situation the court held that, for the accident, there must be the external event with the adverse effect on the passenger. This is comparative interpretation with the U.S. Supreme Court decision in the *Saks* case. Also, the court held that the inaction was non-event which could not be the accident under Article 17 of the Warsaw Convention. Additionally, as indicated by the careful judgments of the Court of Appeal, the straightforward inquiry which must be asked was that, in regards to the perceived significance of the word, whether there was the accident in circumstances where the individual suffered DVT just in view of the impact of a flight on the plane with no activating occasion. The court offered an explanation to this inquiry in the negative angle that it was viewed as the mistake to concentrate on the segment parts of the great definition in *Saks* instead of on the straightforward idea of accident itself.<sup>15</sup>

## **II. The Problem of Defining the Word “Accident” under Thai law**

According to the International Carriage by Air Act B.E. 2558 Section 10 states that “*The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking,*” the air carrier shall be liable to passengers in the event of the passenger’s death or injury caused by the accident. However, there is no provision in the Act defining the term “accident.” If the case is filed to the court,

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<sup>14</sup> [2004] QB 234.

<sup>15</sup> Lord Scott of Foscott House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause Deep Vein Thrombosis and Air Travel Group Litigation (8 actions) (formerly 24 actions) UKHL 72 (2005).

there will be the problem on the criteria employed to determine whether it is the accident or not. If the case is filed to Thai court, it shall be considered whether it is the accident or not in the court of Thailand. It is remarkable to think that what should be the court's decision. There are three possible guidelines as follows.<sup>16</sup>

1. Thai Court may interpret the word "accident" in the tradition of international trade and customary international subject to Section 368 of the Civil and Commercial Code. The criteria used by the Parties in 1929 Warsaw Convention or Montreal Convention 1999 is convicted on the point that any event is the accident, which its details will be analyzed later in the chapter 4. However, it does not appear to any provision of the Act on the International Carriage by Air Act B.E. 2558, in providing about the problems with the interpretation of customary international trade.

2. Thai Court may define the term "accident" which appears in the regulations of the Civil Aviation Act B.E. 2498, No. 3, which are configurable notifications and reports pursuant to Section 61 of the Air Navigation Act B.E. 2497. The definition of the term "accident" is defined that matters arising in connection with the operation of aircraft. The event takes place during the time the persons are in the aircraft with the intention of travelling until they leave from such aircraft, and in case that (a) any person is died or seriously injured by the presence in the aircraft, or by hitting with the aircraft, or anything attached to the aircraft, or (b) the aircraft is damaged in essence. However, according to the mandate of the Committee on Civil Aviation No.3 issued by the Air Navigation Act, the "aircraft accident," shall not be applied to the relationship between the carrier and passengers.<sup>17</sup>

3. Thai Court may interpret the word "accident" by consideration of the dictionary definitions of terminology B.E. 2542 edition of the Royal Academy, which provides the meaning of this word that "the event happened unexpectedly, coincidences."

Therefore, as previously stated, the International Carriage by Air Act B.E. 2558 does not define the meaning of "accident." In addition, Section 10 of

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<sup>16</sup> Jayaravee Nipawan, ความรับผิดชอบเพื่อความเสียหายทางจิตใจตามกฎหมายรับขนระหว่างประเทศทางอากาศ (LL.M. thesis, Thammasat University 2012) 41.

<sup>17</sup> See, Prasert Pompongsuek, Details About the Accident of Aircraft, 'The Investigation of the Accident of Aircraft: A Legal Perspective', JL, Vol. 32, No. 3, (September) 661-693.



the Act and Article 17 of the Montreal Convention have the similar matter that the airline shall be liable for any damage caused to passengers as a result of the accident. It shall be interpreted that any event of the accident for which the airline shall be liable. Also, the Civil and Commercial Code itself does not define the term “accident” as well. However, the word “force majeure” in Section 8 of the Civil and Commercial Code is defined. Therefore, if the case filed to Thai court is in respect of the airline’s liability for damages arising under such provisions of the Act, it should be construed on the fact that whether Thai Court will interpret the case of hijacking or passenger’s illness as the accident or not. This is because those events are not occurred by coincident, but they are intentionally happened or caused by the current intentions. In this regard, the liability of the airlines for the damage caused to the death and bodily injury of passengers shall fall under the provision in the first paragraph of Section 437<sup>18</sup> or Section 634<sup>19</sup> of the CCC as they are similar matters of the law specifying that the possession or control of the vehicle, or the carrier shall be liable for the damage caused to passengers, unless the damage is due to force majeure or fault of the passenger himself. These provisions differ from the provisions of the Montreal Convention 1999, and the International Carriage by Air Act B.E.2558. It is needed to be decided whether the damage occurred is the “accident” or not, because if damage occurred is not accidental, the carrier shall not be liable for any damage occurred. However, under the first paragraph of Section 437 or Section 634, specifying that the control or possession of the vehicle, or the carrier shall be liable for any damage that occurs, except the liability exemption as determined by the law.

### **Conclusions and Recommendations**

In terms of Thai law, the International Carriage by Air Act B.E. 2558 was enacted in the Gazette on February 13, 2558, and came into force on May 15, 2558. The Act has implemented the provisions of the Montreal Convention 1999, in particular of Section 10 of the Act stating that “*The carrier shall be*

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<sup>18</sup> Civil and Commercial Code (CCC) s 437 “*A person is responsible for injury caused by any conveyance propelled by mechanism which is in his possession or control, unless he proves that the injury results from force majeure or fault of the injured person.*”

<sup>19</sup> Civil and Commercial Code (CCC) s 634 “*The carrier of passengers is liable to a passenger for personal injuries and for the damages immediately resulting from delay suffered by reason of the transportation, unless the injury or delay is caused by force majeure or by the fault of such passenger.*”

*liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*” There is also no definition of the word “accident” in Section 10, which contains material substance as same as Article 17 of the Montreal Convention triggering that the carrier is liable for damage caused to passengers as a result of the accident. It must be interpreted whether any event will be considered as the accident. The Civil and Commercial Code itself does not define the term “accident,” it just has the definition of the term “Force majeure” as provided by Section 8 of the Civil and Commercial Code. Thus, if there is a case to the Court of Thailand that the plaintiff has sued the airline liability under the international carriage by air, the court must interpret and lay down the norms to determine the meaning of the term “accident” which triggers the airlines liable for damages arising under such provision.

In order to achieve an effective interpretation of the word “accident” under section 10 of the Thai International Carriage by Air B.E. 2558 (2015), it is, thus, necessary to examine the point in the context of the development of comparative jurisprudence. The important case is the Supreme Court decision in *Air France v. Saks*, 470 US 342 (1985). In such case the court interpreted the term “accident” that the liability under Article 17 arose only if the passenger’s injury was caused by the unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, and in such case, the damage was caused by the accident under Article 17. This is the important decision, and it is also the strong decision which are further applied by many cases.

As set forth below, there are many efforts to interpret the term “accident” to guide Thai court on determining the international air carrier’s liability as follows.

Therefore, the definition of the word “accident” under Section 10 of the Thai International Carriage by Air Act B.E.2558 (2015) should be flexibly applied after assessment of all circumstances surrounding the passenger’s death or bodily injuries as follows.

The term “accident” shall refer to the case that the passenger’s death or bodily injuries is caused by “an unexpected or unusual event or happening that is external to the passenger only, and not where the death or bodily injuries resulted by the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft in such case is caused by the accident under Section 10.

In light of “an unusual or unexpected event” in the meaning of the term “accident,” it is a physical circumstance, which unexpectedly takes place beyond the usual course of things. Thus, if the event on board the aircraft is the ordinary, expected and usual occurrence, then it cannot be termed as the accident. To constitute the accident, the occurrence on board the aircraft must be unusual, or unexpected events. Also, the event or occurrence shall not be the accident if it is solely resulted by the state of health of the passenger and is unconnected with the flight.

The unusual or unexpected operations of the airline must be a “link in the chain of causes” leading to the death or bodily injury of the passenger. In other words, the accident must arise from a risk that is characteristic of air travel.

The happening must be “external to the passenger.” A pre-existing injury aggravated by, or a hypersensitive physical response to, a routine and normal flight shall not be the accident under the meaning of Section 10 of the Act. However, it can be noted that even there is the pre-existing injury condition to the passenger, but the inaction of the flight attendants, or their refusal to assist the passenger who requests the assistance is deemed the unexpected, or unusual event, or happening. Also, such event or happening is external to the passenger, and constitutes a Section 10 “accident.”

## References

### Books

David Mackenzie, **ICAO A History of the International Civil Aviation Organization**, University of Toronto Press, Toronto Buffalo London (2010).

George Thompkins N., Jr., **Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999**, (2010).

Paul S. Dempsey, and Milde Michael, **International Air Carrier Liability: The Montreal Convention 1999**, Canada: McGill University Center for Research in Air & Space Law, (2005).

Paul Stephen Dempsey, **Law & Foreign Policy in International Aviation**, Transnational Publishers, Inc., Dobbs Ferry, New York (1987).

René H. Mankiewicz, **'The Liability of the International Air Carrier,'** Kluwer Law and Taxation, (1981).

Tossaporn Leepuengtham, **The Warsaw System: Why Thailand Should Become a Party**, a Master's Thesis, The Faculty of Graduate Studies and Research, McGill University, (1993).

ชญารวี นิภาวรรณ ,**ความรับผิดชอบเพื่อความเสียหายทางจิตใจตามกฎหมายรับขนระหว่างประเทศทางอากาศ** ,วิทยานิพนธ์นิติศาสตร์ มหบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ,กรุงเทพฯ ,พ.ศ.2555. (Jayaravee Nipawan, **Liability for Mental Injury under the Law of International Carriage by Air**, A Thesis for the Degree of Master of Laws Faculty of Laws, Thammasat University, Bangkok, 2012).

ดวงใจ สินธุสังข์, **ระบบความรับผิดชอบในการรับขนทางอากาศระหว่างประเทศ**, งานเอกสารวิชาการส่วนบุคคล ส่วนหนึ่งของกรอบรม หลักสูตร ผู้บริหารกระบวนการยุติธรรมระดับสูง) บ.ย.ส (รุ่นที่11 วิทยาลัยการยุติธรรม สำนักงานศาลยุติธรรม, กรุงเทพฯ ,พ.ศ.2551 .(Duangjai Sinthusung, **Liability System of International Carriage by Air**, Personal documents academic part of the Court of Administration of Justice, Class 11, College of Justice, the Judiciary, Bangkok, 2008).

ผาณิตรุ่ง วิทยา, **ปัญหากฎหมายการขนส่งทางอากาศ :วิเคราะห์ร่างพระราชบัญญัติการรับขนทางอากาศ พ.ศ....**, วิทยานิพนธ์นิติศาสตรมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, กรุงเทพฯ, พ.ศ.2547. (Phanit Rungvittaya, **Legal Problem on Carriage by Air Law: A Critical of Draft Carriage by Air Act B.E. ....**, A Thesis for the Degree of Master of Laws Thammasat University, Bangkok, 2004).

ภัทรพร อรรถาพิช ,**การขนส่งทางอากาศ: ความรับผิดชอบของผู้ขนส่งทางอากาศในการรับขนคนโดยสาร**, วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, กรุงเทพฯ, พ.ศ.2532. (Patraporn Attapich, **Air Transport: Liability of Carrier for Carriage of Passenger**, a Thesis for the Degree of Master of Laws, Faculty of Laws, Chulalongkorn University, Bangkok, 1988).

สมชาย พิพิธวัฒน์ ,**พระราชบัญญัติการเดินอากาศ ฉบับสมบูรณ์**, กรุงเทพมหานคร, พ.ศ.2542. (Somchai Phiputtawat, **Air Navigation Act: Full Text**, 1999).

## Articles

Andreas Lowenfeld & Mendersohn Allan, “*The United States and the Warsaw Convention*,” 80 **Harvard Law Review**, (1967).

Paul S. Dempsey, and Milde Michael, “*Accidents & Injuries in Air Law: The Clash of the Titans*,” *International Air Carrier Liability: The Montreal Convention of 1999* (McGill 2005).

Prasert Pompongsuek, “*The Investigation of the Accident of Aircraft: A Legal Perspective*,” **Journal of Law**, Vol. 32, No. 3, (September).

René H. Mankiewicz, “*The Liability of the International Air Carrier: A Commentary of the Present Warsaw System*,” (Deventer, Antwerp, Boston, London, Frankfurt) (1981).

Aumporn Juntaravijit ,“*เขาคีรคาชวีตและความเสียหายที่เกิดขึ้นแก่ร่างกายของท่านเมื่อท่านเดินทางทางอากาศระหว่าง ประเทศ อย่างไร*,” **Journal of Law, Chulalongkorn University**, June 1973).

Thotsaporn Leephuengtham, “อุบัตินเหตุที่ทำให้สายการบินต้องรับผิดชอบต่อผู้โดยสาร ในกรณีตายหรือบาดเจ็บ,” **The Intellectual Property and International Trade Law Journal, Judge office, the office of the Judiciary, Thailand,** (2542).

Lord Scott of Foscott House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause Deep Vein Thrombosis and Air Travel Group Litigation (8 actions) (formerly 24 actions) UKHL 72 (2005).

## **CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES: A COMPARATIVE STUDY OF THAI LAWS AND FOREIGN LAWS\***

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### **Abstract**

Bribery is one of the most significant problems in the world that should be immediately solved as it causes harmful effects on business and society at large, weakens public accountability, democratic values, and undermines the rule of law. Nowadays, business operations are mostly done by corporations. Thus, it is not only individuals who commit bribery offences, but also corporations which cause much larger damages to economics and society, compared to the offences committed by individuals.

The United Nations Convention against Corruption or UNCAC is the first international legally binding anti-bribery instrument which had been negotiated by the members of the United Nations including 180 countries around the world and Thailand. Being a state party of UNCAC, Thailand has legal obligations to comply with its principles, including establishing corporate liability for involving in bribery offences which type of liability can be criminal, civil or administrative according to Article 26 of UNCAC concerning the liability of legal person.

According to the obligations under UNCAC, Thailand amended the Organic Act on Counter Corruption B.E. 2542 which established liability of a legal person for bribery offences. However, as shown in the Corruption Perception Index in recent years, a low score and ranking indicates severe corruption problem in Thailand which is still rising and unstoppable. The result can be interpreted that the recent law of Thailand concerning corporate criminal liability for bribery offences does not achieve its purpose of deterrence. Thus, it is necessary to seek other countermeasures which effectively deter bribery problems in Thailand.

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\* This article is summarized and arranged from the thesis “Corporate Criminal Liability For Bribery Offences: A Comparative Study Between Thai Laws and Foreign Laws” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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This article will focus on criminal liability of juridical persons, especially the legal enforcement of corporate criminal liability and sanctions; it does not include criminal liabilities of natural persons representing the juridical persons.

A comparative study of Thai laws and foreign laws is chosen as a method to seek suitable guidelines for developing Thai laws. The United States, as the successful country in combating bribery problem due to high record of detected bribery cases under the Foreign Corrupt Practices Act 1977, the United Kingdom as the UK Bribery Act which is considered the strictest law on bribery offences internationally, and lastly, France, as a model of civil law countries which is the same juristic method as Thailand, are selected to be studied for their laws in order to seek suitable countermeasures for Thailand. This should play the significant role in developing the corporate criminal liability for corruption offences in the long run.

**Keywords:** Corporate criminal liability, Bribery offences, criminal liability of juridical persons



### บทคัดย่อ

การให้สินบนเป็นหนึ่งในปัญหาที่สำคัญระดับโลก ซึ่งควรได้รับการแก้ไขอย่างเร่งด่วน เนื่องจากก่อให้เกิดผลร้ายที่ต่อภาครัฐกิจและสังคมในวงกว้าง ทำลายความน่าเชื่อถือทางสังคม คุณค่าของความเสมอภาค และลดรอนหลักนิติธรรม

ในปัจจุบัน การดำเนินธุรกิจมักจะกระทำในรูปแบบของบริษัท ดังนั้น ไม่เพียงแต่บุคคลธรรมดาที่อาจกระทำความคิดฐานให้สินบน แต่ยังรวมไปถึงการกระทำความคิดโดยบริษัทต่างๆ ซึ่งก่อให้เกิดความเสียหายอย่างใหญ่หลวงต่อเศรษฐกิจและสังคม และความเสียหายที่เกิดขึ้นนั้นมีมูลค่ามากกว่าความเสียหายจากการกระทำความคิดโดยบุคคลธรรมดาอย่างมหาศาล

อนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการทุจริต ค.ศ. 2003 หรือยูเอ็นซีเอซี เป็นเครื่องมือทางกฎหมายชิ้นแรกที่มีผลผูกพันในระดับสากลเพื่อต่อต้านการทุจริตและการให้สินบน ซึ่งเกิดขึ้นจากการเจรจาร่วมกันโดยรัฐสมาชิกของสหประชาชาติ รวม 180 ประเทศทั่วโลก รวมถึงประเทศไทยซึ่งได้ลงนามในอนุสัญญาดังกล่าวในวันที่ 9 ธันวาคม 2546 และได้มีการให้สัตยาบันอนุสัญญาดังกล่าวในวันที่ 1 มีนาคม 2554

ผลจากการเป็นรัฐภาคีของอนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการทุจริต ค.ศ. 2003 ประเทศไทยมีพันธกรณีตามกฎหมายในการปฏิบัติตามข้อกำหนดในยูเอ็นซีเอซี ซึ่งรวมไปถึงการกำหนดความรับผิดชอบทางอาญาของนิติบุคคลสำหรับความคิดเกี่ยวกับการให้สินบน โดยรูปแบบของการลงโทษ อาจเป็นการลงโทษทางอาญา ทางแพ่ง หรือทางปกครอง ตามมาตรา 26 แห่งอนุสัญญาดังกล่าวอันเกี่ยวข้องกับความคิดของนิติบุคคล

ผลจากพันธกรณีของประเทศไทยภายใต้อนุสัญญาดังกล่าว ประเทศไทยได้มีการประกาศแก้ไขพระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยการป้องกันและปราบปรามการทุจริต พ.ศ. 2542 (ฉบับที่ 3) เมื่อวันที่ 9 กรกฎาคม พ.ศ. 2558 และได้บัญญัติถึงความรับผิดชอบของนิติบุคคลในความคิดฐานให้สินบน เพื่ออนุวัติการตามอนุสัญญา ซึ่งเป็นมาตรฐานสากล อย่างไรก็ตาม จากดัชนีชี้วัดภาพลักษณ์คอร์รัปชันโลกในปีที่ผ่านมา มา ประเทศไทยยังคงได้รับคะแนนและอันดับต่ำลง และยังไม่เป็นที่น่าพอใจ ซึ่งบ่งชี้ให้เห็นว่าปัญหาคอร์รัปชันในประเทศไทยรวมถึงปัญหาการให้สินบนยังคงเป็นปัญหาร้ายแรง และมีความรุนแรงขึ้นเรื่อยๆ ดัชนีดังกล่าวยังชี้ให้เห็นว่ากฎหมายไทยในปัจจุบันยังคงไม่สามารถปราบปรามปัญหาการให้สินบนได้อย่างมีประสิทธิภาพ และไม่บรรลุวัตถุประสงค์ของกฎหมายในการป้องกันและปราบปรามการกระทำความคิดฐานให้สินบน ดังนั้นจึงมีความจำเป็นที่จะต้องหามาตรการอื่นที่จะสามารถป้องกันปัญหาการให้สินบนในประเทศไทยได้อย่างมีประสิทธิภาพ

บทความนี้มุ่งศึกษาในประเด็นความรับผิดชอบทางอาญาของนิติบุคคล โดยเฉพาะในด้านการบังคับใช้กฎหมายและการกำหนดโทษ แต่ไม่รวมถึงความรับผิดชอบของผู้แทนนิติบุคคล

บทความนี้จะทำการศึกษาเปรียบเทียบกฎหมายไทยและกฎหมายต่างประเทศ เพื่อหาแนวทางที่เหมาะสมในการพัฒนากฎหมายไทย โดยกฎหมายต่างประเทศที่นำมาศึกษาได้แก่ กฎหมายสหรัฐอเมริกา ซึ่งจัดเป็นประเทศที่ประสบความสำเร็จในการขจัดปัญหาการให้สินบน เนื่องจากเป็นประเทศที่มีประวัติการตรวจพบการให้สินบนสูงสุด ภายใต้พระราชบัญญัติว่าด้วยการกระทำอันเป็นการคอร์รัปชันในต่างประเทศของสหรัฐอเมริกา ค.ศ. 1977 (Foreign Corrupt Practices Act 1977) กฎหมายประเทศอังกฤษ ซึ่งมีพระราชบัญญัติป้องกันการทุจริต ค.ศ. 2010 (UK Bribery Act 2010) ซึ่งเป็นกฎหมายที่มีความเข้มงวดในการปราบปรามการให้สินบนจากการประเมินใน

ระดับสากล และกฎหมายประเทศฝรั่งเศส ซึ่งเป็นประเทศต้นแบบของประเทศที่ใช้ระบบกฎหมายที่ใช้ประมวลกฎหมายหรือซีวิลลอว์ เช่นเดียวกับประเทศไทย บทความนี้จะศึกษาถึงแนวความคิดและบทบัญญัติทางกฎหมายของประเทศเหล่านี้เพื่อเสาะหามาตรการอื่นๆ ที่เหมาะสมที่สามารถนำมาใช้กับประเทศไทย และเป็นบทบาทสำคัญในการพัฒนากฎหมายเกี่ยวกับความรับผิดของนิติบุคคลในความผิดฐานให้สินบนต่อไปในอนาคต

**คำสำคัญ:** ความรับผิดทางอาญาของนิติบุคคล, ความผิดฐานให้สินบน

## **BACKGROUND AND PROBLEMS OF CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES**

Nowadays, we cannot deny that bribery problem is one of the most significant problems in the world that should be immediately solved as it causes harmful effects on business and society at large; weakens public accountability and democratic values; and undermines the rule of law. Unfortunately, bribery problems are increasing day by day; the acts of corruption are done widely at both domestic and international levels. Bribery is gradually changing to more complex and transnational types. Not only are the acts of corruption done by individuals but also the number of corrupt practices done by corporations increasing. Bribery which is done for the benefits of corporations mostly causes amount of damages much larger than that done for individuals' benefits.

As shown in the "Corruption Perception Index" or CPI announced by Transparency International, unfortunately, most ASEAN countries are still close to bribery. According to the result, Thailand earns transparency score of only 35 points from the total of 100, ranking in the 101<sup>st</sup> place from 176 countries around the world as surveyed in 2016, worse than 2015's 38 points with the ranking in 86<sup>th</sup> place.

The United Nations Convention against Corruption (UNCAC) requires the state parties to implement several measures, including the legal amendments, to fight against bribery problems for both domestic and foreign briberies. It also provides a requirement for state parties of UNCAC to ratify the measure on corporate criminal liability on bribery offences and make it consistent with each country's legal principle, in their countries. Thailand's ratification of UNCAC was made on 31 March 2011, almost seven years after the signatory. The ratification of UNCAC has significantly led the first amendment of the Organic Act on Counter-Corruption (OACC) of Thailand, which is now the core anti-bribery legislation in Thailand.

This article considers the recent trend of enforcement actions taken against corporations over bribery offences, the rationale for taking enforcement actions against corporations and the expected law developments in Thailand to comply with the requirements of UNCAC and to effectively cope with bribery problems in Thailand.

There was a bribery scandal occurred which related to the governor of Thailand, Gerald Green and Patricia Green, two executives of Film Festival

Management, Inc. (FFM) which produced movies in Los Angeles, California, in USA. The two were indicted by the grand jury on 17 January 2008 on charge of paying bribe to a top executive of Tourism Authority of Thailand which was a foreign public official according to Foreign Corrupt Practices Act 1977 (FCPA) in the period from 2002 to 2007 at the total amount of 900,000 US Dollars for entering into the agreement for setting up Bangkok International Film Festival (BKKIFF) in Bangkok which was valued around 7 million US Dollars.<sup>1</sup> The method used for paying a bribe, in this case, was disclosed by the prosecutor of USA that the accused had several transactions for payments through intermediaries which bank account opened overseas including the account of such executive's daughter. From the procurement budget investigation between 2003 and 2005, the budget of 200 million US Dollars was used per event whilst when the executive changed, the budget used was only 70 million US Dollars per event. Gerald and Patricia Green, have already been sentenced to six months in jail and house detention in 2010 in connection with this case. The governor and her daughter were accused of seeking kickbacks and subject to the investigation of the Supreme Court's Criminal Division for Holders of Political Positions. The governor was sentenced to 66 years imprisonment but reduced to maximum penalty of 50 years imprisonment and her daughter was also imprisoned for 44 years as a supporter. They were also subjected to confiscation of 1.8 Million US Dollars plus legal interests.

According to this case, it is noticeable that the reason Thailand does not have any legal action against Film Festival Management, Inc. (FFM) was due to the company paying a bribe to Thai official.

Another recent bribery scandal in Thailand is the Rolls-Royce case. The British giant jet engine maker has agreed to pay a huge amount of money to settle bribery charges in the UK, US, and Brazil. The indictment covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. On 17 January 2017, the Deferred Prosecution Agreement (DPA), subject to approval by the court, has been reached between UK Serious Fraud Office (SFO) and Rolls-Royce according to these charges, leading the total sum of settlement of 497.25 million Pounds plus interest and the SFO's costs of 13

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<sup>1</sup> 'Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts' (Department of Justice, 14 September 2009) <<https://www.justice.gov/opa/pr/film-executive-and-spouse-found-guilty-paying-bribes-senior-thai-tourism-official-obtain>>, accessed 20 November 2016

million Pounds and other measures for Rolls-Royce to comply over a specific period. If Rolls-Royce does not breach the conditions of the DPA, it will not be prosecuted at the end of the agreed period. Apart from this amount, Rolls-Royce also paid 169 US Dollars in penalties to the US Department of Justice (DOJ) and 25 million to the Brazilian authorities. In the allegation, Rolls-Royce admitted that it paid more than 36 million US Dollars to Thai Airways in the period between 1991 and 2005 and another 11 million US Dollars was paid to the state-owned energy companies of Thailand, PTT Public Company Limited (PTT) and its subsidiary PTT Exploration and Production (PTTEP) between 2003 and 2013 in order to secure related supply contracts for equipment and after-market products and service. It also alleged that part of the paid amount was for individuals who were agents of the State of Thailand and employees. Due to this scandal and pressure from international organization against bribery, the investigation on the bribery case in Thailand is now under proceedings by the National Anti-Corruption Commission, and also the alleged companies are internally investigating themselves.

So far, neither the Thai two state-owned companies nor Rolls-Royce has been charged with any offence in Thailand. However, it leads to a question that whether the investigation procedure on bribery in Thailand is efficient enough or not. This also decreases the creditability of the country in international aspects.

The enactment of the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) has included corporate criminal liability for bribery offences in Article 123/5, paragraph 2 since 12 July 2015. However, Thailand still earned lower score of Corruption Perception Index (CPI) comparing to last year. As indicated in the Corruption Perception Index (CPI) and the above mentioned actual bribery cases that occurred in Thailand, it is noticeable that bribery problems in Thailand is still rising and unstoppable. Also, most of the bribery cases occurred has been committed by high-profit companies. This shows that the recent law of Thailand concerning corporate criminal liability for bribery offences does not achieve its purpose of deterring bribery problems. The author is concerned whether the provision in Thai law, which only has fine as the penalty, would be able to cope with bribery offences committed by high-profit organizations effectively. Therefore, it is necessary to seek other countermeasures to solve bribery problems in Thailand. A comparative study of

Thai laws and foreign laws is one of the tools to seek appropriate countermeasures supporting the development of Thai anti-bribery laws.

### **United Nations Convention against Corruption 2003 (UNCAC)**

The general principle of UNCAC is to determine all state parties to do according to mandatory requirements or obligation to legislate. It is the minimum procedure for the state parties to adopt and use as a scope to set policy, legislate the laws and to assist in international cooperation to eliminate corruption both inside and outside the country, including the transnational crime to legislate domestic laws according to the minimum requirements of UNCAC. Nevertheless, UNCAC specifies optional requirements or obligation to the state parties to consider adopting or shall endeavor to develop domestic laws properly.

The provision concerning the liability of juridical person in UNCAC is expressly specified in Article 26 which the significant point is that each State Party shall adopt legal measures to establish corporate liability which may be criminal, civil or administrative for the bribery offences provided in UNCAC, and ensure that juridical persons held liable for criminal offences concerning bribery are subject to proportionate and dissuasive criminal or non-criminal sanctions. As a result, Thailand shall implement the provisions of UNCAC by enacting or amending domestic laws and regulations to comply with such convention.

A recent amendment to the anti-corruption laws in Thailand as the Organic Act on Counter-Corruption B.E. 2542 (1999) (Amendment No.3) includes corporate criminal liability for bribery offences in the second paragraph of Article 123/5. It provides that if the offender is an employee, agent, affiliate company or any person who represents or acts on behalf of a juridical person and induced the commission of the official's misconduct for the benefit of the juridical person, even if such person had no actual authority to do so, and that juridical person has no internal adequate procedures to prevent the commission of the offence, the juridical person will be guilty of having committed the offence. However, there is no definition of 'internal adequate procedures' which may cause problem of application.

The penalty for a juridical person who commits this offence is a fine not exceeding twice the amount of undue advantages it gained from bribery.<sup>2</sup>

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<sup>2</sup> Uthit Sankosik, 'The purposes of punishment', 21st issue, 19th year, (Prosecutors Journal, July B.E. 2539), p. 271-299

In this respect, the amendment brings Thai anti-bribery laws closer to UK Bribery Act.<sup>3</sup> This is noticeable whether or not such amount of fine is a proportionate and appropriate sanction.

The amendment introduces vicarious liabilities for companies earning benefits from bribes made by “associated person” including their employees, affiliates, and agents to a Thai or foreign official, irrespective of whether or not they had the authority to act on the company’s behalf. The intention on the part of the company for making bribe is not required for the offence. Noticeably, there is a question whether the definition of “associated person” in this amendment is too broad for consideration of criminal offences committed by juridical persons or not.

### **Economic Analysis of Criminal Laws**

Law and Economics or Economic Analysis of Law is a science concerning the significant study of law, theory, interpretation of the law, evaluation of law and the effects of the law on society by applying Neoclassic Economics Methodology as the guideline and tool for analysis, especially Rational Choice Model.<sup>4</sup>

In Law and Economics viewpoint, the law is a tool used for adjusting individual behavior in the society into a desirable way such as not causing harm to society and not causing danger to others' properties and lives, and to prevent undesirable behavior such as crime commitment through legal sanctions both as monetary sanction or nonmonetary sanction.

Significant aim of criminal justice system is deterrence of criminal offences through legal punishments, both monetary and non-monetary punishments. The significant rule in Economics analysis of criminal laws is Optimal Criminal Sanction. To sanction criminal offender properly, it is necessary to understand the offender's characteristics and behavior. This leads to the proper design of sanction structure to induce adjustment of the offender's behavior effectively.

### **The Rational Choice Model**

The Rational Choice Model of Becker has been applied to explain criminal offender's behavior. It is based on the presumption that criminal

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<sup>3</sup> Ibid

<sup>4</sup> Pokpong Chanwith, ‘Economic Analysis of Criminal Laws’ 2nd edition (Thammasat University, The Thailand Research Fund (TRF), February 2011) p.1

offender is an economic animal which has economic rationality or is called "Rational Calculator." The criminal offender will decide to commit the crime when he estimates that the expected benefits he will get from committing the crime (such as the amount of properties to be stolen) are higher than his expected costs for such commitment. The costs of criminal punishment are to be arrested and be legally punished.<sup>5</sup>

The main legal thought to deter criminal offences by the state is to increase the expected costs of criminal offenders when committing crimes such as to increase the scale of legal sanction or to increase the probability of the offenders to be arrested, etc.

### **Monetary sanction vs. Non-monetary sanction**

Monetary sanction such as fine does not cause any cost to the state as it is a transfer of properties from the offender to the state, in contrary, it produces income to public. While non-monetary sanction such as imprisonment, even though it has high efficiency for deterrence of criminal offences; it will utilize a great number of public resources, cause high costs to public for enforcement, especially, the costs for prison construction, management and maintenance, etc.

Besides, considering from the offender's side, imprisonment is a separation of prisoners who are productive labors from the labor market. Prisoners confront with the opportunity costs that are loss of income during imprisonment and less opportunity for career after imprisonment because of loss of working network and decrease of working skill. After imprisonment, human will have lower productivity and human capital and must face with difficulties for seeking a new job. Due to these results, the offender who was punished by imprisonment is likely to recommit the crime. Moreover, it is not only the offender who faces with opportunity cost, but also the society. Society loses productive labors from the labor market resulting decrease of productivities and public income which affect the economics growth rate.

By the above reasons, Law and Economics supports monetary sanction such as fine since it does not cause any cost to the public. Non-monetary sanction such as imprisonment should be only a supporting measure. In case that the offender has more properties than the fine, such offender shall be punished by fine only, but if the offender has not enough properties to pay fine, imprisonment will be added for the lack of payment. Imprisonment should be

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<sup>5</sup> Ibid p.19



applied only for felonies which cause high damages that only fine may not effectively cause deterrent effect.<sup>6</sup>

Monetary profits are the aim of all business entities, and imprisonment cannot be applied to juridical persons which are liable for bribery offences. Fine is then a suitable sanction which is sufficient to deter re-commit of the crime; provided that the amount of fine must be high enough to cause deterrent effect.

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

The concept of corporate criminal liability is widely promoted in various legal systems in different countries, including the United States of America, the United Kingdom and France where the provisions concerning corporate criminal liability are established. Furthermore, the concept of corporate criminal liability in Thailand is influenced by the laws of these countries.

#### **The United States**

In the USA, the notion concerning criminal sanction to juridical persons is provided. Also, types of sanction have been rapidly developed compared to other countries. The USA succeeds in combating bribery problem due to high record of detected bribery cases under the Foreign Corrupt Practices Act 1977 (FCPA). The author opines that the USA is an interesting country to be studied for its law and notion on corporate criminal liability.

The Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) are the authorities to enforce the FCPA. Recently, the enforcement actions under FCPA by SEC and DOJ have increased which reflects the efficiency of these agencies in combating bribery.<sup>7</sup>

One of the well-known cases is JP Morgan bribery scandal. JP Morgan's subsidiary in Asia created a client referral hiring program to bypass normal hiring process and rewarded well-paying, career-building job candidates

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<sup>6</sup> Pokpong Chanwith, 'Basic knowledge on Laws and Economics', Academic essay for seminar, Thailand Court of Justice and Thailand Development Research Institute, 26 January, 2010, p.21-22

<sup>7</sup> Stacey L. McGraw and Stacey E. Rufe, 'The Foreign Corrupt Practices Act: An Overview of the Law and Coverage-Related Issues' (March 2014) <<http://apps.USAnbar.org/litigation/committees/insurance/Sections/janfeb2014-foreign-corrupt-practices-act.html>> accessed 25 November, 2016

referred by client executives and influential government officials who were unqualified for the positions. For the period of about 7 years, JP Morgan hired approximately 100 interns and full-time employees at the request of foreign government officials, enabling the firm to win or retain business resulting in more than 100 million US Dollars in revenues to JP Morgan.

SEC announced on November 17, 2016 that JPMorgan has agreed to pay more than 130 million US Dollars to settle SEC charges. In addition, JPMorgan is also expected to pay 72 million US Dollars to the Justice Department and 61.9 million US Dollars to the Federal Reserve Board of Governors for a total of more than 264 million US Dollars in sanctions resulting from the aforementioned misconduct.

Type of sanction to be inflicted upon juridical persons in the USA is not only fine. Probation is another type of sanction specified in the law of USA. It is a measure to put the offenders under the control of official for a period to raise their consciousness. If the probation is successful, there will be no other punishment according to the court judgment. The conditions of probation are community services, prohibition of business operation and restructuring of business management to prevent reoccurrence of the offence.

### **The United Kingdom**

For the second country, UK is a country which significantly pays attention to bribery problem and can effectively solve it. Furthermore, the UK Bribery Act is considered the strictest law on bribery offences internationally. The enactment of Bribery Act 2010 obviously shows that the UK gives priority to fight against bribery problem.

UK Bribery Act specifies a strict liability to juridical persons incorporated in or carrying on business in the UK. These juridical persons shall be subject to penalties when they fail to prevent bribery to obtain or retain business or for a business advantage in their organization in Section 7. This means if their employees, agents or any other 'associated persons' bribes another person to obtain or retain business or a business opportunity for the commercial organization, such juridical persons shall be liable for the offence of failing to prevent bribery.

In addition, UK Ministry of Justice has published a guide on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs on 30 March 2011. This guide consists of 6 principles that the

juridical persons need to do to meet the required standard of 'adequate procedures'.

In the UK, the punishment for juridical persons is provided in 2 types<sup>8</sup> which are financial sanction and non-financial sanction.

For financial sanction, judiciary shall determine the scale of fine by considering the appeared intention of the offender or in the judiciary's knowledge to compensate the damages occurred to society from such offence. This caused the fine of juridical persons to be higher than the fine of natural persons. Legal entities may be subject to unlimited amount of fine in some cases.

Non-financial sanctions are also provided in the law of UK, for examples, restructuring of business operation, compensation to the injured persons, public service or even dissolution.

### **France**

For the last country, the author chooses to study the law of France. The provisions concerning corporate criminal liability in France are in line with the civil law juristic method. Most of other civil-law countries are influenced by the law of France.

The general principles concerning corporate criminal liabilities are provided in the Penal Code, 1992. A juridical person shall be criminally liable for the offences if such offence is committed by its organ or representative as provided in article 121-2 to 121-7.<sup>9</sup>

The law of France also provides criminal sanctions to be imposed on juridical persons by considering harmful effects to them; this is separated from the sanction applied to natural persons. Article 131-39 empowers the judge to sanction juridical persons by comparing with the sanction which applies to natural persons. The penalties under this Article are dissolution, prohibition to do social or professional activity, placement under juridical supervision, permanent closure, disqualification from public tenders, or prohibition to draw cheques, etc.

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<sup>8</sup> Taweekiat Meenakanist, 'The complete research on corporate liability for involving in transnational crime' p. 34-36

<sup>9</sup> Surasak Likasitwattanakul, 'Corporate Criminal Liability: The study to suggest juristic method for Thailand, a comparative study with UK and France' (Faculty of law Thammasat University Journal, March 2009) p.97

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

In the past, Thai courts applied Article 144 and Article 167 of Thailand Penal Code to sanction the natural person who was a representative or an employee of the juridical person alone. There was no sanction to be imposed on the juridical person who gains benefits from such offence.

Later, as Thailand became a signatory to the UNCAC on 9<sup>th</sup> December, 2003 and ratified the UNCAC on 1<sup>st</sup> March 2011. Therefore, Thailand has legal obligations to comply with its principles, including establishing corporate liability for involving in bribery offences according to Article 26 of UNCAC concerning the liability of legal person.

Before the enactment of the third amendment of Organic Act on Counter-Corruption (OACC) of Thailand in 2015, Thailand has been evaluated and followed up the ratification of the UNCAC in domestic legislative viewpoint. At that time, Thailand had no domestic law concerning corporate criminal liability for bribery offence which resulted in negative impacts in international perspective on cooperation for combating bribery in Thailand. The third amendment of the OACC enacted to comply with UNCAC is in paragraph 2 of Article 123/5. This is similar to the stated purpose of UK Bribery Act and the practices and policies of the DOJ and SEC in enforcing the FCPA.

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

Though Thailand is a civil law country, the notion of common law system had much influence in Thai society since most of the judges graduated from UK or USA. Influence of common law system, therefore, can be generally found in Thailand, especially in the matter of criminal liabilities for juridical persons.

Sometimes, the Supreme Court of Thailand applies the principle of the Civil and Commercial Code to the criminal cases such as the Supreme Court Order No. 787-788/2506 providing that “[...]juridical persons can have its intention which is the mental element of a criminal offence. Juridical persons are able to commit criminal offences which require *mens rea*. Juridical persons shall be sanctioned, only to the extent of applicable sanctions therefor; provided, types of offences, circumstance, authorization of juridical person's representative and the operating purposes of juridical persons should be considered on a case by case basis [...]”.

From the study of the Penal Code of France 1992 in Chapter 3, Article 121-2 provides a general provision for corporate criminal liability that juridical persons are criminally liable for the offences committed on their account by their organs or representatives. This provision supports several court decisions on criminal liabilities of juridical persons for criminal offences committed by their representatives which are in line with the civil law system.

So far, Thailand has not yet enacted a general provision for corporate criminal liability in the Penal Code; however, several Supreme Court decisions sanction juridical persons without a codified law. Noticeably, there is no specific applicable law in Thailand to sanction juridical persons committing criminal offences which cause huge damages to society and economics. The expansion of Supreme Court judgment to sanction juridical persons has been made without supporting codified law causing the interpretation of law depending on the consideration of each judge. Judge-made-law results in no standard or precise legal principle to be applied to each case which conflicts to the juristic method in Thailand.

To solve the problem of lack of a provision on corporate criminal liability, it is necessary to provide a specific corporate criminal liability as a general provision in the Penal Code of Thailand to effectively support the courts' decisions on criminal liabilities of juridical persons and solve Judge-made law problem in Thailand.

### **The definition of the term 'internal adequate procedures'**

In Article 123/5, paragraph 2, there is a defense for juridical persons whom have in place internal adequate procedures provided in this provision which conforms to the UK Bribery Act<sup>10</sup>; however, there is no definition of the term 'internal adequate procedures' provided. The author views that this may cause problem on interpretation of law. Unlike in the UK, Ministry of Justice has published a guideline on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs<sup>11</sup> which consists of 6 principles that juridical person needs to do to meet the required standard of 'adequate

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<sup>10</sup> Tilleke & Gibbins, 'Anti-Corruption Law in Thailand, A Practical Guide for Investors (January 2016) p. 4

<sup>11</sup> United Nations Office on Drugs and Crime, 'United Nations Convention Against Corruption Signature and Ratification Status (2016)

<<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>

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

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

The last paragraph of Article 123/5 expressly provides the definition of ‘associated persons’ whose acts for which the juridical person shall be criminally liable. An ‘associated person’ includes any employee, agent, subsidiary, and any other party acting for the company engaged in corrupt acts even if the offense is committed without the acknowledgement of the authorized director of the company or without management authorization, such company shall also be liable for such offence. The author opines that this may cause too heavy duties to the company and it is quite impracticable for big companies to control the action of their hundreds or thousands employees. In case the employees other than authorized director committed bribery offences for benefits of the juridical person, such employee is still subject to bribery offence for his own action personally. The scope of corporate criminal liability for bribery offences should be limited to the cases where the authorized person commits the offence by himself or knows or should have known the commitment of such offence.

The idea to limit the scope the definition of ‘associated persons’ to include only those who committed the offence with the knowledge of the authorized persons will result in effective bribery preventive measures in each juridical person. Additionally, the author foresees disadvantage for this idea to revise the definition of the word ‘associated persons’. This provision will not constitute a bribery offence against a juridical person in the event where the bribery is committed by any person for benefits of juridical person without such juridical persons’ knowledge; however, the offender himself is subject to bribery offence in Article 144 of the Penal Code or in the first paragraph of Article 123/5 of OACC (Amendment No.3) as well. Therefore, the author opines that the advantages from the amendment the definition of ‘associated persons’ exceed the disadvantages.

### **Sanctions for bribery offences committed for undue advantages of juridical persons**

The sanction to be imposed on a juridical person is provided in Article 123/5, paragraph 2 of the third amendment of OACC as ‘a fine from one time

but not exceeding two times the damages incurred or the benefits gained. However, the author views that it may not proportionate to the level of damages affecting to other people and society, especially for bribery offences committed by high-profit companies such as in case of two executives of Film Festival Management, Inc. (FFM) and in case of Rolls-Royce mentioned above. Sometimes, fine does not cause negative impacts to high-profit juridical persons in the freedom for operating business, freedom for owning properties, or freedom for being honored which are the high-valued assets of juridical persons. This is noticeable whether the scale of fine provided is effective, proportionate and dissuasive sanction according to Article 26 of UNCAC.

The scale of the fine which is actually charged to a juridical person is merely under the discretion of the court. The author opines that the scale of fine to be inflicted upon juridical persons should be higher since increasing the ceiling of fine will also increase the flexibility of the court to exercise its discretion to each case effectively.

Sometimes, bribery is committed for non-monetary benefits such as facilitating payment which is made with the intention of expediting a governmental process, or for getting a business license, etc. In these cases, the benefits that juridical persons gained in return of paying bribe have no monetary value but instead a pass for starting a business for future profits. For example, in the event where the bribe is paid for a business license, the benefit gained by the juridical person is only a piece of paper which has no monetary value.

The calculation of fine to be inflicted upon juridical persons may not be applicable in these cases because the number of damages or benefits gained cannot be calculated in monetary value at the time of the court judgment.

The author opines that the sanction to be inflicted upon juridical persons should be amended to cover this kind of bribery as well. The scale of fine in the rank of fix amount should be established. Also, the ceiling of the fine amount should be high enough to result in deterrence of bribery offences. Specifying narrow scale of fine will reduce the flexibility of the judge to exercise his discretion to each court case. This may result in improper amount of fine which cannot effectively deter bribery offence committed by juridical persons.

Apart from fine, several countries provide other optional procedures to be enforced to juridical persons; for example, in the USA, the law provides other optional procedures for the court to be inflicted upon the juridical persons such as a ban from doing business with governmental agencies, Multilateral Development Banks, or termination of using business license, etc., in France, the court also can sanction juridical persons by order for dissolution, prohibition from doing some business, forfeiture of properties intended to be used for committing the offence, etc.

The author is concerned whether the provision in Thai law, which only has fine as the penalty, would be able to cope with bribery offences committed by high-profit organizations effectively. The author is also opined that other optional measures such as administrative sanctions should be established.

The most significant thing for business units is the opportunity to operate business and getting profit. The administrative sanctions mostly affect the opportunity to operate business of juridical person which should effectively deter bribery offence apart from fine. Also, in some bribery cases which the benefits to be gained by juridical persons are not related to monetary value; fine may not be applicable in such cases. Providing administrative sanctions to highly-valued assets of juridical persons in the anti-bribery provision is then an efficient solution since juridical persons do not want their business to be stopped or ceased.

## **CONCLUSION AND RECOMMENDATIONS**

Nowadays, business operations are mostly done by juridical persons such as partnership, company, or association, etc. The bribery offence committed for the benefits of juridical persons are increasing day by day. This affects economics, society, and politics both domestically and internationally.

Considering the provisions of the United Nations Convention against Corruption 2003 (UNCAC) and the problems on bribery offences found in Thailand, the laws and regulations concerning anti-bribery provisions in Thailand should be amended to effectively solve bribery problems.

### **Legislative viewpoint**

As aforementioned, there has yet to be a general legislation regarding corporate criminal liability in Thailand. The suggestions to improve Thailand law at this point are:



i) There should be an expressed general provision in the Penal Code of Thailand specifying the conditions as to what circumstances that juridical persons shall be criminally liable.

ii) The application of law should be based on civil law-system juristic method. Thai courts should apply only the written laws to the case. Therefore, in the event where juridical persons should be liable for a criminal offence, it should be provided in the written law to prevent judge-made-law problem as the current situation.

iii) The sanctions to be applied to juridical persons should be separately specified from the sanctions applying to natural persons by considering the negative impacts occurred to juridical persons.

iv) The definition of the term 'internal adequate procedures' provided in Article 123/5 paragraph 2 should be clarified, similar to the law of UK where a guideline on compliance with UK Bribery Act on adequate procedures for corporate anti-bribery programs is provided.

v) The definition of 'associated persons' whose acts constitute criminal liability of juridical persons provided in Article 123/5 paragraph 3 should be limited to directors or authorized representatives acting on such juridical persons' behalf. This will secure the liability of juridical persons from having too broad criminal liabilities for other's offences. The scope of corporate criminal liability for bribery offences should be limited to the cases where the authorized person commits the offence by himself or knows or should have known the commitment of such offence.

### **Sanction viewpoint**

From the analysis on corporate criminal liability for bribery offences, the author opines that the amendment of the sanctions provided in Article 123/5 of the third amendment of OACC is needed as the followings:

i) Administrative sanctions such as dissolution, placement under judicial supervision, permanent closure or prohibition to draw cheques should be added because juridical persons are mostly established to do business and to gain profit from such business. If these administrative penalties apply to juridical persons in Thailand, it would effectively deter them from committing bribery offences since they do not want their business to be ceased or stopped.

ii) For bribery offences committed for monetary benefits or undue advantages, the maximum scale of fine should be increased to five times the number of damages occurred or undue advantages gained from such

bribery in order to enhance the judge to exercise his discretion flexibly to each case, especially for the bribery cases committed by high-profit companies. Increasing the ceiling of fine will effectively prevent reoccurrence of bribery problems in the future, compared to lower amount of fine.

iii) Other recommendation for bribery offences committed for non-monetary benefits or undue advantages: the legislation should cover the cases where the number of damages or the benefits gained cannot be calculated in monetary value or have not yet occurred at the time of the court's judgment.

The author hopes that these recommendations should play the significant role in developing the corporate criminal liability for corruption offences in the long run.

## References

### Books

Surasak Likasitwattanukul, Corporate Criminal Liability: The study to suggest juristic method for Thailand, a comparative study with UK and France, Faculty of law Thammasat University Journal, 2009.

### Articles

Foreign Office of the National Anti-Corruption Commission, "Summary of the United Nations Convention Against Corruption 2003 (UNCAC), management issue, 2008.

Pokpong Chanwith, 'Basic knowledge on Laws and Economics', Academic essay for seminar, Thailand Court of Justice and Thailand Development Research Institute, 2010.

Pokpong Chanwith, 'Economic Analysis of Criminal Laws' 2nd edition, Thammasat University, The Thailand Research Fund (TRF), 2011.

Taweekiat Meenakanist, 'The complete research on corporate liability for involving in transnational crime'

Tilleke & Gibbins, 'Anti-Corruption Law in Thailand, A Practical Guide for Investors, 2016.

Uthit Sankosik, 'The purposes of punishment', 21st issue, Prosecutors Journal, 1996.

### Other Materials

Department of Justice, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (2009)  
<<https://www.justice.gov/opa/pr/film-executive-and-spouse-found-guilty-paying-bribes-senior-thai-tourism-official-obtain>>

United Nations Office on Drugs and Crime, 'United Nations Convention Against Corruption Signature and Ratification Status (2016)  
<<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>

Stacey L. McGraw and Stacey E. Rufe, 'The Foreign Corrupt Practices Act: An Overview of the Law and Coverage-Related Issues' (2014)

<<http://apps.USAnbar.org/litigation/committees/insurance/Sections/janfeb2014-foreign-corrupt-practices-act.html>> accessed 25 November, 2016

**THE POSSIBILITY OF ADOPTING OTHER EXCEPTIONS  
TO THE INDEPENDENCE PRINCIPLE IN LETTERS  
OF CREDIT IN THE PHILIPPINES\***

*Mary Jean M. Kuda\*\**

**Abstract**

The purpose of this thesis is to identify other exceptions to the application of documentary letters of credit other than the fraud exception rule as recognised by the courts in the US, England, Australia and Singapore, with special focus on their adaptability in the Philippines. After examining various cases, three other exceptions have emerged namely, unconscionability, illegality and nullity of documents.

The fraud rule is the only recognised exception in a letter of credit transaction. Only the existence of fraud could hinder payment to the beneficiary of a letter of credit. With the payment function of a letter of credit, the beneficiary is assured of payment. Any activity or transaction on the part of the beneficiary, absence of fraud, will not affect the letter of credit transaction. Consequently, beneficiaries are overly protected from non-payment while buyers/applicants are left with limited recourse.

This research examines other exceptions that could further be alleged by the applicant to stop the beneficiary from drawing on the credit. Upon further research, adapting the three other exceptions would promote balance of rights between the applicant and beneficiary as it would compensate for the rigid application of the independence principle. As a result, it had been concluded that the three other asserted exceptions could be adapted in the Philippines following the decisions arrived at or guidelines provided by the courts in the US, England, Australia and Singapore.

**Keywords:** Letter of credit, Independence Principle, Unconscionability, Illegality, Nullity, Fraud

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\* This article is summarized and rearranged from the thesis “The Possibility of Adopting Other Exceptions to the Independence Principle in Letters of Credit in the Philippines” the requirement for the degree of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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**บทคัดย่อ**

วัตถุประสงค์ของบทความนี้คือการศึกษาค้นคว้าข้อบกพร่องอื่นนอกเหนือไปจากหลักการฉ้อฉล (Fraud) ในการชำระราคาตามเลตเตอร์ออฟเครดิต ซึ่งเป็นหลักข้อบกพร่องอันเกิดขึ้นโดยคำพิพากษาของศาลในประเทศสหรัฐอเมริกา ประเทศสหราชอาณาจักร ประเทศออสเตรเลีย และประเทศสิงคโปร์ โดยมุ่งเน้นศึกษาถึงการปรับใช้หลักข้อบกพร่องในการชำระราคาตามเลตเตอร์ออฟเครดิตในประเทศฟิลิปปินส์ จากการค้นคว้าพบหลักข้อบกพร่องอื่นสามประการได้แก่ หลักการเข้าทำสัญญาในพฤติการณ์ที่ไม่สามารถปกป้องผลประโยชน์ของตนเองได้ (Unconscionability) หลักความไม่ชอบด้วยกฎหมาย (Illegality) และหลักความเสียหายของเอกสาร (Nullity of documents)

หลักการฉ้อฉลนั้นเป็นข้อบกพร่องเดียวที่มีในการชำระราคาตามเลตเตอร์ออฟเครดิต กล่าวคือมีเหตุข้อบกพร่องที่ จะปฏิเสธไม่จ่ายเงินแก่ผู้รับประโยชน์ตามเลตเตอร์ออฟเครดิตก็ต่อเมื่อมีการฉ้อฉลเกิดขึ้น พฤติการณ์อื่นใดอันกระทำโดย ผู้รับประโยชน์นั้น หากมิใช่กระทำโดยฉ้อฉล ย่อมไม่กระทบกระเทือนถึงสิทธิการได้รับชำระราคาตามเลตเตอร์ออฟ เครดิต ฉะนั้น ผู้ได้รับประโยชน์ตามเลตเตอร์ออฟเครดิตได้รับความคุ้มครองอย่างสูง

ทว่าผู้ซื้อหรือผู้เปิดเครดิตนั้นถูกจำกัดมิให้โต้แย้งข้ออ้างอันใด การศึกษานี้ได้พิจารณาถึงข้อบกพร่องอื่นซึ่งผู้ซื้อหรือผู้เปิดเครดิตจะสามารถยกขึ้นอ้างเพื่อป้องกันมิให้เกิดการชำระราคาแก่ผู้รับประโยชน์ตามเลตเตอร์ออฟเครดิต ใน การศึกษาพบว่าหากปรับใช้ข้อบกพร่องสามประการดังกล่าวแล้วจะสามารถอำนวยความสะดวกแก่นิติสัมพันธ์ของคู่สัญญา ทั้งสองฝ่ายได้มากกว่าการยึดถือหลักความเป็นอิสระอย่างเคร่งครัดประการเดียวในการชำระราคาตามเลตเตอร์ออฟเครดิต ดังนั้น จะเป็นประโยชน์อย่างยิ่งหากข้อบกพร่องสามประการนี้ได้บังคับใช้ในประเทศฟิลิปปินส์ โดยพิจารณาถึงคำตัดสิน หรือเกณฑ์ที่กำหนดโดยศาลในประเทศสหรัฐอเมริกา ประเทศสหราชอาณาจักร ประเทศออสเตรเลีย และประเทศสิงคโปร์

**คำสำคัญ:** เลตเตอร์ออฟเครดิต, หลักความเป็นอิสระ, หลักการเข้าทำสัญญาที่ไม่สามารถปกป้องผลประโยชน์ของตนเองได้, หลักความไม่ชอบด้วยกฎหมาย, หลักความเสียหายของเอกสาร, หลักการฉ้อฉล

## **Introduction**

A construction company located in Makati, Philippines and a steel supplier situated in the United States entered into a sale and purchase agreement of construction materials. To facilitate the sale, the construction company applied for a letter of credit at X Bank in favor of the supplier. When the shipment reached the Philippines however, the construction materials were of low quality and different from that agreed upon. The construction company filed an injunction case against X Bank to stop paying on the credit. Then X Bank invoked the independence principle<sup>1</sup> whereby it argued that it is not obliged to inspect the materials since the contract of sale is separate and distinct from its credit undertaking. The injunction was denied. Consequently, the steel supplier was able to draw on the credit.

Applying the current laws and principles on letters of credit in the Philippines, the judgment is correct. Absent any fraud in the credit transaction, X Bank could not be stopped from paying the supplier based solely on the quality of the construction materials. Since the supplier presented valid documents on its face, the bank has no reason to withhold payment. However, on a layman's point of view, something is not right. Equity and justice dictate that the steel supplier is not entitled to be paid at all or for the same contract price at least. While the construction company can sue the steel supplier based on the breach of contract, due to distance and jurisdictional issues, filing an injunction order against the issuing bank which is located also in the Philippines is the most convenient remedy to pursue. But with the limited grounds provided, chances are high that injunction orders will not be entertained by the courts due to the security afforded by the independence principle.

The principle of independence requires that the bank pays the seller once the required documents are presented to it regardless of any breach of the underlying contract. Hence, the beneficiary has power to demand that the issuing bank honor the credit obligation after upholding the conditions of the credit.

“Assurance of payment plays an important role when the buyer asks the seller to open a letter of credit, but does the seller have an absolute right to

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<sup>1</sup> Referred to as the autonomy principle in countries such as the US, England, Australia and Singapore and referred to as independence principle in the Philippines hence, will be used interchangeably depending on the country being referred to.

payment?”<sup>2</sup> It seems that the answer to this question is on the negative. There is one traditionally recognised exception to the independence principle and that is fraud exception or otherwise referred to as, the fraud rule. Under this rule, the issuing bank can refuse to pay the credit when fraud is involved.

In the Philippines, the independence principle is adhered to in order to determine whether the issuing bank can refuse payment to the beneficiary or not. In most cases, the court rules on the negative as the independence principle dictate that the beneficiary is entitled to payment without looking beyond the face of the submitted documents and regardless of the accomplishment of the underlying contract. Similarly, the existence of fraud is the only exception to this principle. However, even the application of the fraud rule is limited to fraud that affects the independent purpose or character of the credit and not fraud under the main contract.<sup>3</sup> This rigid and limited application of independence principle has caused harsh results.

Over time, common law courts have asserted other possible scenarios that negate the application of the autonomy principle.

### **Unconscionability Exception**

Unconscionability refers to a “condition in which claim of beneficiary to draw under the credit or bank guarantee is so affected with bad faith that courts decides to prevent bank from payment in absence of fraud or forgery”.<sup>4</sup> Many legal authorities and scholars believe that unconscionability can be used as a defence.<sup>5</sup> In broad sense, however, unconscionability is only possible in the absence of good faith.<sup>6</sup>

Among other common law countries, Singapore is the first that has adopted this exception. Its development has been a case of trial and error. In an earlier case of *“Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan,”*<sup>7</sup>

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<sup>2</sup> Ronald J. Mann, ‘The Role of Letters of Credit in Payment Transactions’ (2000) 98 Mich L Rev

<sup>3</sup> (2004) G.R. No. L-100831

<sup>4</sup> Eliahu Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart 2010) 169

<sup>5</sup> John Lowry, *Commercial Law: Perspective and Practice* Lexis Nexis, p. 175.

<sup>6</sup> *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* (2000) 1 SLR 657

<sup>7</sup> *Dauphin Offshore* (n 80).



the court opined that circumstances of each case determine as to what kind of situation would constitute unconscionability and that there is no pre-determined categorisation.<sup>8</sup> But it was recommended in “*Raymond Construction Pte Ltd v Low Yang Tong*”.<sup>9</sup> that the “idea behind unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensive or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question would not by themselves be unconscionable.” In “*McConnell Dowell Constructors (Aunt) Pty Ltd v Sembcorp Engineers and Constructors Pte. Ltd.*”,<sup>10</sup> the court opined that “all unconscionability cases must involve an element of unfairness.”<sup>11</sup>

Finally, in “*GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Another*”,<sup>12</sup> the court put to rest as to any doubt as to the existence of another exception to the independence principle. In this case, the Plaintiff GHL, a property developer and Defendant Unitrack entered into a building contract. Pursuant to the contract, Unitrack provided GHL with a performance bond equivalent to 10% of the contract price. As the construction failed to finish on time, Unitrack commenced an action for injunction against GHL to withhold payment on the remaining amount of the performance bond. The court found GHL is not allowed to call on the entire amount of the performance bond.

Being a trailblazer on the matter, Singapore has clearly laid out guidelines for the application of unconscionability. In “*Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd and Anor*”,<sup>13</sup> Mr. Justice Pillai laid down the applicable principles distilled from various cases<sup>14</sup> as follows:

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<sup>8</sup> *ibid*

<sup>9</sup> (Suit 1715/95, 11 July 1996, unreported)

<sup>10</sup> (2002) 1 SLR 199

<sup>11</sup> *ibid*

<sup>12</sup> (1999) 4 SLR 604 accessed January 6, 2017

<<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/cases-in-articles/equity-and-trusts/1511-ghl-pte-ltd-v-unitrack-building-construction-pte-ltd-and-another-1999-4-slr-604-1999-sgca-60>>

<sup>13</sup> (2010) SGHC 250 accessed April 21, 2017

<<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/14406-astrata-singapore-pte-ltd-v-tridex-technologies-pte-ltd-and-another-and-other-matters-2010-sghc-250>>

<sup>14</sup> *Bocotra Construction Pte Ltd & Others v Attorney General* [1995] 2 SLR(R) 262 at [278] (“Bocotra”); *GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Another* [1999] 3 SLR® 44 at [51] (“GHL”); *Dauphin Offshore Engineering & Trading Pte*

“(a) Whether there is unconscionability depends on the facts of each case. There is no pre-determined categorisation.

(b) In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors.

(c) The concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.

(d) While in every instance of unconscionability there would be an element of unfairness, the reverse is not necessarily true. Unfairness per se does not constitute unconscionability.

(e) In intervening in a call on an on-demand bond/guarantee, the court is concerned with abusive calls on the bonds.

(f) Mere breaches of contract by the party in question would not by themselves be unconscionable.

(g) It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.”<sup>15</sup>

In England, the first case on unconscionability is “*Elian and Rabbath v Matsas and Matsas*”<sup>16</sup> in which the Court of Appeals ruled that in “system of

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*Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa in Zayed Al Nahyan* [2000] 1 SLR® 117 (“Dauphin”) and *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 2 SLR® 180 (“Eltraco”)

<sup>15</sup> (2010) SGHC 250

<sup>16</sup> [1966] 2 Lloyds Rep 495

performance guarantees, there might be circumstances where the bad faith of a party entitles court to erode principle of independence by granting injunction in order to prevent an irrevocable injustice”.<sup>17</sup> Since the preceding case centered on a performance bond, Lord Jenning further clarified that similar to a letter of credit, courts should strictly enforce the terms of a bank guarantee and its implementation should not be prevented by means of injunction unless circumstances may arise warranting interference by injunction.<sup>18</sup>

In “*TTI Team Telecom International Ltd v Hutchison 3G UK Limited*”<sup>19</sup>, the court held that as a reason for superseding the autonomy principle in performance bonds under English law, unconscionability can be recognised as a defence for payment in the UK.<sup>20</sup>

The above legal arguments notwithstanding, unconscionability has not attained recognition to place it on the same footing as fraud. Further, it seems that the English courts have taken a silent position in terms of its recognition as a defence for payment in international letter of credit transactions just like bank guarantees and performance bonds.<sup>21</sup>

Clearly, there has been no strict guideline on the applicability of the concept of unconscionability in England. Apparently, it is resorted to whenever fraud, duress, or illegality could not be clearly established.

In Australia, the unconscionability exception was given a legislative effect.<sup>22</sup> Unlike in the US where the Uniform Commercial Code expressly acknowledges only fraud and forgery.<sup>23</sup>

### **Illegality Exception**

The Uniform Customs and Practices for Documentary Credits<sup>24</sup> does not provide any guidance as to the formulation of other exception. Consequently, each jurisdiction is open to develop their respective exceptions. Different

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<sup>17</sup> *ibid*

<sup>18</sup> *ibid* 172

<sup>19</sup> [2003] 1 All ER 914

<sup>20</sup> *ibid*

<sup>21</sup> Hamed Alavi, ‘Comparative Study of Unconscionability Exception to the Principle of Autonomy in Law of Letter of Credits’ [2016] 12 AUDJ 102

<sup>22</sup> Australian Consumer Law Act of 2010, s 20 (1) originally Australia Trade Practices Act 1974, s 51 AA, (1) “ A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.”

<sup>23</sup> s 5-109

<sup>24</sup> International Chamber of Commerce’s set of rules on documentary credits which is used for letter of credit transactions worldwide

jurisdictions as may be observed in the proceeding discussion has adopted the illegality exception albeit different reasons or authority.

Further, some academics<sup>25</sup> in this area are in favor of the adoption of the illegality exception to stop payment under the credit. According to Agasha Mugasha, “a letter of credit will not be enforced if its effect is to perpetuate or carry out an illegal scheme or contravene public policy.”<sup>26</sup>

The English courts have recognized the application of the illegality exception as early as 1765 in “*Pillans & Rose v Van Mierop & Hopkins*”.<sup>27</sup> In this case, a certain White drew a bill of exchange on plaintiffs in favor of a certain Clifford. The plaintiffs confirmed the credit on condition that defendants Van Mierop & Hopkins would guarantee said bills. The defendants informed plaintiffs that it refused to pay the bill because White stopped the payment. The court pronounced that “if there be a turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence; but here nothing of that kind appears, nor anything like fraud in the plaintiffs”.<sup>28</sup> While it is more of a contract case, the court further stated that “all letters of credit relate to future credit and does not include an old debt as in this case”.<sup>29</sup> In “*Mahonia Ltd. v J. P. Morgan Chase Bank*”,<sup>30</sup> the court held that a letter of credit resulting from an illegal underlying transaction would also be deemed illegal. In this case, the letter of credit in question was issued by Morgan Chase upon request of Enron Corporation (Enron) pursuant to a facility or a swap agreement. Then Morgan Chase alleged that Enron’s purpose in executing said agreement was to secure a loan without showing it in its accounts hence, illegal under the securities law. The court was confronted with

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<sup>25</sup> See Gerald T McLaughlin ‘Letters of Credit and Illegal Contracts: The Limits of the Independence Principle’ (1989) 49 Ohio St L J 1197; Nelson Enonchong, ‘The Autonomy Principle of Letter of Credit: An Illegality Exception?’ (2006) LMCLQ 404; Roger J Johns and Mark S Blodgett ‘Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independent Principle of Letters of Credit and Bank Guarantees’ (2011) 31 N Ill U L R 297; Michelle Kelly-Louw ‘Illegality as an exception to the autonomy principle of bank demand guarantees’ (2009) 42 Comp & Int’l L J S Afr 339

<sup>26</sup> The Law of Letters of Credit and Bank Guarantees (2003) The Federation Press

<sup>27</sup> [1765] 3 Burr 1664

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> [2003] EWHC 1927

the issue, among others, of whether or not Morgan Chase is entitled to refuse payment on the credit if it has prior knowledge of established or obvious fraud committed by Enron to which the court ruled in the affirmative. Then Mr. Justice Colman concluded that “the letter of credit could not be enforced against the bank on the basis that in certain circumstances the illegality of the underlying contract can taint the letter of credit and thereby render it unenforceable”.<sup>31</sup> However, in this case, it was found that the underlying transaction was not illegal because Enron’s accounting was not in violation of the US security law. After failure to seek summary relief, Plaintiff Mahonia elevated the case to the English Commercial Court for a full trial. Then Justice Cook agreeing Justice Colman’s view concluded that “letters of credit could be tainted by illegality of the underlying contracts and thus unenforceable despite of the autonomy principle”.<sup>32</sup> While the application of the illegality principle has not yet fully established in England, the above cases prove that when the facts and conditions of the case called for its application, the courts do not hesitate to apply it.

In the US, the Revised UCC<sup>33</sup> has not explicitly provided for a separate illegality exception. However, Professor McLaughlin argues that although there is no clear provision about the illegality exception, the courts are still left open to accept an illegality exception because the law does not explicitly dismiss its application.<sup>34</sup> His argument is based on a provision of the UCC which provides that “the statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified in Article 5”.<sup>35</sup>

There are attempts by litigants to allege illegality of the underlying contract as a ground to enjoin payment but US courts have refused to allow it.<sup>36</sup> In “*KMW International v Chase Manhattan Bank NA*”,<sup>37</sup> KMW and Khuzestan Water and Power Authority (Iran) entered into a purchase

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<sup>31</sup> *ibid*

<sup>32</sup> [2003] EWHC 1927

<sup>33</sup> a 5-109

<sup>34</sup> G T McLaughlin, ‘Exploring Boundaries: A Legal and Structural Analysis of the Independence Principle of Letter of Credit Law’ (2002) 119 BLJ, 527-528

<sup>35</sup> a 5-103(b)

<sup>36</sup> *New York Life Assurance Company v Hartford National Bank and Trust Company* (1977) 173 Conn 492; *Prudential Insurance Company of American v Marquette National Bank of Minneapolis* (1976) 419 F Supp 734

<sup>37</sup> *KMW International v Chase Manhattan Bank NA* (1979) 606 F 2d 10

order of telephone poles. Thereafter, an irrevocable credit was issued by Chase Bank upon KMW's request. The political turmoil in Iran went in between the fulfillment of the purchase order. Due to nonperformance, KMW secured a temporary restraining order to enjoin Chase Bank from paying on the ground that any demand made on the credit is "of necessity would be false and fraudulent". While the court acknowledged that "there is nothing in the UCC or the UCP which excuses an issuing bank from paying a letter of credit because of supervening illegality, impossibility, war or insurrection",<sup>38</sup> it nevertheless, denied the injunction against payment on the ground that the political turmoil in Iran is not sufficient reason for Chase Bank not to perform its obligation under the terms of credit.

Further, considering illegality in the underlying contract under fraud or forgery to use it as a defence under UCC has failed on the ground that the absence of any provisions in the UCC for an illegality defence means that illegality in the underlying contract has not been recognised as a separate defence in the US.<sup>39</sup>

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<sup>38</sup> (1979) 606 F 2d 10

<sup>39</sup> *Western Security Bank NA v Superior Court* (1993) 25 Cal Rptr 2d 908

### **Nullity Exception**

The nullity exception applies to circumstances where the beneficiary did not commit fraud, but the documents are null because the same have been either forged or executed without authorization.<sup>40</sup> It pertains to the attributes of the documents the beneficiary submitted to the bank. If established, the bank may refuse payment due to the nullity. A null document is nothing but a scrap of paper.

Singapore is the first common law country to admit the nullity exception which clearly is a deviation from that endorsed by the English courts. The application of the nullity exception has been demonstrated in “*McConnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and Constructors Pte. Ltd.*”<sup>41</sup> In this case, Standard Charter rejected payment in favor of the beneficiary-seller because the seller’s freight forwarder does not exist hence, the airway bills supposedly issued by the latter is a forgery. The court, in upholding the nullity exception, ruled that “the negotiating/confirming bank is not obliged to pay if it has established within the seven-day period that a material document required under the credit is forged and null and void and notice of it is given within that period.”<sup>42</sup>

In England, Lord Diplock in “*United City Merchant (Investment) Ltd v Royal Bank of Canada*”<sup>43</sup> left open the nullity question by saying:

“...I would prefer to leave open the question of the rights of an innocent seller/beneficiary against the confirming bank when a document presented by him is a nullity because unknown to him it was forged by some third party; for that question does not arise in the instant case...”<sup>44</sup>

This open ended question has been addressed in “*Montrod Ltd v Grundkötter Fleischvertriebs GmbH*”<sup>45</sup> where the court, through Mr. Justice Potter, ruled that the English law did not provide whether to treat the nullity exception as a separate ground or as an extension of the fraud exception. In this

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<sup>40</sup> Richard Hooley, ‘Fraud and Letters of Credit: Is there a Nullity Exception?’ (2002) 61 CLJ 279

<sup>41</sup> [2002] 2 SLR 155

<sup>42</sup> [2003] 1 SLR 597, 33

<sup>43</sup> [1983] 1 AC 168

<sup>44</sup> [1983] 1 AC 168

<sup>45</sup> [2002] 1 ALL ER (Comm) 257

case, the parties entered into sale contract of frozen pork secured by a documentary credit issued by a third-party defendant bank. Pursuant to the terms, an inspection certificate must be issued and signed by Montrod before shipment. As the inspection certificate was issued but was not signed by Montrod, the latter refused to reimburse the bank.

It is also believed that a nullity exception would not be beneficial to the certainty of letters of credit because it will require the issuing bank to look beyond the face of the documents which it lacks skills to do.<sup>46</sup> However, the nullity exception may not be totally rejected in English law as to do so may encourage circulation of forged documents.<sup>47</sup>

Presently, the English courts have yet to decide a case applying the nullity exception.

### **Adoptability in the Philippines**

Considering the foregoing case discussions, it only proves that when the terms are drawn properly and conditions are met, other exceptions to the autonomy principle maybe admitted without destroying the integrity of letters of credit. The courts may adopt these other asserted exceptions to mitigate the harshness of the application of the independence principle.

In applying the guidelines, the courts have to be cautious keeping in mind the decisions in the various cases decided by the Singapore courts when it comes to the application of the unconscionability and nullity exceptions and the English courts for the illegality exception. These guidelines are helpful in navigating through the complexities of adopting other exceptions to the independence principle.

To balance the rights of all parties in a letter of credit transaction and to adapt to the changing business landscape, it is therefore recommended to:

#### **1. Make it a part of the domestic law**

The Philippine Code of Commerce has been rendered obsolete by the modern commercial transactions. The provisions on letters of credit do not even address the issues brought about by the changing business landscape. Further, the UCP is silent as to adapting exceptions to the independence

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<sup>46</sup> Mark Williams, 'Documentary Credits and Fraud: English and Chinese Law Compared' *Journal of Business Law* 155 (2004)

<sup>47</sup> Richard Hooley, "Fraud and Letters of Credit: Is there a Nullity Exception?" 61 (2002)  
Cambridge LJ 181



principle. In fact, the issue on whether or not to allow exceptions is left to the discretion of each country. It is therefore, sound and practical to amend the Code of Commerce in order to make the exceptions a part of the domestic law to the following effect:

"If an applicant claims that a required document is null or forged or materially fraudulent or transaction is unconscionable or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons."

A bill may be passed in Congress which seeks to amend or revise the provisions on letters of credit as contained in the Code of Commerce. The proposed amendment must be approved by both the House of Representatives and the Senate along with the signature of the President. Afterwards, the bill can become a law known as a Republic Act.

## **2. Recognizing the vital function of the banks**

In a letter of credit transaction, the banks receive the documents required under the credit regardless of the fact that one or some of the documents are forged or issued without proper authorization. In doing so, banks encourage the proliferation of forged or unauthorized documents within the commercial arena. This practice runs counter with the fiduciary duty of banks which is to observe the highest degree of care and meticulousness.

As banks play an important role in the letter of credit system, their role must not be limited to checking the documents presented before it. While it is not practical to make the bank responsible to check whether the goods are shipped in accordance with what has been agreed upon, it is also not a sound practice for the banks to take the documents presented before it on its face value alone. Banks should be able to develop a system or way on how to make sure that the documents presented before them are genuine or properly secured.

### **3. Take judicial notice of the cases decided by the English and Singaporean Courts**

While it may take a while to amend the law, the Philippine Supreme Court can take judicial notice of the ruling of the English courts pertaining to illegality exception and the Singapore courts pertaining to the unconscionability and nullity exceptions. To summarize, the conditions that would permit unconscionability exception are: a) the facts of the case must be carefully considered, and b) existing contractual agreements freely entered into by the parties must be respected. Whereas for illegality exception, the conditions are: a) the illegal facts must be clearly established, and b) the illegality must be known to the other party.

The Philippine Courts can add other conditions as it may deem fit based on the local landscape. The reason being is that some conditions set by other foreign jurisdictions may not be suitable when applied domestically. Like for instance, one of the approved conditions set by English courts under the illegality exception is that the illegality must be known to the other party. The Philippine courts could further clarify it by defining at what point knowledge of the beneficiary would make him not entitle to payment. Will it be knowledge at the time of procuring the required documents or knowledge at the time of submission of the required documents to the bank? Further, the Philippine courts may use such guidelines arrived at by the foreign courts as a model in order to formulate and develop other exceptions.

## Refereces

### Statutes

Uniform Customs and Practices for Documentary Credits (UCP 600)

US Uniform Commercial Code of 2007

Australian Consumer Law Act of 2010

### Books

Ellinger, Eliahu Peter and Dora Neo. *The Law and Practice of Documentary Letters of Credit*  
(Hart 2010) 169

### Journals

Hooley, Richard. "Fraud and Letters of Credit: Is there a Nullity Exception?" 61  
(2002) Cambridge LJ 181

Mann, Ronald J., and Clayton P. Gillette. "The Role of Letters of Credit in  
Payment

Transactions." *Michigan Law Review* 98, no. 8 (2000): 2494.

McLaughlin, Gerald. "Exploring Boundaries: A Legal and Structural Analysis of  
the Independence Principle of Letter of Credit Law." *Banking Law Journal* 119,  
(2002): 527-528.

Williams , Mark. "Documentary Credits and Fraud: English and Chinese Law  
Compared" *Journal of Business Law* 155 (2004)

### Online

Alavi, Hamed. "Comparative Study of Unconscionability Exception to the  
Principle of Autonomy in Law of Letter of Credits." *Acta Universitatis Danubius*  
*12*, no. 2 (2016): 107, accessed December 12, 2016,  
<http://journals.univ-danubius.ro/index.php/juridica/article/view/3537/3440>

## LEGAL ISSUES ON CREDITORS' RIGHTS AND PROTECTIONS IN SINGLE MEMBER COMPANIES\*

*Natcha Rattaphan\*\**

### **Abstract**

Single member company is a type of business organisations which can be established by a sole member who shall have a limited liability not exceeding the contribution. Since single member company has a separate legal entity, it shall have its own rights and liabilities. This hybrid characteristic is problematic for creditors who engage in business transactions with single member companies because they fear that their rights will be affected. Since nowadays, there is an attempt to recognise the concept of single member company in Thai jurisdiction, the key to the success of the new legislation is that the law must balance between single member companies' benefit and creditors' rights for the highest mutual interest.

**Keywords:** Single Member Companies, One-man Companies, Creditors' Rights and Protections

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\* This article is summarised and rearranged from the thesis "Legal Issues on Creditors' Rights And Protections in Single Member Companies", The Master of Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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**บทคัดย่อ**

บริษัทจำกัดคนเดีวเป็นองค์กรธุรกิจที่สามารถจัดตั้งได้โดยบุคคลเพียงคนเดียวซึ่งมีความรับผิดชอบจำกัดไม่เกินจำนวนทรัพย์สินที่นำมาลงทุน บริษัทจำกัดคนเดีวมีสิทธิและความรับผิดชอบของตนเองเนื่องจากมีสภาพบุคคลแตกต่างหากจากผู้ก่อตั้ง คุณลักษณะพิเศษนี้ก่อให้เกิดปัญหาต่อเจ้าหน้าที่ของบริษัทว่าสิทธิของเจ้าหน้าที่นั้นอาจถูกกระทบกระเทือน ปัจจุบันหน่วยงานที่เกี่ยวข้องอยู่ในระหว่างดำเนินการร่างกฎหมายเพื่อรองรับการจัดตั้งบริษัทจำกัดคนเดีวในประเทศไทย การคำนึงถึงประโยชน์ของบริษัทจำกัดคนเดีวควบคู่ไปกับสิทธิของเจ้าหน้าที่จึงเป็นสิ่งสำคัญที่จะทำให้กฎหมายฉบับนี้บรรลุวัตถุประสงค์

**คำสำคัญ:** บริษัทจำกัดคนเดีว, นิติบุคคลคนเดีว, สิทธิและการคุ้มครองเจ้าหน้าที่

## Introduction

Businesses grow rapidly in the digitalisation age because of technology. The trend of the business model has changed and there are many small enterprises (SMEs) operated by a sole owner. Various small enterprises can be totally managed by a sole owner. Statistics issued by the Thai government show that the majority of enterprises incorporated in the country are small or medium-sized.<sup>1</sup> There are about 200,000 incorporated companies where their majority shares, i.e. more than 50 percent are held by just one person.<sup>2</sup> Therefore, there should be a simplified corporate form that is more appropriate for small enterprises.<sup>3</sup> However, the current Thai law i.e. the Civil and Commercial Code (CCC) is still inconsistent with this new trend of business. The most significant problem is that at least three shareholders are required to incorporate a private limited company and the process of establishing a company is time-consuming and costly. After the incorporation, there are many obligations with which the company must comply under this law.

In fact, single member company is not a new concept. Many sole proprietors who want to limit their liability in order to reduce their risk in operating the business incorporate a company by providing a tiny number of shares for nominees to meet the minimum requirement of the number of shareholders. These nominees are usually people who have a close relationship with the proprietor. This kind of enterprise could be called a “single member company de facto” which is deemed to be a legitimate business organisation. Consequently, various jurisdictions can find no reason to stipulate the minimum number of shareholders. The requirement of a minimum number of

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<sup>1</sup> The Office of Small and Medium Enterprise Promotion (OSMEP), ‘the Strategy Plan of The Office of Small and Medium Enterprise Promotion no.3 B.E. 2555 – 2559’ (2011) Bor-1 (สำนักงานส่งเสริมวิสาหกิจขนาดกลางและขนาดย่อม (สสว.), “แผนส่งเสริมวิสาหกิจขนาดกลางและขนาดย่อม ฉบับที่ 3 พ.ศ. 2555-2559” (2554) บ-1)

<sup>2</sup> Noppadon Pakornnimiddee, *the Advantages and Disadvantages of the Formation of a One-Man Company in Thailand* (School of Law, Sripatum University 2016) 1 (นพดล ปกรณ์นิมิตติ, รายงานการวิจัยเรื่องข้อดีและข้อเสียการจัดตั้งบริษัทจำกัดที่มีผู้ถือหุ้นคนเดียวในประเทศไทย (คณะนิติศาสตร์ มหาวิทยาลัยศรีปทุม 2559) 1)

<sup>3</sup> Legal and Development Research Institute of Chulalongkorn University, *the Research on Recognition of Single Member Companies, Final Report* (11<sup>th</sup> September, 2015) 48 (ศูนย์วิจัยกฎหมายและการพัฒนา จุฬาลงกรณ์มหาวิทยาลัย, โครงการศึกษากฎหมายเพื่อรองรับการจัดตั้งนิติบุคคลโดยบุคคลคนเดียว รายงานการศึกษาลงฉบับสมบูรณ์ (11 กันยายน 2558) 48)

shareholders has become less significant due to the development of the concept related to company law. Thailand is no exception and an attempt is currently being made to legislate a new law to adopt the concept of a single member company in Thai jurisdiction as appeared in the Draft Law on Single Member Companies Act B.E...., which was approved by the Council of Ministers on the 24<sup>th</sup> January, 2017.

The consequence of incorporating companies is that the legal entity of the company will be separated from the sole member. There are several matters to be considered due to the adoption of this concept from a legal perspective. Based on the hybrid characteristic of single member companies i.e. while they are similar to those of sole proprietorships, they consist of a single person who is able to limit his liability to the extent of his personal funds like members of multi-member companies. This characteristic is problematic for creditors who engage in business transactions with single member companies because they fear that their rights will be affected. Creditors may have to bear a higher level of risk. Since there is only one member who has the full power to control the company, it is more likely to fail due to the lack of efficient management and expertise. Moreover, since company is funded by a sole person, it is exposed to the risk that it may be undercapitalised or unable to access loans from banks or financial institutions for its business activities due to less creditability. As a result, the company may not have sufficient funds to repay its debts. The other controversial aspect of single member companies is trust. Since it is less formal, a single person may easily incorporate a single member company in bad faith as a corporate veil for the purpose of evading liability against creditors. A sole member may engage in unfair or illegal conduct without being controlled by other shareholders.<sup>4</sup> Thus, it could be said that the special characteristic of a single member company could expose creditors who engage in business transactions with it to a greater risk.

Based on the realisation of this indisputable problem, the appropriate creditors' rights and protections are also undeniable to effectively recognise a single member company. The focus of this thesis will be the legal issues related to the balance between the benefits of single member companies and creditors' rights and protections for the best mutual interest. Some traditional provisions may be exempted in order to facilitate the management of single member

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<sup>4</sup> *ibid* 37

companies due to their unique characteristic, while some specific provisions are required to provide creditors with sufficient protection.

### **Creditors' Rights and Protections in Single Member Companies under Thai and UK Law**

From the study on Thai Draft Law on Single Member Companies Act B.E.... (Draft law), the Civil and Commercial Code (CCC), Thai Bankruptcy Act B.E. 2483 and the law under UK jurisdiction namely: Companies Act 2006 (CA), Insolvency Act 1986 (IA) and Company Directors Disqualification Act 1986 (CDDA), there are several relevant interesting legal issues which can be categorised as follows:

#### **1. Members' Qualifications**

Similar to other types of business organisations, the UK law simply imposes the same regulations regarding the existence and management of other types of business organisation to single member companies so long as they are not in conflict with the characteristic of having a sole member.<sup>5</sup> This issue is very distinguished from Thai draft law where there are several conditions to set up a single member company. The member must be a Thai natural person who has full competence and has not been convicted bankruptcy, fraud or found guilty of any criminal offences related to fraud. There are also several grounds of winding up of single member companies under Thai draft law, i.e. the death, bankruptcy or incapacity of the member. Moreover, each person shall set up only one single member company in order to prevent the undercapitalisation problem.<sup>6</sup> These qualifications obviously reflect the concern regarding creditors' rights and protections in single member companies. However, since single member companies are normally closely-held companies and their conduct usually only affects a few relevant parties, some requirements may be unnecessary for incorporation of a single member company.

#### **2. Change of Members**

Further from the above mentioned issue, the existence of single member companies under UK law is not relied on sole members. Their shares are transferable in accordance with the company's Articles.<sup>7</sup> In the event of the death of the sole member, the heir shall be responsible for both rights and

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<sup>5</sup> CA s. 38

<sup>6</sup> The Draft Law on Single Member Companies Act B.E...., s. 3, 9, 11 and s. 38(1)-(2)

<sup>7</sup> CA s. 544(1)



duties in accordance with the law of succession.<sup>8</sup> Besides, single member companies can only be transformed into multi-member companies by being entered in the register of company members.<sup>9</sup>

Different from UK law, a company under Thai draft law can restructure its investment by seeking other investors to meet the minimum requirement of the incorporation of limited companies (three shareholders under the current CCC). This provision imposes the duty on the company to notify the creditors before the transformation and creditors are entitled to object to it.<sup>10</sup> Nevertheless, since there is no explicit provision which allows the voluntary transfer of the company to a new investor, I may assume that single member companies under this draft cannot be transferred to a new owner. On the one hand, this prohibition could obstruct the growth of the business. However, it is one of the mechanisms which provides protection to creditors because there is a close bond between the sole member and his single member company. The qualifications of the members are an important factor in single member companies. The change of member could increase the risk of inability to enforce the repayment of debt by creditors. Finally, in the event that the heir intends to keep operating the business in the event of the death of the member, the company could devolve to the heir in accordance with the CCC.<sup>11</sup> It could be called the transfer of company by law. On the one hand, allowing the heir to continue the business will enhance its consistency. However, similar to the voluntary transfer, this change also affects the creditors' position. Therefore, from my view, the transfer of company by law should not be allowed.

### **3. Directors' Qualifications**

Directors are the persons who have the duty to manage the company's day-to-day business; therefore, their conduct does not only affect the members, but also affects other relevant persons. Under the UK law, there are some requirements on directors' qualifications.<sup>12</sup> Moreover, the court may disqualify a person from holding the office of director on several grounds; for instance, on conviction for an indictable offence, persistent breach of companies

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<sup>8</sup> Legal and Development Research Institute of Chulalongkorn University (n 3) 143

<sup>9</sup> CA s. 123

<sup>10</sup> The Draft Law on Single Member Companies Act B.E...., s. 33

<sup>11</sup> The Draft Law on Single Member Companies Act B.E...., s. 38(1)

<sup>12</sup> CA s. 155, 157

legislation, fraudulent trading and unfitness management.<sup>13</sup> Under Thai draft law, parallel to the members' qualifications, the directors must have full competence and also must not have been convicted or found guilty of certain offences related to fraud.<sup>14</sup> Therefore, we may conclude that both jurisdictions impose several similar directors' qualifications and prohibit the disqualified persons to hold the office of director.

#### **4. Directors' Specific Duties**

Following from the above issue, since directors' conduct does not only affect members, it also affects relevant parties. UK law explicitly emphasises directors' duty to consider the interest of creditors which does not exist in Thai jurisdiction.<sup>15</sup> Based on this provision, the other specific law that imposes directors' duties to creditors is the insolvency law. Directors, including other officers, may be penalised for malpractice in the course of winding up. Any person who operates the business to defraud the creditors shall be liable to make a contribution to the company and also be charged with a criminal offence.<sup>16</sup> Besides, the directors could be liable for making a contribution to the company for wrongful trading in the event that there is no prospect of avoiding insolvent liquidation.<sup>17</sup> The interesting issue is that whether or not there is similar mechanism under Thai jurisdiction. From the study, Thai law fails to deal with several circumstances which are detrimental to creditors' rights.

Directors are not liable for any damage occurred due to risky management. Thai law does not impose liability on directors who conduct business activities after they realised that the company could not avoid insolvent liquidation. Even though the directors know the said fact, they have no duty to inform creditors of the company's poor financial status. Discovering this is deemed to be the creditors' responsibility.<sup>18</sup> Therefore, there is an academic opinion that Thai law should recognise these principles in order to promote creditors' rights and protections.<sup>19</sup>

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<sup>13</sup> CDDA

<sup>14</sup> The Draft Law on Single Member Companies Act B.E...., s. 17

<sup>15</sup> CA s. 172

<sup>16</sup> IA s. 213; CA s. 993

<sup>17</sup> IA s. 214

<sup>18</sup> *ibid* 102

<sup>19</sup> *ibid* (3)-(4)

### **5. Disregard of Corporate Entity**

Under UK jurisdiction, there have been some cases of single member companies to which the concept of piercing the corporate veil was applied; for example, the company was initially established for fraudulent purposes, was undercapitalised or the assets had been disposed of so that nothing was left to repay the debt to creditors.<sup>20</sup> In these cases, the court shall use its discretion to decide whether to pierce the corporate veil in order to make members personally liable for company's debt. Although this principle is not specifically imposed on a single member company, there is more potential that the doctrine of piercing the corporate veil shall be applied to a single member company due to the characteristic that it is absolutely controlled by a sole person who could easily be found guilty of misconduct. Under Thai jurisdiction, this principle specifically appears only in s. 44 of the Consumer Protection Act, in which the court may order shareholders and other controllers such as directors to be liable for the company's debt towards consumers. However, no general rule exists in Thai law. Therefore, this concept seems to have been applied less explicitly compared to the UK jurisdiction.

### **6. Share Capital**

The member of a single member company in both jurisdictions shall generally have the duty to pay a contribution to the company. Under UK law, the member may contribute either money or something that is worth money to the company.<sup>21</sup> This means that labour can be appraised and contributed to the company's assets. Under the current Thai draft law, members may contribute capital in the form of money or assets, but not in the form of labour.<sup>22</sup> This restriction is one of the provisions that reflects the concern about creditor protection. It would be difficult to appraise the value of labour; therefore, if a contribution by labour was allowed, it is likely that single member companies would be undercapitalised in order to limit the liability of the member. In my opinion, this regulation however seems to be inappropriate. Single member companies are designed to be suitable for small traders. In fact, it is common in today's business that these traders may not have any valuable asset to contribute to the company; however, they have a specialised skill or know-how

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<sup>20</sup> Legal and Development Research Institute of Chulalongkorn University (n 3) 30

<sup>21</sup> CA s. 582(1)

<sup>22</sup> The Draft Law on Single Member Companies Act B.E...., s. 3

to operate a business and earn an income. Therefore, they should be allowed to contribute by their labour.

### **7. Capital Maintenance**

Since company's capital is deemed a security for creditors, i.e. in the event of default, creditors will be able to impose the repayment of debt from the company's capital contributed by members. Generally speaking, both jurisdictions impose similar mechanisms on this issue as follows. First, the minimum capital requirement some jurisdictions specify the minimum capital requirement in single member companies based on concern that they could be undercapitalised. However, there is no such requirement for private limited companies in both UK and Thai law, since the appropriate amount of capital depends on each business. Thus, it is unreasonable for the law to specify a fixed amount of capital. Second, the provision on reduction of capital is another approach to maintain the company's capital. Under UK law, companies must comply with several procedures before the reduction of capital; for instance, solvency statement made by directors, the confirmation by the court and creditors' right of objection.<sup>23</sup> Similar to UK law, the Thai draft law also imposes several procedures on the reduction of capital which reflect the same concern on creditors' rights.<sup>24</sup> Finally, the regulation on the distribution of dividend is another approach to maintain the total assets of the company which will be advantageous to the amount claimable by creditors. Both jurisdictions impose several procedures on this issue. Creditors are entitled to claim for compensation for unlawful distribution. Members and relevant officers shall be liable to make contribution in such event.<sup>25</sup>

### **8. Mandatory Disclosure**

Due to the characteristic that a single member company consists of a sole member who has limited liability and this member has absolute power to control the business, this member could easily make decisions by himself that affects the rights of other relevant parties. Therefore, the mandatory disclosure of information and documents is considered to be one of the most significant approaches to protect creditors' rights. First, there is a requirement to register

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<sup>23</sup> CA s. 641-653

<sup>24</sup> The Draft Law on Single Member Companies Act B.E...., s. 32

<sup>25</sup> CA Part 23; The Draft Law on Single Member Companies Act B.E...., s. 28-30 and 52

important information of single member companies in both jurisdictions.<sup>26</sup> Besides, the mandatory disclosure of a company's accounts and reports is another important mechanism to secure creditors' rights and protections. These documents must be prepared and examined accurately as stipulated by the law. Therefore, third parties will be able to access these documents to determine the financial status of the company and be able to estimate the risk of engaging in business transactions with it. The study found that both jurisdictions have imposed several duties on the accounts and reports.<sup>27</sup>

Nevertheless, the interesting point is that under UK law, small companies shall be exempted from some duties such as preparing a strategic report, directors' report and examination of the accounts by an auditor in order to reduce the difficulty in operating a small business. If single member companies are qualified as small companies, they will be exempted from several duties. From my point of view, this kind of provisions should be introduced into Thai draft law in order to impose appropriate duties considering the risk that could be created by each company.

Written document is an important evidence to express the members' internal intentions to the third persons. Since there is no general meeting in single member companies, a record of any decisions made by the sole member should be provided to the company.<sup>28</sup> Besides, apart from the ordinary course of business, the contract between the company and its sole member shall be made in writing.<sup>29</sup> These are the only provisions under UK law which imposes duties specifically on single member companies. Notwithstanding, there is no similar provision existed in the draft law. Therefore, I suggest that this provision is appropriate to introduce into Thai draft law in order to enhance creditors' rights and protections in single member companies.<sup>30</sup>

### **9. Adjustment of Transactions**

Some vulnerable transactions engaged in by the company could affect the amount claimable by creditors. There are mechanisms to adjust the company's remaining assets in order to maximise the value of these

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<sup>26</sup> CA s. 123; The Draft Law on Single Member Companies Act B.E...., s. 5-7, 12-13, 48-49

<sup>27</sup> CA Part 15; The Draft Law on Single Member Companies Act B.E...., s. 23-24

<sup>28</sup> CA s. 357

<sup>29</sup> CA s. 231

<sup>30</sup> Legal and Development Research Institute of Chulalongkorn University 124 (n 3) 134-135

transactions. Different from imposing liability on relevant parties, these provisions aim to provide remedies for damage, i.e. to restore the position of the company or cancel vulnerable transactions. Both jurisdictions provide mechanisms to restore the position of the company or cancel the transactions at an undervalue or giving preferences to particular creditors.<sup>31</sup> Even though there are some different procedures and requirements, we will find that Thai law has provided remedies similar to UK law.

### **10. Restriction on Re-use of Company Names**

The re-use of the names of companies that underwent insolvent liquidation by the directors or shadow directors is also prohibited for a certain period under UK law. This provision reflects the concern regarding a situation in which the director allows the insolvent company to be liquidated for the purpose of evading his obligation and then establishes a new company and operates a similar business with similar resources, which is called the phoenix syndrome.<sup>32</sup> Single member companies tend to be small businesses which are inclined to have a high potential of failure because of a lack of expertise. Therefore, this mechanism could play an important role in preventing the incorporation of a new company in order to evade the debt owed to creditors.

### **Conclusions**

From the study, I found several issues which are relevant to creditors' rights and protections in single member companies. Some of mechanisms under Thai jurisdiction are similar to UK law; for instance, the provisions on capital maintenance and adjustment of transactions. However, due to the idea that the existence of single member companies is relied on their sole members, Thai draft law imposes several restrictions on members' qualifications which may cause difficulty in business. Moreover, there are some mechanisms in UK law which could be introduced into the Thai counterpart in order to promote the creditors' rights and protections in single member companies; namely, the provisions on the decisions made by the sole members and the contract between the company and sole member shall be made in writing, the duties regarding the preparation of company's accounts and reports should be determined by the size of single member companies, directors should have

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<sup>31</sup> IA s. 238-241 and 423-425; CCC s. 237; Thai Bankruptcy Act B.E. 2483, s. 113-115 and 90/40-90/41

<sup>32</sup> IA s. 216

specific duties to be concerned with the interest of creditors in the event of insolvency, and restriction on re-use of the insolvent company names.

## References

นพดล ปกรณ์นิมิตดี, รายงานการวิจัยเรื่องข้อดีและข้อเสียการจัดตั้งบริษัทจำกัดที่มีผู้ถือหุ้นคนเดียวในประเทศไทย (คณะนิติศาสตร์ มหาวิทยาลัยศรีปทุม 2559)

(Noppadon Pakornnimiddee, *the Advantages and Disadvantages of the Formation of a One-Man Company in Thailand* (School of Law, Sripatum University 2016))

ศูนย์วิจัยกฎหมายและการพัฒนา จุฬาลงกรณ์มหาวิทยาลัย, โครงการศึกษากฎหมายเพื่อรองรับการจัดตั้งนิติบุคคลโดยบุคคลคนเดียว รายงานการศึกษาลับสมบูรณ (11 กันยายน 2558)

(Legal and Development Research Institute of Chulalongkorn University, *the Research on Recognition of Single Member Companies, Final Report* (11 September 2015))



**PROOF OF USE OF TRADEMARK UNDER SECTION 7  
OF TRADEMARK ACT CONCERNING ACQUIRED  
DISTINCTIVENESS BY COMPARATIVE APPROACHES  
BETWEEN THAI AND FOREIGN TRADEMARK LAWS\***

*Nedprawee Rodson\*\**

**Abstract**

A trademark is considered a vital aspect of any business as it is used for identifying the goods or services so that consumers are able to recognize such goods or services as originating from a particular source through the trademark. Everything can be used as a trademark, such as letters, numerals, phrases, colors, pictures, symbols, etc., but not everything can be registered as a trademark. One of the most essential requirements for registration of a trademark is distinctiveness. Distinctiveness is important in the eye of trademark law because a distinctive trademark is the tool which creates a connection between the goods or services covered under that trademark with the consumers' perception. According to trademark laws, if a trademark is inherently distinctive, then it is registrable. However, an inherently non-distinctive trademark may also be registrable if such trademark satisfies the requirements of distinctiveness through use, i.e. acquired distinctiveness.

Similar to other trademark systems, Thailand has also adopted the concept of acquired distinctiveness. However, there are certain problems in the Thai laws and regulations regarding proof of use in order to achieve acquired distinctiveness, i.e. problems with the requirements for the proof of use, problems with the evidence to prove use, etc. which obstruct the chances of trademark registrability on this ground.

This Article will focus on the general concept of distinctiveness and the requirements for proving acquired distinctiveness through use of a trademark by using comparative approaches between Thai and foreign laws such as The United States of America, Japan and the Republic of Singapore whose trademark laws, especially regarding proof of use for acquired distinctiveness, are quite comprehensive. This study will be based on the

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\* This article is summarized and arranged from the thesis "Proof of use of trademark under section 7 of trademark act concerning acquired distinctiveness by comparative approaches between Thai and foreign trademark laws" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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requirements under Section 7 paragraph three of Thai Trademark Act B.E. 2534 (1991) as amended by Act (No.2) B.E. 2543 (as amended by Act (No.3) B.E. 2559) and Ministerial Regulations for proof of acquired distinctiveness together with judgements of the Central Intellectual Property & International Trade Court and the Supreme Court by comparing the laws, practices from the examination guidelines and the judgements from foreign countries. In this way, the Author will discuss the alternatives for improving the laws and practices for the proof of use for acquired distinctiveness with the expectation that they could increase the chances of trademark registration of inherently non-distinctive trademarks in Thailand.

**Keywords:** Trademark, Distinctiveness, Acquired Distinctiveness, Proof of Use

### บทคัดย่อ

เครื่องหมายการค้านั้นเปรียบเสมือนเป็นส่วนหนึ่งของธุรกิจ เนื่องจากว่าเครื่องหมายการค้าได้ถูกนำไปใช้เพื่อเป็นชื่อเรียกสินค้าหรือบริการ ซึ่งจะทำให้ผู้บริโภคสามารถที่จะจดจำสินค้าหรือบริการนั้น ๆ ได้ จากเครื่องหมายการค้า สิ่งที่จะเป็นเครื่องหมายการค้าได้อาจเกิดจากคิดประดิษฐ์ขึ้นจาก ตัวอักษร ตัวเลข วลี สี รูปภาพ และอื่น ๆ อีกมากมาย แต่ไม่ว่าสิ่งทีคิดประดิษฐ์ขึ้นมานั้นจะสามารถรับจดทะเบียนเพื่อเป็นให้ได้รับการคุ้มครองที่เป็นไปตามเงื่อนไขของกฎหมายได้ ตามหลักกฎหมาย คุณสมบัติประการหนึ่งของกาที่เครื่องหมายการค้านั้นจะได้รับการจดทะเบียน คือ เครื่องหมายดังกล่าวจะต้องมีลักษณะบ่งเฉพาะ ซึ่งลักษณะบ่งเฉพาะนี้มีความสำคัญเป็นอย่างมากในแง่ของกฎหมายเครื่องหมายการค้า เนื่องจากว่าลักษณะบ่งเฉพาะเป็นเครื่องมือที่สร้างความเชื่อมโยงกันระหว่างการรับรู้ของผู้บริโภคกับสินค้าหรือบริการภายใต้เครื่องหมายการค้า นั้น ๆ ภายใต้บทบัญญัติกฎหมายเครื่องหมายการค้า เครื่องหมายการค้าที่มีลักษณะบ่งเฉพาะด้วยตัวเองจะได้รับจดทะเบียนเครื่องหมายการค้า แต่สำหรับเครื่องหมายการค้าที่ไม่ได้มีลักษณะบ่งเฉพาะในตัวเอง การได้รับจดทะเบียนเครื่องหมายการค้าจะขึ้นอยู่กับการใช้เครื่องหมายการค้าภายใต้ข้อกำหนดเงื่อนไข และคุณสมบัติที่ใช้เครื่องหมายการค้า และถ้าหากเจ้าของเครื่องหมายการค้าสามารถพิสูจน์ความมีลักษณะบ่งเฉพาะของเครื่องหมายการค้า นั้น โดยการใช้ได้แล้ว เครื่องหมายที่ไม่ถือว่ามีความบ่งเฉพาะ ก็จะได้รับการจดทะเบียนและได้รับความคุ้มครองตามกฎหมาย

ระบบการจดทะเบียนเครื่องหมายการค้าในประเทศต่างๆ ทั่วโลก ต่างก็มีหลักการที่คล้ายคลึงกันเพื่อให้เครื่องหมายการค้าต่างๆ รับจดทะเบียนได้ไม่ว่ามีลักษณะบ่งเฉพาะด้วยตนเองหรือไม่ก็ตาม ซึ่งระบบเครื่องหมายการค้าในประเทศไทยก็ได้รับเอาหลักการการรับจดทะเบียนมาปรับใช้เป็นกฎหมายเช่นกัน แต่ในความเป็นจริง กฎหมายดังกล่าวก็ยังคงมีปัญหาอยู่ โดยเฉพาะอย่างยิ่งประเด็นปัญหาในเรื่องการพิสูจน์การใช้เพื่อให้เครื่องหมายมีลักษณะบ่งเฉพาะอันพึงรับจดทะเบียนได้ ซึ่งปัญหาเหล่านั้น ได้แก่ ปัญหาในเรื่องของคุณลักษณะสำหรับการพิสูจน์การใช้ หรือประเด็นปัญหาเรื่องของคุณลักษณะหลักฐานที่ควรรับฟังเพื่อพิสูจน์การใช้เครื่องหมายการค้า และอื่นๆ ที่ก่อให้เกิดอุปสรรคต่อโอกาสที่เครื่องหมายการค้าจะได้รับจดทะเบียน

บทความนี้จะพิจารณาในเรื่องของหลักการทั่วไป โดยเฉพาะอย่างยิ่ง ในเรื่องของลักษณะบ่งเฉพาะและข้อกำหนดเพื่อพิสูจน์ลักษณะบ่งเฉพาะ โดยการใช้ โดยผู้เขียนได้ทำการศึกษาเปรียบเทียบระหว่างกฎหมายไทยและกฎหมายต่างประเทศ กล่าวคือ กฎหมายเครื่องหมายของประเทศสหรัฐอเมริกา ประเทศญี่ปุ่น และ ประเทศสิงคโปร์ ซึ่งกฎหมายเครื่องหมายการค้าของประเทศเหล่านี้มีหลักเกณฑ์ เงื่อนไข ที่ชัดเจนและเหมาะสมที่จะนำมาปรับใช้เพื่อสำหรับการพิสูจน์การใช้ของเครื่องหมายการค้าในประเทศไทย การวิจัยและการวิเคราะห์นี้เป็นการศึกษาบนพื้นฐานภายใต้มาตรา 7 วรรคสาม แห่งพระราชบัญญัติเครื่องหมายการค้าฉบับล่าสุด พ.ศ.2534 (แก้ไขเพิ่มเติม ครั้งที่ 3 พ.ศ. 2559) และประกาศต่าง ๆ ที่ออกมาเพื่อขยายความด้วยบทกฎหมาย รวมถึง คำพิพากษาต่าง ๆ โดยเปรียบเทียบกับกฎหมาย แนวทางปฏิบัติจากหลักเกณฑ์การตรวจสอบและคำตัดสินของศาลต่างประเทศ ซึ่งในกรณีนี้ ผู้เขียนจะนำเสนอแนวทางแก้ไข ปัญหาเรื่องลักษณะบ่งเฉพาะด้วยการใช้ ซึ่งผู้เขียนหวังเป็นอย่างยิ่งว่าจะเพิ่มโอกาสในการจดทะเบียนของเครื่องหมายการค้าที่ไม่มีลักษณะบ่งเฉพาะด้วยตนเองในประเทศไทย

คำสำคัญ: เครื่องหมายการค้า, ลักษณะบ่งเฉพาะ, ลักษณะบ่งเฉพาะโดยการใช้, การพิสูจน์โดยการใช้

## **1. BACKGROUND OF ACQUIRED DISTINCTIVENESS IN TRADEMARK LAW**

Generally, distinctiveness is one of the key requirements for registrability of a trademark in order for it to be distinguishable from other trademarks. According to trademark laws, non-inherently distinctive trademarks are not deemed distinctive, thus, such marks require proof of use in order to acquire distinctiveness. For this reason requirements for proof of acquired distinctiveness have been implemented in order to support the trademark owners, and other concerned persons and establish a common understanding so that the same rules are applied to all.

To achieve distinctiveness for a non-inherently distinctive trademark, the trademark owner has to comply with the provisions described in Section 7 paragraph three of the Thai Trademark Act and the Ministerial Regulations which indicate the requirements for proof of use of a trademark such as the characteristics of use, the designated goods or services, length of use and type of evidence. However, when the requirements are applied in actual practice, it is found that such requirements are not sufficient enough to serve as proof of use for acquired distinctiveness and thus day obstructs the chances of successful trademark registration.

## **2. LEGAL PROBLEMS OF PROOF OF USE CONCERNING ACQUIRED DISTINCTIVENESS**

Upon studying cases of successful and unsuccessful proof of acquired distinctiveness, it is observed that the requirements for proof of use for registering non-inherently distinctive trademarks under Section 7 paragraph three of Thai Trademark Act and its relevant regulations are insufficient on account as they do not clearly specify what constitutes acceptable evidence of use, for example, the amounts of evidence required, the types of evidence, the length of use or any other significant criteria.

## **3. FOREIGN LAWS FOR PROOF OF USE CONCERNING ACQUIRED DISTINCTIVENESS**

It is undeniable for trading and exchanging goods and services across the countries. IN-COMPLETE SENTENCE – What is undeniable? Therefore, countries have mutually created and agreed upon international rules and regulations to be applied as common requirements amongst countries party to said treaties. The international rules and regulations have set the minimum

requirements for member countries to implement in their own national trademark laws.

The member countries of the World Trade Organization (“WTO”) are required to implement their trademark laws based on the minimum standards set by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”) and the Paris Convention. Each member country must have requirements on intellectual property, especially trademark law, that is similar to each other; however, higher standards above the requirements under the TRIPs Agreement may be also implemented if they so choose. The requirements concerning acquired distinctiveness are implemented in the national trademark laws of member countries, including the United States of America, Japan and the Republic of Singapore.

### **3.1 The United States of America (“U.S.”)**

For U.S. trademark law, the proof of use for acquired distinctiveness under the U.S. trademark system considers the following criteria: (1) prior registration; (2) length of use; and (3) actual evidence. Prior registration can be used as evidence that the same or similar trademarks, which are registered with adequately similar goods or services, and have been successfully registered before. The key to this evidence is that the prior registration must be the legal equivalent to the designated registration, i.e. the prior registration must be able to create the identical and continuing commercial impact such that consumers can understand that the prior registered trademark and the pending trademarks are the same mark.<sup>1</sup> Also, the prior registration must be in full force and effect in order to be acceptable as proof of use. Still, proof of prior registration is accepted only as prima facie evidence which means it is not a compulsory requirement that the trademark owner has to prove, but it is an advantage for the trademark owner seeking to obtain registration of a non-inherently distinctive trademark. Regarding length of use, subject to Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), it is clearly stated that a mark that is used in commerce for five years before the date of the claim of secondary meaning is made, may be acceptable as prima facie evidence in the course of proof of acquired distinctiveness. Like the prior registration requirement, the five-year period of use is not a strict rule, in other words, the trademark owner can

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<sup>1</sup> USPTO Trademark Manual of Examining Procedure (TMEP)  
<<https://tmep.uspto.gov/RDMS?TMEP/print?version=current&href=TMEP31200d1e1003...>>accessed 3 May 2017

submit other evidence to prove acquired distinctiveness even though the trademark has been used less than five years. Another requirement is actual evidence. The purpose of which is proving actual use of trademark in connection with the goods or services in the course of trade such as affidavits, declarations, letters from longstanding consumers, turn over figures or nature and extent of advertising, direct evidence that expressly exhibits the predominance of the proprietors' trademark from others such as surveys<sup>2</sup> or any other evidence that shows the terms of use, way of use, and the ability of distinguishing the goods or services from others.<sup>3</sup> Moreover, circumstantial evidence is also acceptable for proving use, for example, long term of use, advertising expenditures, affidavits or declarations indicating the source of a mark, survey and marketing research and the studies of consumer's perception.

### 3.2 Japan

Under Japanese trademark law, proof of use for acquired distinctiveness is specified in Article 3(2) of the Japanese Trademark Act, there are two requirements for proving acquired distinctiveness: (1) use of trademark and (2) the ability of consumers to recognize the trademark with the goods or services with a particular person. The requirements for proving acquired distinctiveness are clarified in the Japanese Examination Guidelines. Use of the trademark can be considered in two different ways: trademark aspect and goods or services aspect. For the trademark aspect, the trademark used in the evidence must be identical to the trademark in the application; otherwise it is not recognized as use.<sup>4</sup> In some cases, even though the trademark in the evidence of use is not identical, it may be deemed as use of the trademark if the differences do not affect the identity of the trademark by determining the degree of differences in appearance and the actual states of transaction of the designated goods or designated services.<sup>5</sup> Examples of trademarks that are recognized as identical are: (1) the difference in the trademark appears only in the describing of vertical writing and horizontal writing; (2) the trademark in the evidence and in the application appear in plain characters and the fonts that both trademarks used are very similar; (3) the appearance of the three-

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<sup>2</sup> J. Thomas McCarthy, 'McCarthy on Trademarks and Unfair Competition 4<sup>th</sup>'. West Group. 2012 McCarthy § 15:70

<sup>3</sup> USPTO Trademark Manual of Examining Procedure (TMEP) (n1) 21-22

<sup>4</sup> Japan Patent Office, 'Examination Guidelines for Trademark' 51 <[http://www.jpo.go.jp/tetuzuki\\_e/t\\_tokyo\\_e/tt1302-002.htm](http://www.jpo.go.jp/tetuzuki_e/t_tokyo_e/tt1302-002.htm)> accessed 9 December 2016

<sup>5</sup> Ibid

dimensional shapes of the trademark in the application and the evidence has only minor differences.<sup>6</sup> For the goods and services aspect, the designated goods or services in an application and in the evidence must be identical in order to be recognized as use of trademark. However, the difference of use in the application and in the evidence may be deemed acceptable if such differences do not affect the identity of the designated goods or services in the application together with the consideration of evidence of goods or services in the course of trade.<sup>7</sup> Another requirement for proof of acquired distinctiveness under Japanese Trademark law is the ability of consumers to recognize the trademark with the goods or services of a particular person. The recognition of the consumer is determined by the perception of consumers with regard to the source of the goods or services throughout the country. The key for measuring consumers' recognition is based on the level of consumers' awareness which can be determined by: (1) the composition and appearance of trademark in the application; (2) the terms of use, quantity of use, period of use and location of use of trademark; (3) the advertising method, duration, areas and proportion, (4) a person who use a trademark either in an application or in evidence, (5) the characteristics of goods or services that are used in the course of trade; and (6) the results from questionnaires indicating consumers' awareness of trademark.<sup>8</sup> To prove acquired distinctiveness along with the requirements, the trademark owner is required to submit sufficient evidence such as: (1) photographs or movies showing use of the trademark in the course of trade; (2) business documents such as purchase orders, sale receipts, invoices, shipping documents, etc.; (3) all kinds of advertisements published by the applicant; (4) articles in general newspapers showing the trademarks in applications by either the applicant or other parties; (5) reports from surveys of consumers' perception on the trademark owner's trademark.<sup>9</sup>

### **3.3 The Republic of Singapore ("Singapore")**

According to Singaporean Trademark Law, subject to trademark registration under Section 7(1) of the Singaporean Trademark Act, a non-inherently distinctive trademark can be deemed distinctive if such trademark can acquire distinctive character as a result of use. The requirements for proof of acquired distinctiveness and examples of acceptable evidence are described

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<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid 53.

<sup>9</sup> Ibid

in “Evidence of Distinctiveness Acquired Through Use” which is the examination guidelines for proving acquired distinctiveness. The factors for trademark examination concerning acquired distinctiveness are: (1) Period of Use: The longer the use of the trademarks grants higher chances to obtain trademark registration. Regarding the guidelines, five years of use together with the proof of extreme sales is generally required. Use shorter than five years may still be acceptable if such trademarks are used extensively and continuously before the date of application. However, less than a 2-year period may not be sufficient enough to prove use.<sup>10</sup> For proof of period of use, the evidence should indicate the date of first use with the goods or services in Singapore. Moreover, sufficient use must be continuous without any interference. In the event that the trademark is transferred, the evidence must show the information of the former owner and indicate the date of acquisition;<sup>11</sup> (2) Extent of Use (Turnover): Turnover figures are the sale volume of the goods or services under the trademark. The larger the turnover the higher chances of the trademark being registered. Turnover figures should be demonstrated by classifying goods or services in accordance with trademark classifications. The characteristic of goods or services is also of concern if they are special or ordinary goods or services because it will effect the turnover figures, in other words, if such goods or services are special, the number of sales may be lower than the goods or services used for common goods. It will be advantageous to the proof of use if the trademark owner presents the nature and size of the market and the size of the market share so that it shows the rank of the goods or services in the market, if the sales of goods or services become the majority in the market, the better chance of registration the trademark owner may receive. In some events, turnover figures may not be appropriate for certain business such as financial services to prove the extent of use of trademark. Thus, other alternatives to prove use of such businesses would be number of account holders, investors, branches etc.;<sup>12</sup> (3) Advertising expenditure: Advertising figures include any type of advertising or medium such as out-of-home advertising, door-to-door advertising or online advertising

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<sup>10</sup> Intellectual Property Office of Singapore (IPOS). ‘Evidence of Distinctiveness Acquired Through Use’ (Version 1) 2006  
<[http://www.ipos.gov.sg/Portal/0/.../6%20Evidence%20of%20Use\\_Nov2015%20v2pdf](http://www.ipos.gov.sg/Portal/0/.../6%20Evidence%20of%20Use_Nov2015%20v2pdf)>  
accessed 29 December 2016

<sup>11</sup> Ibid, 5

<sup>12</sup> Ibid, 6



etc. Such advertising figures should be five or more years before the filing date.<sup>13</sup> The breakdown of advertisements in relation to the classification of goods or services is also significant, and the amounts given must be in Singaporean Dollars. The samples of advertisements concerning the goods or services intended to be registered should be involved.<sup>14</sup> In some cases, only evidence of advertising may be acceptable without any proof of sale, for example the sale of aircraft usually starts with intensive advertising before an actual sale.<sup>15</sup> Also, minor and no advertising expenditure may be acceptable, for example, in the case of the sale of a special product that is sold in a limited market;<sup>16</sup> (4) Nature of exhibits: The exhibits should describe the impact or reflection of the trademarks used with the goods or services by specifying the date of use (estimations are also acceptable), and must be used as and for the purpose of trademarks. The exhibits should declare the date or period of use. The use of the trademark shown in the exhibits must be identical to the trademark in the application because if it is different, then it may be questioned whether the trademark in the application has acquired distinctiveness on its own or not. Examples of use are: (1) when a mark composed of non-fundamental parts of the trademark, such mark may be deemed distinctive on its own. The samples of exhibit that are deemed sufficient are articles, brochures, catalogues, balance sheets, statement of accounts, annual reports and so forth;<sup>17</sup> (5) Goods or services claimed: The evidence of use must be in connection with the goods or services trying to obtain registration, and should reflect the goods or services subject to the specifications of goods or services that wish to be registered. That is because if such trademarks are extremely descriptive, the registrar will intensively consider evidence with the items under the specifications.<sup>18</sup>

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<sup>13</sup> Ibid, 6

<sup>14</sup> Ibid, 6

<sup>15</sup> Ibid, 7

<sup>16</sup> Ibid, 7

<sup>17</sup> Ibid, 7

<sup>18</sup> Ibid, 9-10

#### **4. ANALYSIS ON THE PROBLEMS WITH PROOF OF USE CONCERNING ACQUIRED DISTINCTIVENESS UNDER SECTION 7 PARAGRAPH THREE OF THE THAI TRADEMARK ACT**

Generally, the use of a trademark is not a requirement for acquiring trademark rights. However, use will be applied as evidence of proving acquired distinctiveness in order to fulfill the criteria of trademark registration.

Previously, in the Thai Trademark Act B.E.2534 (1991) (as amended by Trademark No.2 B.E. 2543 (2000)), only trademarks “having or consisting of (1) a personal name, a surname not being such according to its ordinary signification, a name of juristic person or tradename represented in a special manner; or (2) a word or words having no direct reference to the character or quality of the goods and not being geographical name proscribed by the Minister in Ministerial Notification”, if it has been used as trademarks with goods which have been widely sold or advertised according to the rule prescribed by the Minister by notification and if it is proved that the rules have been duly met it shall be deemed distinctive.”<sup>19</sup>

Nowadays, the Thai Trademark Act B.E.2534 (1991) (as amended by Trademark No.2 B.E. 2543 (2000)) had been amended in July B.E.2559 (2016). Section 7 was also revised by expanding the characteristics of trademarks acceptable for registration, especially non-conventional trademarks, i.e. sound marks. In addition, proof of acquired distinctiveness was also amended to accept all characteristics prescribed in Section 7 paragraph three stating that “trademarks having the characteristics under (1) to (11) which have been widely sold or advertised in accordance with the rules prescribed by the Minister by notification and if it is proved that the rules have been duly met”.<sup>20</sup>

According to the last paragraph of Section 7 of the Thai Trademark Act, which describes what the trademark which acquired distinctiveness through use has to be prove: (1) the trademarks have been used with goods or services; (2) the trademark have been widely sold or advertised; (3) such sale or advertising meets the rules prescribed by the Minister?

The rules related to proof of acquired distinctiveness prescribed by the Minister by notification for proving uses are mentioned in the Ministerial Regulations Re: The requirement for proving distinctiveness regarding Section 7 las paragraph of Trademark of Trademark Act B.E. 2534 (1991) as

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<sup>19</sup> Thai Trademark Act, Section 7

<sup>20</sup> Thai Trademark Act, Section 7 paragraph 3

amended by the Trademark Act (No.2) B.E. 2543 (2012) (the “Ministerial Regulations”)

#### **4.1 Problems on the Registration Procedure**

The main problem of the registration procedure, especially in case of the non-inherently distinctive trademark, is that it is time consuming due to the lengthy examination process. If the Registrar considers that the trademark lacks of distinctiveness, the Registrar may request the trademark owner submit evidence to prove acquired distinctiveness. This process takes time because the trademark owner needs to prepare sufficient and persuasive evidence, and after receipt of said evidence, the Registrar has to reconsider the registrability of the trademark and whether the evidence can overcome the requirements for proof of acquired distinctiveness or not. Consequently, the long examination term may obstruct the the trademark owner from utilizing or seeking some benefits from using such trademark.

#### **4.2 Problems on Criteria for Proof of Acquired Distinctiveness**

##### **4.2.1. Term of use**

Subject to Clause 2(1) of Ministerial Regulations, it is stated that “the goods or services has been continuously used with trademark, either by distribution, publication or advertising for the moderate term, such trademark caused the public in general or in the relevant area to be acknowledged and recognized that such goods or services are distinguished from the others.”<sup>21</sup>

According to Clause 2(1) of Ministerial Regulations, the trademark must be used for a moderate term in order to be acceptable as proof of acquired distinctiveness. The undefined term is flexible and it seems to be to the advantage of the trademark owner to prove use in order to obtain acquired distinctiveness after he considers that the trademark is capable of distinguishing goods or services from others.

Upon the interpretation of moderate term, the trademark owner may consider the term of use by referencing the Trademark Board's decisions and judgements. In Supreme Court Judgement No. 19480/2556, the Court held that “*Ten-year term of use of trademark is deemed as moderate enough to establish the acquired distinctiveness of trademark*”.<sup>22</sup> In case of the term of

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<sup>21</sup> Ministerial Regulations Re: The Requirements for proving the distinctiveness regarding Section 7 last paragraph of Trademark of Trademark Act B.E. 2534 (1991) (as amended by the Trademark Act (No.2) B.E. 2543)(2012)), Clause 2(1)

<sup>22</sup> Supreme Court Judgement No. 1948/2556

use is less than 10 years, the Court will determine whether the term of use is enough for creating acquired distinctiveness or not. Referring to the Supreme Court Judgement No. 5403/2551, the Court held that “*two years of use is not enough to constitute acquired distinctiveness*”.<sup>23</sup> Therefore, to satisfy the criteria of term of use, the trademark owner is required to submit the strong evidence of use together with proof that the trademark is used continuously without any interference. Another concern about the term of use is that in case the trademark is very descriptive; a longer term of use may be required.

Upon the proof of acquired distinctiveness, basically, the longer use of trademark, the higher chance that the mark will be registrable under acquired distinctiveness. According to the Clause 2(1) of Ministerial Regulations, there is no specific period of use for proving acquired distinctiveness, but only states that the trademark is required to be used within moderate term. Nevertheless, the decisions from both the Trademark Board and the Court seem to agree that the acceptable term of use may take a long time i.e. ten years<sup>24</sup> in order to overcome the requirement of proof of acquired distinctiveness. Moreover, it is not clear about the length of use that is deemed moderate for the proof of acquired distinctiveness. Consequently, it is difficult for the trademark owner to start the registration procedure of a non-inherently distinctive trademark upon the requirement of term of use because the trademark owner may not know whether the term of use is sufficient enough to constitute the registration of the trademark or not.

#### **4.2.2 Use with goods or services**

Clause 2(2) of Ministerial Regulations states that “the distribution, publication or advertising of any goods or services shall be deemed distinctive only with such goods or services.”<sup>25</sup>

This clause specifies that the proof of use for a trademark with goods or services is deemed acceptable only with the goods or services that are actually used. This clause, if interpreted strictly, states that if the specifications of goods or services in evidence and in the application are not identical, the use of the goods or services cannot be deemed as evidence for proof of acquired distinctiveness.

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<sup>23</sup> Supreme Court Judgement No. 5403/2551

<sup>24</sup> Supreme Court Judgement No. 3685/2551

<sup>25</sup> Ministerial Regulations Re: The Requirements for proving the distinctiveness regarding Section 7 last paragraph of Trademark of Trademark Act B.E. 2534 (1991) (as amended by the Trademark Act (No.2) B.E. 2543)(2012)), Clause 2

Therefore, similar goods or services that do not affect to the identity of the goods or service in an application are not registerable. This may cause a problem to the trademark owner as the trademark owner may desire to start their business with limited goods, and then expand their business later, in such a case if the goods that are used with the trademark, and the goods that he plans to sell are not different, the trademark owner should be able to obtain protection upon registration of such goods.

#### **4.2.3 Use of trademark**

Referring to Clause 2(3) of Ministerial Regulations, which specifies that “trademark that is proven for acquired distinctiveness according to this Ministerial Regulations must be identical to the trademark filed in an application for the registration.”<sup>26</sup>

This clause decrees that the trademark appearing in an application and in evidence shall be identical; otherwise it cannot be deemed appropriate for trademark registration. Examples of determination of use of trademark are prescribed in the following judgements:

The Central Intellectual Property and International Trade Court Court Judgement No.9/2560, the Court held that “...the trademark appeared in the evidence are different from the trademark specified in the application for the registration which is unacceptable to be evidence of this case...” or

The Supreme Court Judgement No. 5402/2551, the Court held that “...the mark that has been published on the media is different from the service mark “SOUTH AFRICAN AIRWAYS.” So, it is not clear whether to assume and accept that the service mark of the trademark owner is the service mark that has advertised or published that the people widely knows that trademark ...”

Evidence of use must contain exactly the same characteristics and appearance with the trademarks intended to be registered. In practice, the trademark owner may promote its trademark in a partial form apart from the trademark registered. Even though, the partial trademark cannot be submitted as evidence, it can still lead and imprint on consumers' perception. Thus, rejection of evidence of similar trademarks may cause misconception as to the

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<sup>26</sup> Ministerial Regulations Re: The Requirements for proving the distinctiveness regarding Section 7 last paragraph of Trademark Act B.E. 2534 (1991) (as amended by the Trademark Act (No.2) B.E. 2543)(2012)), Clause 2

true duty of a trademark, in other words, if similar trademarks still refer to the substance of a trademark it should not be denied registration.

#### **4.3 Problems of the Examination Guidelines for Proof of Acquired Distinctiveness**

The examination guidelines for proof of acquired distinctiveness are specified in Ministerial Regulations that contain substantive requirements for proof of acquired distinctiveness these are: the length of use, the territory of use, the characteristics of the goods and services, the characteristics of use, and acceptable evidence of trademark. The advantage of the examination guidelines is to prescribe the details for proof of acquired distinctiveness but when comparing to the examination guidelines of other countries; it seems that the Ministerial Regulations may not be enough to facilitate proof of acquired distinctiveness. The problems with the examination guidelines are relating to inflexible provisions in connection with the requirements of identical trademark and identical goods or services for proving acquired distinctiveness, the term of use, and lack of examples supporting interpretation except for the examples of evidence.

## **5. CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Conclusions**

The aim of trademark law is to balance between the benefits of an individual and public interests, In order to protect the benefits of both sides, it is required that trademark owners register their trademarks. Even though the requirements for trademark registration of each country may be different in some certain points, such as the use and intent-to-use requirement, the substantial requirements are the same, i.e. distinctiveness, non-similarity and not prohibited by law. But as discussed, in some cases, the requirements for trademark registration do not accommodate trademarks that lack inherent distinctiveness, but still can perform as a trademark. Therefore, the requirements for trademarks are extended to cover trademarks that are non-inherently distinctive. In such cases, the requirements and the examination guidelines for proof of acquired distinctiveness play an essential role by giving instruction to the trademark owner, the Registrar, the Trademark Board and the Court to follow with regard to the proof of acquired distinctiveness.

Despite this upon studying the Thai Trademark Act and its relevant regulations regarding proof of use, i.e. the Ministerial Regulations, the Author finds that there are some problems with proof of use concerning acquired

distinctiveness specified in Section 7 paragraph three of Thai Trademark Act and the regulations under the Ministerial Regulations. In this regard, upon studying the legal principles of use and grounds for registration for non-inherently distinctive trademarks under foreign laws such as the U.S., Japan and the Republic of Singapore, the Author would kindly propose that adopting the advantages of proof of use of these other countries for use in Thailand would solve the inherent problems with proof of acquired distinctiveness and mitigate the problems of use concerning the proof of acquired distinctiveness as follows:

## **5.2 Recommendations**

### **5.2.1 To Adopt the Use Requirement for Trademark Registration**

Regarding the trademark registration process in Thailand, use or intention-to-use a trademark before filing the application is not required for the registrability of a trademark. However, upon studying the requirements for trademark registration of foreign countries, the Author finds that the use requirement benefits the trademark owner as proof of acquired distinctiveness. Even though the purpose of the submission of declaration of use for trademark registration and the proof of acquired distinctiveness are different, the evidence of use for registration may be useful for the Registrar when considering distinctiveness based on such evidence, provided that the Registrar can request for further submission of evidence to prove acquired distinctiveness and re-examines the trademark based on such evidence.

Hence, the Author would kindly recommend applying use and intent-to-use applications as one of the requirements for registration as use or intent-to-use requirements can guarantee that the trademark is put into use before registration. On this point, use requirements reflect the main purpose of a trademark which is to be used with the goods or services so that consumers are able to recognize the goods or services from the use of trademark.

### **5.2.2 To Specify the Term of Use and Accept as Prima Facie Evidence**

According to the requirement for proof of acquired distinctiveness specified in Clause 2(1) of the Ministerial Regulations, the terms “moderate term of use” is unclear for the trademark owner to prove use in order to acquire distinctiveness through use of such trademark. Because, nowadays, it is not necessary to spend a long time to create the ability to distinguishing goods or services from others by putting the trademark into

promotions and extreme sales and advertising campaigns, and by virtue of internet and social media, consumers can easily recognize and imprint trademarks with the goods or services rapidly. Therefore, referring to the study of foreign trademark laws, especially the U.S. and the Republic of Singapore, the terms of use, according to the practices of the Intellectual Property Office of Singapore, which is specified in the Evidence of Distinctiveness Acquired through Use, indicates that five-years of use is generally required for proof of acquired distinctiveness.<sup>27</sup> And for the US trademark law under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f) and § 2.14 of T.M.R.P specifies that five-years use of trademark can be accepted as the prima facie evidence for proof of acquired distinctiveness.<sup>28</sup> Hence, the Author kindly proposes that it will be more beneficial for establishing proof of acquired distinctiveness if the term of use is set to an exact amount of time, that is five-years of use of the trademark and accept this period as prima facie evidence of proof of acquired distinctiveness. However, prima facie evidence performs as a standard of use that could be changed if the trademark owner can prove that the trademark is already distinctive even it has been used less than five years.

Therefore, the Author would kindly suggest Clause 2(1) of Ministerial Regulations be changed to “goods or services which have been continuously used with the trademark, either by distribution, publication or advertising for at least five years prior to the filing date, and such trademark could cause the public in general or in the relevant area to acknowledge and recognized that such goods or services are distinguished from others.”

### **5.2.3 To Expand the Acceptable Evidence for Proof of Acquired Distinctiveness**

#### **5.2.3.1 To Accept Evidence of Similar Goods or Services as Proof of Acquired Distinctiveness**

With regard to the Examination Guidelines of Japan, there is an exception for acceptable evidence of use of goods or services that are different from the designated goods or services if such difference does not affect the identity of the specifications of goods as designated in an application.<sup>29</sup>

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<sup>27</sup> Intellectual Property Office of Singapore (IPOS), ‘Trademarks info pack’ (2016) 5 <<https://www.ipos.gov.sg/Portals/0/about%201P/trademark/TMInforpack07012016.pdf>> accessed 9 December 2016

<sup>28</sup> The Lanham Act, 15 U.S.C. § 1052(f) and § 2.14 of T.M.R.P, Section 2(f)

<sup>29</sup> Japan Patent Office (n4)



In such a case the Author would kindly propose to amend Clause 2(2) of Ministerial Regulations to accept evidence of use that contains the designated goods or services which are not identical to the specification of goods or services in the application. However, the difference of between the designated goods or services and the specification of goods or services in an application should not be substantial so that they do not affect the identity of the designated goods or services in the sense that consumers will still understand that the goods or services in the evidence and those designated in applications come from the same origin. Examples of evidence of goods or services which should be admissible are those that are in the same classification and have almost the same function and appearance, for example, ball pen and fountain pen or hostel and hotel where the prices are not so different.

Therefore, the author's recommendation for the issue of limiting the scope of evidence of similar goods or services is to amend Clause 2(2) of Ministerial Regulations to "the distribution, publication or advertising of any goods or services shall be deemed distinctive only with such goods or services, however the use of trademark with similar goods or services may be acceptable if the difference does not affect the identity of the designated goods or services".

### **5.2.3.2 To Accept Evidence of Similar Trademarks for Proof of Acquired Distinctiveness**

Regarding the Examination Procedures of Japan, there is an exception to accept similar trademarks as proof of acquired distinctiveness if such difference does not affect the identity of the trademark.<sup>30</sup>

In this regard, the Author would kindly propose to amend Clause 2(3) of Ministerial Regulations to accept similar trademarks as proof of acquired distinctiveness, provided that such difference does not affect the identity of the trademark. That means if the trademark appearing in the evidence is not the same as the trademark specified in an application, but with only slight differences it can be deemed that the trademarks are identical. The acceptable difference could be measured by the perception of consumers, so that even if the trademarks are different, consumers will still consider that they are the same mark with the same source of goods or services.

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<sup>30</sup> Ibid 51

Examples of similar trademarks which should be admitted as identical are:

- (1) The differences between the trademark in evidence and in the designated trademark applications are vertical writing versus horizontal writing.
- (2) The trademarks are written in two different fonts, but the fonts are closely similar to each other, for example, “HONEY” (Font: Calibri) and “HONEY” (Font: Arial).

Hence, the Author would kindly recommend the revision of Clause 2(3) of Ministerial Regulations to “The trademark appearing in the evidence for proof of acquired distinctiveness according to this Ministerial Regulations shall be identical to the trademark filed in an application, provided that the similarity of the trademark in the evidence does not affect the identity of the trademark in an application it shall be accepted.”

#### **5.2.4 Amend or Implement Clearer Examination Guidelines for Proof of Acquired Distinctiveness**

Upon completion of the comparative study of trademark laws and practices of foreign countries, the Author found that not only could appropriate trademark laws facilitate proof of acquired distinctiveness, but also that sufficient examination guidelines could support both the trademark owner and the Registrar to have a common understanding about proof of acquired distinctiveness. Therefore, the Author would kindly recommend to revise the Examination Guidelines following other recommendations for amending the requirements for proof of acquired distinctiveness.

#### **5.2.5 To Indicate the Reason of Trademark Registrability in Trademark Database**

The Author finds it is difficult and not very convenient to search for information about trademarks that are registrable through the proof of acquired distinctiveness from the trademark database. Thus, the Author would kindly recommend that adding remarks in the database about trademarks that are registered by proof of acquired distinctiveness like the trademark databases of foreign countries such as the U.S. or the Republic of Singapore. The purpose of the remarks are for the benefit of searching and studying the registrability of such trademarks, in other words, if such trademarks are registrable based on proof of acquired distinctiveness, then people could search

for the method of proof or evidence used for proof of acquired distinctiveness of such trademarks.

With regard to the recommendations in this article, The Author does not expect to immediately and completely change the Thai Trademark Act concerning proof of use for acquired distinctiveness as per the Author's suggestions. The Author aims to indicate that laws and regulations do not accommodate proof of use for acquired distinctiveness. As a result, it obstructs the chance of trademark registability which may affect economic growth since businessmen cannot seek protection for their trademarks in Thailand, although registration is possible the registration procedure causes both delay and expense in order to obtain registration. In this regard, the Author expects that the proposed recommendations could be the guidelines for improving proof of use for acquired distinctiveness. The guidelines may not resolve all problems of proof of use for acquired distinctiveness; therefore, they should be adjusted to be in alignment with actual practices.

## References

### Books

- Amada Michaels. *A Practical Guide to Trademark Law*. 3<sup>rd</sup> Edition. London Sweet & Maxwell. 2002
- Arthur Wineburg. *Intellectual Property Protection in Asia*. 2<sup>nd</sup> Edition. LexisNexis. 2003
- J. Thomas McCarthy. *McCarthy on Trademarks and Unfair Competition 4th*. West Group. 2012
- Jerome Gilson and Anne Gilson Lalonde. *Gilson on Trademarks*. Matthew Bender. 2013.
- Jon Holyoak & Paul Torremans. *Intellectual Property Law*. Butterworths. 1995
- Shubha Ghosh, Richard Gruner, Jay P. Kesan & Rober I. Reise. *Intellectual Property Private Rights, The Public Interest, and The Regulation of Creative Acitivity*, 2<sup>nd</sup> Edition. Thomson Reuters. 2010
- UNCTAD-ICTSD Project on IPRs and Sustainable Development. *Resource Book on TRIPS and Development*. Cambridge University Press. 2005
- World Intellectual Property Organization (WIPO). *Background Reading Material on Intellectual Property*. 2nd Edition. WIPO Publication.
- รัชชัย สุกผลศิริ. ระบบทรัพย์สินทางปัญญาของประเทศไทย. กรุงเทพมหานคร: จุฬาลงกรณ์มหาวิทยาลัย, 2554.  
(Thatchai Suppapholsiri, *Intellectual Property Systems in Thailand*. Bangkok: Chulalongkorn University, 2001.)
- รัชชัย สุกผลศิริ. คำอธิบายกฎหมายเครื่องหมายการค้า พร้อมด้วยพระราชบัญญัติเครื่องหมายการค้า พ.ศ. 2534. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2536. (Thatchai Suppapholsiri, *Explanation of Trademark Law including Trademark Act B.E. 1991*. 1<sup>st</sup> ed. Bangkok: Nititham, 1993.)
- วัศ ดิงสมิธ. คำอธิบายกฎหมายเครื่องหมายการค้า. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : สำนักพิมพ์นิติธรรม, 2545 (Wat Tingsamit. *Explanation of Trademark Law*. 1<sup>st</sup> Ed. Bangkok: Nititham 2002)
- ### Articles
- Masaki Mikami, “New Trademark Examination Guidelines” Marks Newsletter Vol. 3, May 2, 2016.
- Mark P. Mackenna, “The Normative Foundations of Trademark Law,” 82 Notre Dama L. Rev. (2006-2007).

Satyapon Sachdecha. "Non-Use Cancellation" The Thai Bar Law Journal. Volume 71 Part 1. Bangkok: Petchrung Publishing Center Co., Ltd. January-๕๖ (March 2015)

Vichai Ariyanuntaka. "Some observations on the legal protection of Trademarks and Unfair Competition Law." Intellectual Property and International Trade (Law Journal. 2002)

### **Electronic Media**

"Japanese Trademark Law." [http://www.jpaa.or.jp/english/trademark/trademark\\_Registration.html](http://www.jpaa.or.jp/english/trademark/trademark_Registration.html). January 3, 2017

"The History and Development of Trademark Law" <http://www.iip.or.jp/e-e-publication/ono/chz.pdf>. January 3, 2017

Dr. Shoen Ono. "Overview of Japanese Trademark Law" (2<sup>nd</sup> ed., Yuhikaku Publishing 1999)"

[http://www.iip.or.jp/e\\_e\\_publication/ono/ch2.pdf](http://www.iip.or.jp/e_e_publication/ono/ch2.pdf). January 3, 2017

Intellectual Property Office of Singapore (IPOS). "Trademarks Infopack" <http://www.ipos.gov.sg/Portals/0/about%20IP/trademark/TMInfopack07012016.pdf>. December 9, 2016

Intellectual Property Office of Singapore (IPOS). "Evidence of Distinctiveness Acquired Through Use" <http://www.ipos.gov.sg/Portals/0/.../6%20Evidence%20of%20Use%20Nov2015%20v2.pdf>. December 29, 2016

### **Other Materials**

Thai Trademark Act B.E. 2534 (1991) as amended by the Trademark Act (No. 3)

B.E. 2559 (2016)

Ministerial Regulations Re: The Requirements for proving the distinctiveness regarding Section 7 last paragraph of Trademark Act B.E. 2534 (1991) (as amended by the Trademark Act (No.2) B.E. 2543)(2002))

The Regulations of the Trademark Board regarding the Procedure of Appeal or Petition for Cancellation of Trademarks B.E. 2545 (2002)

Thai Civil and Procedure Act (as amended in B.E.2550 (2008), Japan

Trademark Act 1959

Singapore Trademark Act (Chapter 332, Revised Edition 2005) US Trademark Act 1946

US TRADEMARK LAW: RULE OF PRACTICE & FEDERAL STATUTES  
A COMPARATIVE STUDY OF LEGAL MEASURES ON MEAT  
SAFETY IN THAILAND, THE UNITED STATES,  
AND SINGAPORE\*

*Orapat Traimongkolkul\*\**

**Abstract**

Meat safety control in Thailand has been faced with complexities in regards to producer's capacity and limitations, consumer's demand and food culture, and requirements by international food regulations. In an attempt to seek for appropriate measures to cope with such complexities, a problem-based comparative analysis was conducted on legal measures on meat safety of three countries; namely, Thailand, the United States, and Singapore. Implications for improvements of Thai laws and regulations were derived respectively, focusing on domestic supply chain of raw meat, from primary production to slaughter.

Overall, the legal measures for meat safety of the U.S. and Singapore share the similar structure in that both countries regulate comprehensive as well as specific laws addressing the meat safety control. Moreover, they are based on the same concept that adulterated meat shall be strictly prevented from entering to the human consumption chain, and thus a holistic approach is essential throughout the meat supply chain. In details, however, the two countries place different emphases on legal measures in the aspects of allocation of authority, scope of laws, and the cooperation among concerned agencies. As for Thailand, remarkable efforts in advancing laws and regulations on meat safety have been noted in recent years. Nonetheless, there remains some room for improvements, particularly with regards to quality control for general domestic consumers. Foremost is the problem of the legal structure itself, in that laws governing meat safety are fragmented as several specific laws have been enacted, resulting in problematic implementations of regulations along the meat supply chain. On details, problems of the existing provisions were identified. In accordance with the findings, enhancement of

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\* The article is summarized and rearranged from the thesis 'A Comparative Study of Legal Measures on Meat safety in Thailand, The United States, and Singapore' Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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provisions under the existing laws governing primary production and slaughter was proposed so that to handle problematic issues at hand. For the benefit in the long run, re-structuring of the meat safety laws governing the entire meat supply chain was also proposed under appropriate circumstances.

**Keywords:** Food Safety, Food Safety Laws, Meat Safety Control

**บทคัดย่อ**

การควบคุมความปลอดภัยในเนื้อสัตว์ของประเทศไทย เผชิญปัญหาซับซ้อนที่เกี่ยวข้องกับศักยภาพและข้อจำกัดของผู้ผลิต วัฒนธรรมของผู้บริโภค และกฎระเบียบสากลด้านความปลอดภัยของอาหาร เพื่อค้นหามาตรการที่เหมาะสมในการรับมือกับปัญหาดังกล่าว งานวิจัยนี้จึงได้ศึกษาเปรียบเทียบมาตรการทางกฎหมายในการควบคุมความปลอดภัยในเนื้อสัตว์ของประเทศไทย สหรัฐอเมริกา และสิงคโปร์ และนำข้อมูลมาปรับใช้เพื่อการปรับปรุงมาตรการทางกฎหมายของไทย โดยเน้นปัญหาเฉพาะห่วงโซ่การผลิตเนื้อสัตว์บริโภคสดภายในประเทศ ตั้งแต่กระบวนการผลิตขั้นปฐมภูมิจนถึงกระบวนการฆ่าชำแหละ

โดยภาพรวม มาตรการทางกฎหมายเพื่อความปลอดภัยในเนื้อสัตว์ของสหรัฐอเมริกาและสิงคโปร์มีลักษณะร่วมกันคือ มีกฎหมายที่ครอบคลุมและจำเพาะสำหรับควบคุมคุณภาพเนื้อสัตว์ นอกจากนี้ทั้งสองประเทศยังยึดถือหลักการเคร่งครัดในการป้องกันไม่ให้เนื้อสัตว์ปนเปื้อนได้เข้าสู่ห่วงโซ่อาหาร โดยการควบคุมแบบองค์รวมตลอดเส้นทางของห่วงโซ่การผลิตจนถึงผู้บริโภค อย่างไรก็ตาม มาตรการของทั้งสองประเทศมีความแตกต่างในด้าน การจัดสรรอำนาจขอบเขตของกฎหมาย และความร่วมมือระหว่างหน่วยงาน สำหรับประเทศไทย แม้จะมีการตราและปรับปรุงกฎหมายอย่างต่อเนื่อง แต่พบว่ายังคงมีจุดอ่อนหลายประการ โดยเฉพาะในด้านที่เกี่ยวข้องกับการควบคุมคุณภาพเนื้อสัตว์สำหรับผู้บริโภคทั่วไปในประเทศ เมืองแรก คือปัญหาด้านระบบหรือโครงสร้างของกฎหมาย ที่มีกฎหมายเกี่ยวข้องหลายฉบับที่จำเพาะและแยกส่วน ไม่เอื้อต่อการควบคุมคุณภาพตลอดห่วงโซ่การผลิต ต่างจากที่พบในประเทศสหรัฐอเมริกาและสิงคโปร์ ในส่วนรายละเอียดของบทบัญญัติ พบปัญหาบางประการทั้งการควบคุมคุณภาพการผลิตขั้นปฐมภูมิและการฆ่าชำแหละ ผู้วิจัยได้ให้ข้อเสนอแนะเพื่อการปรับปรุงบทบัญญัติตามกฎหมายปัจจุบันให้มีประสิทธิภาพมากขึ้น รวมถึงข้อเสนอเพื่อการปฏิรูประบบกฎหมายด้านการควบคุมความปลอดภัยในเนื้อสัตว์ที่เชื่อมโยงตลอดห่วงโซ่ของการผลิตเนื้อสัตว์ ทั้งนี้ภายใต้เงื่อนไขที่เหมาะสม

**คำสำคัญ:** ความปลอดภัยในอาหาร, กฎหมายด้านความปลอดภัยในอาหาร, การควบคุมความปลอดภัยในเนื้อสัตว์



## Introduction

Food safety is vital to human nutrition and food security, and is a critical component for sustainable development. Food products of animal origin are a source of foodborne diseases (FBD) which is the important cause of morbidity and mortality in human worldwide.<sup>1</sup> For meat products, risks in food safety can occur at all of the elements in the meat supply chain, from primary production to slaughter, processing, and product distribution.<sup>2</sup>

Meat is considered significant agricultural commodity in Thailand, especially pork which has exhibited a continuous growth rate in production, domestic consumption and export.<sup>3</sup> Along with such growing trend, there have been efforts in uplifting the production quality in the meat supply chain, but with emphasis tends to place more on quality assurance for export. For domestic consumption, meat safety remains problematic as legal provisions and enforcements are not adequately circumspect. It has been commonly observed in the domestic market that premium meat products from large suppliers normally meet safety standards, whereas products from small and medium suppliers are deemed to be risk-prone in food safety<sup>4</sup>. As meat products with questionable safety are available in common markets, the majority of the Thai consumers are thus at risk in their daily consumption of meat.

Effective legal measure is fundamental to the success in achieving food safety for Thai people, taking into account the balance of the benefits for domestic consumers at all levels. With regards to meat products, there are several specific as well as related laws governing meat safety, with authorities delegated to various agencies at national and provincial levels. Previous studies have pinpointed specific problems of certain legislations and on particular meat categories, but a broader perspective has not been approached. This article attempts to examine more holistically the existing laws and regulations on

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<sup>1</sup> The World Organization for Animal Health (OIE), 'Animal Production Food Safety'. <[www.oie.int/en/food-safety/achievements-to-date](http://www.oie.int/en/food-safety/achievements-to-date)> accessed 12 January 2017.

<sup>2</sup> John N. Sofos, 'Meat and Meat Product' in Yamine Motarjemi and Huub Lelieveld (eds), *Food Safety Management: A Practical Guide for the Food Industry* (Elsevier 2014).

<sup>3</sup> สำนักงานเศรษฐกิจการเกษตร, *สถานการณ์สินค้าเกษตรที่สำคัญและแนวโน้ม ปี 2558* (Office of Agricultural Economics, Thailand, *Status and Trends of Significant Agricultural Commodities in 2015*). (Ministry of Agriculture 2014).

<sup>4</sup> Interview with Chainarong Kantawanich (ชัยณรงค์ กันชวานิช), specialist on meat science (Bangkok, 15 January 2015).

meat safety in Thailand in comparison to selected foreign countries. The comparative analysis helps to reveal lessons learned on the legal approaches of the three countries. Specifically, the study seeks to identify legal weak points as well as the problems involved in the production chain of raw meat. The information yielded from this study will be helpful for legal measure enhancement on meat safety, particularly for domestic consumption.

### **Status and Trends of Food Safety Laws**

Global awareness on food safety in the 21<sup>st</sup> century has stimulated rigorous advancements in scientific control as well as legal measures among countries all over the world. Amid such legal proliferation, food safety laws have seen varied among countries in regards to legal structure as well as content due to the differences in the food culture as well as the socio-economic background of each country. Analysis of food laws from different countries worldwide revealed problems and issues in the aspects of food law quality, general legislation, and food safety authorities<sup>5</sup>

Regardless of variations, food laws must be modernized to protect the food supply, and at the same time enable the food industry and a government's approval agencies the flexibility to apply innovations and new technology. At present, strategies to ensure food safety place more emphasis on *preventive measures* or precautionary principle implemented throughout food supply chain, and moving from sectorial approach to *integrated or holistic approach*.<sup>6</sup>

As for **meat safety control**, legal approaches are also found varied among countries. In the countries with powerful food safety legislation, meat safety is controlled by a specific law which is comprehensive on meat commodity, governing the entire meat supply chain, from the production, slaughtering, processing, and selling of meat and meat products. In some countries, laws are created for more specific groups of meat such as meat, poultry and egg, and fish with an aim to regulate food safety of each agricultural commodity in a holistic manner. In contrast, other countries with younger history of food safety legislation tend to treat the meat safety issue in isolated laws and regulation.

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<sup>5</sup> Bernd M.J. van de Meulen, 'International Food Law' in Christine E. Boisrobert (ed), *Ensuring Global Food Safety: Exploring Global Harmonization* (Elsevier 2010).

<sup>6</sup> Europe-ACP Liaison Committee (COLEACP), 'EDES Handbook on Basic Food Safety Concepts' <<http://edes.coleacp.org/en/edes/page/20342-publications>> accessed March 10, 2015.

### **International Standards on Meat Safety**

The recent decades have been the period of initiative undertakings on design and establishment of international agreements on food safety regulations, based on scientific concepts and methodology of food safety control. Reviewed herewith are three sets of generally accepted standards, rules, and guidelines pertaining to meat safety control.

#### **Codex Alimentarius's Code of Hygienic Practice for Meat**

*Codex Alimentarius* is a compilation of food safety standards that have been developed and adopted by the Codex Alimentarius Commission (CAC) established in 1963 with financial assistance by FAO and WHO.<sup>7</sup> The Codex Alimentarius's Code is recognized worldwide as an important reference on food safety.

As the production chain of meat involves particularly details different from other kinds of food, the Codex Code provides a **Code of Hygienic Practice for Meat** (CAC/RCP 58-2005) as a specific guideline for legislation on meat hygiene of each state.<sup>8</sup> This Code recommends hygienic practices for meat in the whole production chain as supplementary provisions to the General Principles of Food Hygiene. There are various animals producing meat covered by this Code, but not including marine animals. In addition to 'the Code', there are some recommended standards in particular aspects related with meat hygiene, such as MRLs of veterinary drug residues and Codex's Code on Good Animal Feeding, among others.

#### **World Organization for Animal Health (OIE)'s Guide**

OIE is the intergovernmental organization responsible for improving animal health worldwide. It is committed to provide a better guarantee of food of animal origin and to promote animal welfare through a science-based approach, and is recognized as a reference organization by the World Trade Organization (WTO).<sup>9</sup>

OIE's international standards on animal health and welfare are prepared and updated by recognized scientific experts and are democratically

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<sup>7</sup> World Trade Organization (WTO), 'The WTO and the FAO/WHO Codex Alimentarius' <[https://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_codex\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm)> accessed 15 February 2015.

<sup>8</sup> Codex Alimentarius Commission (CAC), *Code of Hygienic Practice for Meat (CAC/RCP 58-2005)*, Sec.3.

<sup>9</sup> The World Organization for Animal Health (OIE), 'Our Mission' <<http://www.oie.int/en/about-us/our-missions>> accessed 12 January 2017.

adopted at annual General Sessions of the World Assembly of Delegates of the OIE. These standards are designed to prevent and control animal diseases, including zoonoses, ensure the sanitary safety of world trade in terrestrial and aquatic animals and animal products, and improve animal welfare.<sup>10</sup> The OIE focuses its guidelines and recommendations on the aspect of animal health and welfare, which mostly relates to primary production of meat. The associated recommendations are the *Guide to Good Farming Practices for Animal Production Food Safety* and the *Terrestrial Animal Health Code*. The *guide* is concerned with animal husbandry management in farms with regards to food safety perspective<sup>11</sup>, whereas the *Terrestrial Code* covers principles and recommendations on the role of veterinary service, the approach of animals handling and health surveillance in farming, trading, and slaughter process.<sup>12</sup>

### **EU's Rules on Meat Safety**

Development of the European Union (EU) food laws has been shaped by a number of food crises, as evidenced in the case of the BSE (*mad cow disease*) crisis during 1980s-2003 which lead to a major reform of the EU food safety laws.<sup>13</sup> The European Commission issued a *Green Paper* in 1997, stating that “the current food legislation fell short of meeting the needs of consumers, producers, and manufacturers of food products”.<sup>14</sup> Soon afterwards, in 2000, the EU Commission's *White Paper on Food Safety* was published. In this White Paper, a new legal framework was proposed in order to establish a high level of consumer health protection.<sup>15</sup>

The White Paper provided the ground for the three Hygiene Regulations known as the *Hygiene Package* that deals with all foods and

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<sup>10</sup> Ibid.

<sup>11</sup> OIE, ‘Guide to Good Farming Practices for Animal Production Food Safety’ <[http://www.oie.int/fileadmin/Home/eng/Food\\_Safety/docs/pdf/](http://www.oie.int/fileadmin/Home/eng/Food_Safety/docs/pdf/)> accessed 12 January 2017.

<sup>12</sup> OIE, ‘Terrestrial Animal Health Code’ <<https://www.oie.int/doc/ged/d10905.pdf>> accessed 12 January 2017.

<sup>13</sup> John D.G. McEvoy. ‘Emerging food safety issues: An EU perspective’ (2016) 8 Drug Testing and Analysis 511.

<sup>14</sup> Emilie H. Leibovitch, ‘Food Safety Regulation in the European Union: Toward an Unavoidable Centralization of Regulatory Powers’ (2008) 43 Texas International Law Journal 429.

<sup>15</sup> Commission of the European Communities, ‘White Paper on Food Safety’ <[http://ec.europa.eu/dgs/health\\_food-safety/library/pub/pub06\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/library/pub/pub06_en.pdf)> accessed 15 January 2017.

covers the entire food chain.<sup>16</sup> Among the three regulations set forth, *Regulation (EC) No 854/2004* provides specific rules for the organization of official controls on products of animal origin intended for human consumption. The Hygiene Package also sought to streamline food hygiene rules along the lines of a risk-based approach and embed a stronger emphasis on flexibility in the adaptation of rules to different contexts.<sup>17</sup>

### **Comparative Legal Measures on Meat safety in Thailand, the United States and Singapore**

The United States and Singapore are case studies of countries with powerful food safety measures, but having distinctively different contexts. The United States has a long history of food legislation with profound innovations in food management and proactive actions against food-borne diseases, particularly in regards to meat safety.<sup>18</sup> The U.S. food safety laws are comprehensive for specific agricultural commodity, with the *Meat Inspection Act* at the forefront, dating back to 1809.<sup>19</sup> At present, the main provision for meat safety control is the *Federal Meat Inspection Act (FMIA)*.<sup>20</sup> Other related laws includes the Federal Food, Drug, and Cosmetics Act (FFDCA), and the Humane Method of Slaughter Act. Apart from the laws mentioned, there are regulations combined in the U.S. Code of Federal Regulations (CFR) which elaborate each issue in details. To help address the public health challenge of food safety, in 2010 Congress passed the Food Safety Modernization Act (FSMA) which took effect in 2011. The passage of the FSMA marked the first major overhaul of federal food safety emphasizing the prevention of food-borne illness rather than the reaction to disease outbreak.<sup>21</sup>

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<sup>16</sup> European Commission, 'Legislation' <[https://ec.europa.eu/food/safety/biosafety/food\\_hygiene/legislation\\_en](https://ec.europa.eu/food/safety/biosafety/food_hygiene/legislation_en)> accessed 15 January 2017.

<sup>17</sup> James Lawless and Klaus Wiedemann, 'European Meat Inspection—Continuity and Change in Building a (more) Risk-Based System of Regulation' (2011) *European Food and Feed Law Review* 96.

<sup>18</sup> Robin Johnson, 'Prescriptive Approaches to Food Safety in Meat Products' (2004) 33(3) *Outlook on Agriculture* 151.

<sup>19</sup> Neal D. Fortin, 'Development of Food Legislation around the World: The United States and Canada', in Christine E. Boisrobert and others (eds), *Ensuring Global Food Safety: Exploring Global Harmonization* (Elsevier 2010).

<sup>20</sup> U.S. Department Of Agriculture (Usda), 'Federal Meat Inspection Act' <<https://www.fsis.usda.gov/Wps/Portal/Fsis/Topics/Rulemaking/Federal-Meat-Inspection-Act>> Accessed 20 February 2016.

<sup>21</sup> Y. Tony Yang and Mathew Swineburne, 'New Produce Safety Regulations: Promises and Challenges' (2016) 131 *Public Health Reports* 754.

Singapore, on the other hand, is an exemplary case of ASEAN country with more recent history of food safety laws, yet remarkably powerful ones.

Singapore enjoys one of the lowest incidences of food-borne disease outbreaks compared to the rest of the world, despite the fact that around 90% of all food consumed in Singapore is imported.<sup>22</sup> Generally, food safety in Singapore is governed by the Sales of Food Act. Safety of meat products throughout the supply chain is controlled by three main laws depending on stage of production: *Animals and Birds Act (ABA)*, *Feeding Stuffs Act (FSA)*, and the *Wholesome Meat and Fish Act (WMFA)*.<sup>23</sup>

On similarity, the legal measures for meat safety of the United States and Singapore share a common feature in that both countries regulate specific yet comprehensive laws addressing the meat safety control governing the whole supply chain. Moreover, they are based on the same concept that adulterated meat shall be prevented from entering to the human consumption chain, and thus a holistic approach is essential throughout the meat supply chain. The major factors of concern in the laws of both countries are animal diseases, animal feed and veterinary drug, transportation of animals and meat products, sanitary condition and hygienic practice in the premises. Above all, food safety for domestic consumer protection is on top of priority in both countries.

Aside from the common aspects mentioned above, the two countries place different emphases on legal measures over meat safety, due to difference in size, administrative structure, and amount of meat production activities. Overall, Singapore law is less complicated and more flexible as more discretionary power is assigned to the Director-General. Moreover, there is a marked difference in the allocation of duties between agencies. In general, food safety governance in the United States is seen as a fragmented system, involving various federal agencies and laws.<sup>24</sup> In case of meat, authorities to control safety of most meat, poultry, and egg product in the United States are delegated to the U.S. Department of Agriculture (USDA), while safety of other

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<sup>22</sup> Agri-food & Veterinary Authority of Singapore (AVA), 'Food Safety Standards' <<http://www.ava.gov.sg/explore-by-sections/food/food-safety-quality/singapores-food-safety-standards>> accessed 26 January 2017.

<sup>23</sup> AVA, 'Legislation' <<http://www.ava.gov.sg/legislation>> accessed 13 December 2015.

<sup>24</sup> Stephanie Tai, 'Whole Foods: The FSMA and the Challenges of Defragmenting Food Safety Regulation', *American J. of Law & Medicine*, (2015) 41. 447.

foods, as well as animal feed, are controlled by the U.S Food and Drug Administration (USFDA). On the contrary, food safety authority in Singapore is more consolidated to one agency, the Agri-food & Veterinary Authority of Singapore (AVA). Secondly, the scope of law is different, especially in slaughter process. *Federal Meat Inspection Act* of the United States is restricted to meat and meat products with very specific definitions.<sup>25</sup> Contrastingly, in Singapore, meat and fish safety are included in the same act titled *Wholesome Meat and Fish Act*, with broader definition.<sup>26</sup> Thirdly, as the provisions concerning cooperation between Federal and State agencies of the United States are emphasized, it is less obvious in the case of Singapore. It should be noted as well that the U.S. has been more proactive in addressing the threat of foodborne illness as a bioterrorist attack.<sup>27</sup>

In the case of Thailand, food safety awareness and governance are relatively young, especially when compared to the U.S. Starting with the *Food Act B.E. 2522* as an umbrella for food quality control, recent years have seen numerous efforts in the development of food safety laws and regulations in Thailand, mainly as responses to international requirements for export. As for legal measures specifically directed at meat safety, the *Control of the Slaughter for Distribution of Meat Act B.E.2559* is presently the main law in support of the Food Act. In contrast with the U.S. and Singapore, certain provisions of meat safety control are under several related laws, namely, Animal Feed Quality Control Act B.E. 2558, Agricultural Standards Act B.E. 2551, Animal Epidemics Act B.E. 2558, and Factory Act, B.E. 2535. When compared to the other two countries, Thai laws on meat safety are not as comprehensive in meat categories coverage, and more segmented in terms of governing the entire supply chain. The multi-agency system has posed problems of fragmented authority, but on different aspects and scale from the case of the U.S. In contrast with the other two countries, Thai laws, regulations and enforcements have been more responsive to premium market and exportation.

With regards to compliance with international agreements on standards, the United States as a global leader in Codex Alimentarius has

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<sup>25</sup> USDA, (N 20).

<sup>26</sup> AVA, 'Wholesome Meat and Fish Act' <[http://www.ava.gov.sg/docs/default-source/legislation/wholesome-meat-and-fish-act/60web\\_wmf\\_processing](http://www.ava.gov.sg/docs/default-source/legislation/wholesome-meat-and-fish-act/60web_wmf_processing)> accessed 13 December 2016.

<sup>27</sup> K. Havas and M. Salman, 'Food security: its components and challenges', Int. J. Food Safety, Nutrition and Public Health, (2011) 4 (1).

established the U.S. Codex Office with the main goal to facilitate the continued adoption and leadership.<sup>28</sup> Singapore observes stringent food safety standards. As the national authority for food safety in Singapore, the AVA has put in place an effective integrated food safety system to ensure that food is safe for consumption.<sup>29</sup> The country adopts the Codex's Codes in principle with some flexibility in legal requirements. Interestingly, some requirements are more restrictive than those recommended by the Codex's Code. As for Thailand, meat safety regulations generally comply with the Codex's Codes, particularly for exportation. As in various other countries, a Codex Contact Point was set up as coordinating agency to encourage compliances with agreements or guidelines provided by the Codex.<sup>30</sup> Substantial parts of the Codex's Codes have been adopted, but with some limitations set forth in legal requirements.

Comparative analysis of legal measures on meat safety of the three countries in the aspects of *structure*, *agencies*, and *measures* are elaborated further in the following table, thereby revealing their similarities and differences, as well as strengths and weaknesses.

### **Problems and Issues of Meat Safety Control under the Thai Laws**

Remarkable efforts in advancing laws and regulations on meat safety have been noted in recent years. Nonetheless, there appears some room for improvements, particularly with regards to quality control for general domestic consumers. Problems are identified at two levels, as follows.

#### **1. Problems of the Overall System**

*Problems of the Thai legal structure for meat safety.* Fragmentation of Thai laws on meat safety may be a cause of deficiency in law enforcements. Firstly, control of feed quality is under the Animal Feed Quality Control Act, whereas slaughter process is under the Control of Slaughter for Distribution of Meat Act. Moreover, the process after the slaughter, including importation of meat products, is within the scope of the Food Act. Though the processed meat

<sup>28</sup> U.S. Codex Office, 'U.S. Codex Strategic Plan (for 2012-2017)' 4, <[http://www.fsis.usda.gov/wps/wcm/connect/ab59575e-0ccc-4ff5-8ecb-300a0bbf5ffb/US\\_Codex\\_Strategic\\_Plan\\_2012-2017.pdf](http://www.fsis.usda.gov/wps/wcm/connect/ab59575e-0ccc-4ff5-8ecb-300a0bbf5ffb/US_Codex_Strategic_Plan_2012-2017.pdf)> accessed 26 January 2017.

<sup>29</sup> AVA, (n 26).

<sup>30</sup> สำนักงานมาตรฐานสินค้าเกษตรและอาหารแห่งชาติ (มกอช.), 'บทบาทสำคัญของสำนักงานมาตรฐานสินค้าเกษตรและอาหารแห่งชาติ (มกอช.) ในงาน Codex' (National Bureau of Agricultural Commodity and Food Standards (ACFS), 'Roles of the ACFS concerning with Codex's work') <<http://www.acfs.go.th/codex/index.php>> accessed 28 May 2016.



is a category of 'food' in common understanding, such product contains certain specific characteristics which should be handled with specific law and regulations. Aside from the said problem of law fragmentation, there have been efforts driven by production industry to develop another kind of specific law, targeting at certain meat category. As a case in point, the Cattle Beef industry Strategy Committee, in collaboration with the Beef Producers Association, have drafted *Beef Industry Development Act*, which covers regulations specifically on beef, governing beef production industry in a holistic manner throughout the supply chain, with food safety is one key element.<sup>31</sup> If the said draft is approved and enacted as an act, beef shall be the only category of meat covered by this specific law, while meat from other animal origins will remain under the existing fragmented laws.

***Problems in allocation of responsibilities among concerned agencies.***

Past research of food safety control system of various countries pointed out that, at the central government level, the problems commonly found are the fragmented, ill-coordinated, unclear responsibility, and dual or multi roles of food authorities.<sup>32</sup> Such mentioned problems are also observed in the case of Thailand. At present, two main agencies are responsible for meat safety control: Thai FDA (*Thai Food and Drug Administration*) under Ministry of Public health, and DLD (*Department of Livestock*) under Ministry of Agriculture and Cooperatives. The DLD's control is limited to the primary production and slaughter, whereas the FDA authorizes meat safety in the processes thereafter. With regards to food standards setting and implementation, more than one agencies are assigned responsibilities under different laws and regulations. For mandatory minimum standards provided by concerned regulations, four agencies, namely, DLD, FDA, and TISI (*Thai Industrial Standards Institute*) are in charge. On the other hand, ACFS (*National Bureau of Agricultural Commodity and Food Standards*) has as its main duty to set both mandatory and voluntary standards and to control the compliance.

Such allocation of power leads to fragmented or redundant control of meat safety. Without adequate coordination between or among these agencies,

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<sup>31</sup> Interview with Matana Osothongs (มีทนา โอสอทองส์), Beef Production Specialist, (5 Apr 2016).

<sup>32</sup> Youngsup Han, 'Food, Risk, and changing food safety control systems: Politics of Food in Four Countries and the EU: A Comparative Perspective' (2006). (Ph.D. thesis Nottingham Trent University).

the control is hardly comprehensive or consistent, as each agency has its own standards and administrative approaches. In any event that problems arise, it may be difficult to trace back to locate the actual cause of such problems, as information is kept separately in each agency. The complication is extended further on the matter of importation and exportation. Exportation of agricultural products, including meat, is under the control of Ministry of Agriculture and Cooperatives, while product importation and rejection are within the authority of the FDA. All these depict a scenario of problematic allocation of responsibility under the present laws<sup>33</sup>

## **2. Problems of Specific Legal Provisions**

The examination of the existing provisions reveals several weak points with regards to primary production, slaughter, and standards setting of raw meat. Beginning with the control of *primary productions* as the upstream of the supply chain, certain inadequate provisions are identified, including standards for the animal raising premise, measures to facilitate traceability, animal feed, and transportation of animals. Weak points in provisions are noted as well for the control of *slaughter process*, namely, scope of control (inconclusive definitions of ‘meat’, criteria of condemned meat), management of the ‘unfit for food purpose’ meat, sanitary condition inspection, control of meat with risk-prone origin, and enforcement.

Provisions on *standards setting* are problematic as different standards are set by different agencies, opening room for ambiguity in the implementation of standards. Another issue is concerned with voluntary standards on meat safety provided by the ACFS. With such voluntary basis, it is most likely that upper scale producers and slaughterhouses tend to apply for certification while the smaller counter parts opt to neglecting. Thus, the benefits of such standards tend to be mostly for consumers of the premium market.

## **Conclusion and Recommendations**

In designing food safety regulations for a developing country, it is worthy to consider that *the benefit of the food safety regime should not be felt mostly by well-connected and affluent consumers, while impacting adversely on poorer and vulnerable consumers.*<sup>34</sup> In agreement with such remark, the author

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<sup>33</sup> Interview with Thanacheep Peerathornich (ธนชีพ พีระธรรมิษฐ์), the Director of Bureau of Food Safety Extension and Support (BFSES), Thailand. (6 October 2015).

<sup>34</sup> Guanqi Zhou, ‘The Regulatory Regime of Food Safety in China: A Systemic not Accidental Failure’ (Ph.D. thesis, University of Adelaide 2016).

wishes to reinstate that the underlying intention of Thai laws and regulations on meat safety should be placed on a balance of interests for all levels of domestic consumers.

In accordance with the critical review of the current Thai meat safety legislations, combined with the comparative findings across the three countries, recommendations are proposed for a re-examination of the measures being used in Thailand, in the aspects of the legal structure as well as the content of meat safety laws. Key principles and concepts of meat safety control, particularly the precautionary principle and the integrated control governing the entire meat production chain serve as the guiding post for the recommendations.

#### ***Enhancement of the Existing Provisions***

Firstly, to cope with the immediate problems at hand, enhancement of provisions under the existing laws is suggested with regards to primary production, slaughter, and related measures. To maximize the safety of *primary production*, provisions should be amended on standards setting and monitoring, animal identification and traceability, safety of animal feed, and control of transportation of animals.

For the process of *slaughter*, more conclusive definitions of ‘animal’ and ‘meat’ should be considered along with other related definitions. In terms of coverage, definition by animal category as in the Singapore law should be taken into consideration. Moreover, the criteria of ‘unfit for food purpose’ should also be enhanced by more comprehensive ministerial regulations or notifications. Intensification of legal measures to ensure safety of raw meat is also further recommended. The prominent recommendation is that management of ‘unfit for food purpose’ meat should be conducted by methods that ensure safety of meat released into the human supply chain. On the other hand, the laws should promote precautionary principle by requiring the operators to prepare preventive measures and demanding for frequent sanitary condition inspection.

Other recommendations include improved measures for control of imported meat from risk-prone origin, and standards setting. As for enforcement, strict liabilities as mandated in the Singapore law should be considered to simplify the legal procedures.

#### ***Future Alternative: Legal Re-structuring***

As meat production industry evolves with the changing contexts of environment and trading, the author views that meat safety problems in Thailand in the next decades deemed to be more complicated. Solving the emerging problems by pinpointing on particular legal provisions might not be sufficient to handle the complexity. Accordingly, future re-structuring of the meat safety laws is thus proposed, considering first the issue of '*general versus specific laws*' as alternative model of meat safety control to suit the Thai context. In line with the said re-structuring, allocation of responsibilities between the concerned agencies should be adjusted to increase efficiency in meat safety monitoring from raw meat production to processing. In addition, the role of National Food Committee or any other levels of liaison agencies should be enhanced by laws to increase the unity in the control system so that to maximize the continuity of meat safety control in all stages of the supply chain. Lastly, increasing consumer involvement in the legal process is another key element to be considered. Of prime concern, lessons from the reformation of food laws in most developing countries have indicated that the success of such attempt depends on the readiness of the concerned parties and stakeholders of a given country. Likewise, the feasibility of the aforementioned reform of the Thai regulations relies on the readiness, in potentials as well as culture, both in the parts of the government sector and the meat production industry at all levels.

Given the realm of the Thai meat industry, in strengthening the meat safety legislations as proposed, flexibility should be allowed on regulations required for small and medium-scale producers, as long as hygienic condition and safety of meat are not violated.

**Comparative Summary of Legal Measures on Meat Safety of the U.S., Singapore, and Thailand**

Components	U.S.	Singapore	Thailand
<b>1. Structure</b>	<ul style="list-style-type: none"> <li>-Specific on meat category</li> <li>-Single law covering safety of both raw and processed meat</li> </ul>	<ul style="list-style-type: none"> <li>-Comprehensive on meat category</li> <li>-Single law covering safety of both raw and processed meat</li> </ul>	<ul style="list-style-type: none"> <li>-Specific on meat category</li> <li>-Specific laws for raw meat and processed meat</li> </ul>
<b>2. Agencies</b>	<ul style="list-style-type: none"> <li>- Multi-agency system</li> <li>- Problems of fragmented authority</li> </ul>	<ul style="list-style-type: none"> <li>- More consolidated to one agency</li> </ul>	<ul style="list-style-type: none"> <li>- Multi-agency system</li> <li>- Problems of fragmented authority</li> </ul>
<b>3. Measures</b>	<p><b>3.1 Primary Production</b></p> <ol style="list-style-type: none"> <li>1) Premise                             <ul style="list-style-type: none"> <li>-no obvious provision</li> <li>-voluntary standards</li> </ul> </li> <li>2) Feed and drug control                             <ul style="list-style-type: none"> <li>-under the same law and agency as those of human</li> </ul> </li> <li>3) Disease control                             <ul style="list-style-type: none"> <li>-focusing on interstate movement &amp; importation of animal</li> <li>-animal identification as a tool for disease tracing; mandatory in some cases</li> </ul> </li> <li>4) Importation of animal license/permission required                             <ul style="list-style-type: none"> <li>-mandatory inspection</li> </ul> </li> </ol>	<p><b>3.1 Primary Production</b></p> <ol style="list-style-type: none"> <li>1) Premise                             <ul style="list-style-type: none"> <li>-no obvious provision</li> <li>-voluntary standards</li> </ul> </li> <li>2) Feed and drug control                             <ul style="list-style-type: none"> <li>-under specific law for feed</li> </ul> </li> <li>3) Disease control                             <ul style="list-style-type: none"> <li>-covering domestic control no matter of movement</li> <li>-animal identification as a tool for disease tracing; mandatory in some cases</li> </ul> </li> <li>4) Importation of animal license/permission required                             <ul style="list-style-type: none"> <li>-inspection depending on authority's discretion</li> </ul> </li> </ol>	<p><b>3.1 Primary Production</b></p> <ol style="list-style-type: none"> <li>1) Premise                             <ul style="list-style-type: none"> <li>-no obvious provision</li> <li>-voluntary standards</li> </ul> </li> <li>2) Feed and drug control                             <ul style="list-style-type: none"> <li>-under specific law for feed</li> </ul> </li> <li>3) Disease control                             <ul style="list-style-type: none"> <li>-covering domestic control no matter of movement</li> <li>-animal identification as a tool for disease tracing; mandatory in some cases</li> </ul> </li> <li>4) Importation of animal license/permission required                             <ul style="list-style-type: none"> <li>-mandatory inspection</li> </ul> </li> </ol>

Comparative Summary of Legal Measures on Meat Safety of the U.S., Singapore, and Thailand *(cont.)*

Components	U.S.	Singapore	Thailand
<p><b>3. Measures</b> <i>(cont.)</i></p>	<p><b>3.2 Slaughter Process</b></p> <p>1) Scope -not as conclusive</p> <p>2) Control -license/permission required -mandatory inspection -conclusive definition of 'adulterated' and 'unfit for consumption' -<i>mandatory</i> HACCP and SSOPs</p> <p>3) Importation of meat -subject to single law</p>	<p><b>3.2 Slaughter Process</b></p> <p>1) Scope -conclusive on animal category</p> <p>2) Control -license/permission required -inspection depending on authority's discretion -conclusive definition of 'adulterated' and 'unfit for consumption' -<i>voluntary</i> HACCP and SSOPs</p> <p>3) Importation of meat -subject to single law</p>	<p><b>3.2 Slaughter Process</b></p> <p>1) Scope -not as conclusive</p> <p>2) Control -license/permission required -mandatory inspection -Not so conclusive definition of 'adulterated' and 'unfit for consumption' -<i>voluntary</i> HACCP and SSOPs</p> <p>3) Importation of meat -subject to <i>separate</i> laws</p>
	<p><b>3.3 Other Measures</b></p> <p>1) Standard setting. -minimum standards required as mandatory -voluntary standard setting regulated by specific agency in USDA</p> <p>2) Cooperation/coordination. -problems found among agencies, resolved by the Food Safety Modernization Act</p>	<p><b>3.3 Other Measures</b></p> <p>1) Standard setting. -Minimum standards required as mandatory, -unity in standard setting, regulated by one agency</p> <p>2) Cooperation/coordination -authority consolidated to one agency, no obvious provisions on cooperation among agencies.</p>	<p><b>3.3 Other Measures</b></p> <p>1) Standard setting. -minimum standards required as mandatory, -standard setting regulated by different laws and agencies</p> <p>2) Cooperation/coordination -vertical &amp; horizontal problems -overlapping of powers and duties</p>

Comparative Summary of Legal Measures on Meat Safety of the U.S., Singapore, and Thailand *(cont.)*

Components	U.S.	Singapore	Thailand
<p><b>3. Measures</b> <i>(cont.)</i></p>	<p><b>3.2 Slaughter Process</b></p> <ul style="list-style-type: none"> <li>1) Scope                             <ul style="list-style-type: none"> <li>-not as conclusive</li> </ul> </li> <li>2) Control                             <ul style="list-style-type: none"> <li>-license/permission required</li> <li>-mandatory inspection</li> <li>-conclusive definition of 'adulterated' and 'unfit for consumption'</li> </ul> </li> <li>3) Importation of meat                             <ul style="list-style-type: none"> <li>-mandatory HACCP and SSOPs</li> <li>-subject to single law</li> </ul> </li> </ul>	<p><b>3.2 Slaughter Process</b></p> <ul style="list-style-type: none"> <li>1) Scope                             <ul style="list-style-type: none"> <li>-conclusive on animal category</li> </ul> </li> <li>2) Control                             <ul style="list-style-type: none"> <li>-license/permission required</li> <li>-inspection depending on authority's discretion</li> <li>-conclusive definition of 'adulterated' and 'unfit for consumption'</li> </ul> </li> <li>3) Importation of meat                             <ul style="list-style-type: none"> <li>-voluntary HACCP and SSOPs</li> <li>-subject to single law</li> </ul> </li> </ul>	<p><b>3.2 Slaughter Process</b></p> <ul style="list-style-type: none"> <li>1) Scope                             <ul style="list-style-type: none"> <li>-not as conclusive</li> </ul> </li> <li>2) Control                             <ul style="list-style-type: none"> <li>-license/permission required</li> <li>-mandatory inspection</li> <li>-Nor so conclusive definition of 'adulterated' and 'unfit for consumption'</li> </ul> </li> <li>3) Importation of meat                             <ul style="list-style-type: none"> <li>-voluntary HACCP and SSOPs</li> <li>-subject to <i>separate</i> laws</li> </ul> </li> </ul>
	<p><b>3.3 Other Measures</b></p> <ul style="list-style-type: none"> <li>1) Standard setting                             <ul style="list-style-type: none"> <li>-minimum standards required as mandatory</li> <li>-voluntary standard setting regulated by specific agency in USDA</li> </ul> </li> <li>2) Cooperation/coordination                             <ul style="list-style-type: none"> <li>-problems found among agencies, resolved by the Food Safety Modernization Act</li> </ul> </li> </ul>	<p><b>3.3 Other Measures</b></p> <ul style="list-style-type: none"> <li>1) Standard setting                             <ul style="list-style-type: none"> <li>-Minimum standards required as mandatory,</li> <li>-unity in standard setting, regulated by one agency</li> </ul> </li> <li>2) Cooperation/coordination                             <ul style="list-style-type: none"> <li>-authority consolidated to one agency, no obvious provisions on cooperation among agencies.</li> </ul> </li> </ul>	<p><b>3.3 Other Measures</b></p> <ul style="list-style-type: none"> <li>1) Standard setting                             <ul style="list-style-type: none"> <li>-minimum standards required as mandatory,</li> <li>-standard setting regulated by different laws and agencies</li> </ul> </li> <li>2) Cooperation/coordination                             <ul style="list-style-type: none"> <li>-vertical &amp; horizontal problems</li> <li>-overlapping of powers and duties</li> </ul> </li> </ul>

## References

- Agri-food & Veterinary Authority of Singapore (AVA), "Food Safety Standards." <http://www.ava.gov.sg/explore-by-sections/food/food-safety-quality/singapores-food-safety-standards>. (accessed January 26, 2017).
- Agri-food & Veterinary Authority of Singapore (AVA), "Legislation." <http://www.ava.gov.sg/legislation>. (accessed December 13, 2015).
- Agri-food & Veterinary Authority of Singapore (AVA), "Wholesome Meat and Fish Act." [http://www.ava.gov.sg/docs/default-source/legislation/wholesome-meat-and-fish-act/60web\\_wmf\\_processing](http://www.ava.gov.sg/docs/default-source/legislation/wholesome-meat-and-fish-act/60web_wmf_processing). (accessed December 13, 2016).
- Bureau of Food Safety Extension and Support (BFSES, Thailand), "Chain of Actions on Food Safety." <http://www.foodsafety.moph.go.th/th/food-safety/general-detail>. (accessed February 10, 2016).
- Codex Alimentarius Commission (CAC), *Code of Hygienic Practice for Meat (CAC/RCP 58-2005)*, Sec.3.
- Commission of the European Communities, "White Paper on Food Safety." [http://ec.europa.eu/dgs/health\\_food-safety/library/pub/pub06\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/library/pub/pub06_en.pdf). (accessed January 15, 2017).
- Europe-ACP Liaison Committee (COLEACP), "EDES Handbook on Basic Food Safety Concepts". <http://edes.coleacp.org/en/edes/page/20342-publications>. (accessed March 10, 2015).
- European Commission, "Legislation." [https://ec.europa.eu/food/safety/biosafety/food\\_hygiene/legislation\\_en](https://ec.europa.eu/food/safety/biosafety/food_hygiene/legislation_en). (accessed January 15, 2017).
- Fortin, N.D. "Development of Food Legislation around the World: The United States and Canada", *Ensuring Global Food Safety: Exploring Global Harmonization*, edited by Christine E. Boisrobert, et al, 32-36. New York, Elsevier, 2010.
- Han, Y. "Food, Risk, and Changing Food Safety Control Systems: Politics of Food in Four Countries and the EU: A Comparative Perspective" (Ph.D. thesis, Nottingham Trent University, 2006).
- Havas, K. and M. Salman. "Food Security: Its Components and Challenges." *Int. J. Food Safety, Nutrition and Public Health*, 4(1), (2011).



- James, L. and K. Wiedemann. "European Meat Inspection-Continuity and Change in Building a (more) Risk-Based System of Regulation." *European Food and Feed Law Review*, 96, (2011).
- Johnson, R. "Prescriptive Approaches to Food Safety in Meat Products." *Outlook on Agriculture*, 33(3), (2004): 151-155.
- Kantawanich, C., Meat Science Specialist, (Interview, January 15, 2015).
- Leibovitch, E.H. "Food Safety Regulation in the European Union: Toward an Unavoidable Centralization of Regulatory Powers." *Texas International Law Journal*, 43, (2008): 429-452.
- McEvoy, J.D.G. "Emerging Food Safety Issues: An EU Perspective." *Drug Testing and Analysis*, 8, (2016): 511-520.
- National Bureau of Agricultural Commodity and Food Standards (ACFS, Thailand), "Roles of the ACFS Concerning with Codex's Work" <http://www.acfs.go.th/codex/index.php>. (accessed May 28, 2016).
- Office of Agricultural Economics, *Status and Trends of Significant Agricultural Commodities in 2015*. (Ministry of Agriculture, Thailand, 2014).
- Osothongs, M., Beef Production Specialist, (Interview, Apr 5, 2016).
- Peerathornich T., Director of Bureau of Food Safety Extension and Support (BFSES, Thailand), (Interview, October 6, 2015).
- Sofos, J.N. "Meat and Meat Product." In *Food Safety Management: A Practical Guide for the Food Industry*, edited by Y. Motarjemi and H. Lelieveld, 119-158. New York: Elsevier, 2014.
- Tai, S. "Whole Foods: The FSMA and the Challenges of Defragmenting Food Safety Regulation." *American J. of Law & Medicine*, 41, (2015): 447-458.
- U.S. Codex Office, "U.S. Codex Strategic Plan (for 2012-2017)" [http://www.fsis.usda.gov/wps/wcm/connect/ab59575e-0ccc-4ff5-8ecb-300a0bbf5ffb/US\\_Codex\\_Strategic\\_Plan\\_2012-2017.pdf](http://www.fsis.usda.gov/wps/wcm/connect/ab59575e-0ccc-4ff5-8ecb-300a0bbf5ffb/US_Codex_Strategic_Plan_2012-2017.pdf) (accessed January 6, 2017).
- U.S. Department of Agriculture (USDA), "Federal Meat Inspection Act". <https://www.fsis.usda.gov/wps/portal/fsis/topics/rulemaking/federal-meat-inspection-act>. (accessed February 20, 2016).
- van de Meulen, BMJ, "International Food Law." In *Ensuring Global Food Safety: Exploring Global Harmonization*, edited by C. E. Boisrobert, New York: Elsevier, 2010.

World Organization for Animal Health (OIE), "Animal Production Food Safety": [www.oie.int/en/food-safety/achievements-to-date](http://www.oie.int/en/food-safety/achievements-to-date). (accessed January 12, 2017).

World Organization for Animal Health (OIE), "Guide to Good Farming Practices for Animal Production Food Safety"  
[http://www.oie.int/fileadmin/Home/eng/Food\\_Safety/docs/pdf/3\\_Lang\\_Good\\_farming\\_practices.pdf](http://www.oie.int/fileadmin/Home/eng/Food_Safety/docs/pdf/3_Lang_Good_farming_practices.pdf) (accessed January 12, 2017).

World Organization for Animal Health (OIE), "Our Mission".  
<http://www.oie.int/en/about-us/our-missions>. (accessed January 12, 2017).

World Organization for Animal Health (OIE), "Terrestrial Animal Health Code". <https://www.oie.int/doc/ged/d10905.pdf>. (accessed January 12, 2017).

World Trade Organization (WTO), "The WTO and the FAO/WHO Codex Alimentarius". [https://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_codex\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm). (accessed February 15, 2015).

Yang, Y.T. and M. Swineburne. "New Produce Safety Regulations: Promises and Challenges." *Public Health Reports*, 131, (2016): 754-757.

Zhou, G. "The Regulatory Regime of Food Safety in China: A Systemic not Accidental Failure." (Ph.D. thesis, The University of Adelaide, 2016).

**BUILDING PRO BONO CULTURE IN THAILAND'S LEGAL  
BUSINESS AS A CONTRIBUTION TO SUSTAINABLE  
DEVELOPMENT\***

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**Abstract**

Law-related matters and the justice system are complicated. It consists of complex details, rules, and procedures. Not to mention the costs that the users have to pay. To understand and implement the rights in law-related matters and through the justice system, one needs to have the knowledge and a good understanding of the laws, rules, and procedures required. If they do not, they would need to have the resources up to the certain level to afford a legal representative of their own. For many people that do not have either the knowledge or the resources required, their chances to access to justice are almost as good as none.

The justice gap and the problem of unequal access to justice are still in evidence in many countries around the world, including Thailand. While there are many attempts and efforts in tackling such problem; either by the public or the civil society sectors in Thailand, the problem still exists. These problems affect not only the poor people but a wide range of individuals and organizations that cannot afford a legal representative or unable to obtain the help they need due to various factors.

Pro bono has been recognized on an international stage as an effective mean to provide legal services and develop equal access to justice for all. Pro bono is a service that requires specific skills of professionals to provide services to those who are unable to afford them. Although the term 'pro bono' may be used by different professionals that involve the offering of free services, it is usually referred to the provision of legal services.

There is no distinctive explanation why there is a low number of pro bono activities in Thailand. However, the author strongly believes that in taking

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\* This article is summarized and arranged from the thesis "Building Pro Bono Culture in Thailand's Legal Business as a Contribution to Sustainable Development" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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a greater role in supporting and encouraging pro bono culture by the Thai government, the pro bono culture in Thailand's legal business would grow stronger than ever. Whereas, it would provide the public with a greater chance to implement and protect their right of access to justice. At the same time, lawyers would have their opportunities to fulfill the professional and ethical obligations that they owed to the society while gaining various benefits in business aspects. The State would have the support from the lawyers in providing and enhancing access to justice in Thailand. Also, building pro bono culture in Thailand will further result as a contribution to sustainable development under the 2030 Agenda for Sustainable Development of the United Nations; particularly the Sustainable Development Goal 16.

This article will focus on the limitations of the current legal aid system in Thailand, and the study of pro bono practices and approaches in foreign countries as a model for the development of pro bono culture in Thailand's legal business.

**Keywords:** Pro Bono, Legal Aid, Access to Justice, Sustainable Development

### บทคัดย่อ

กระบวนการยุติธรรมและประเด็นต่าง ๆ ที่มีความเกี่ยวข้องกับกฎหมายถือได้ว่าเป็นสิ่งที่ยุ่งยากและซับซ้อน ด้วยสิ่งเหล่านี้ประกอบไปด้วยรายละเอียด กฎระเบียบและแนวทางการดำเนินงานที่ซับซ้อนและเข้าใจได้ยาก รวมไปถึงค่าใช้จ่าต่าง ๆ ที่ผู้ใช้บริการต้องชำระเพื่อจะได้เข้าถึงการบริการ การจะบังคับใช้สิทธิในประเด็นต่าง ๆ ที่มีความเกี่ยวข้องกับกฎหมายหรือการจะบังคับใช้สิทธิผ่านกระบวนการยุติธรรมได้นั้น จะต้องอาศัยความรู้และความเข้าใจในกฎหมาย กฎระเบียบและกระบวนการที่เกี่ยวข้องอย่างแท้จริง หากบุคคลไม่ทราบในสิ่งดังกล่าวก็จำเป็นที่จะต้องจ้างที่ปรึกษาทางกฎหมายหรือทนายความเพื่อมาให้บริการในส่วนนี้ ซึ่งการจะจ้างที่ปรึกษากฎหมายหรือทนายความได้นั้นก็ต้องอาศัยทรัพย์สินจำนวนมากพอสมควร เช่นนี้แล้ว หากบุคคลไม่มีทั้งความรู้และทรัพย์สิน โอกาสที่เขาเหล่านั้นจะเข้าถึงความยุติธรรมได้ก็แทบจะไม่มี

ปัญหาเรื่องช่องว่างและการเข้าถึงความยุติธรรมยังคงมีอยู่ในหลายประเทศทั่วโลก รวมถึงประเทศไทย แม้ว่ามีความพยายามจำนวนมาก ทั้งจากภาครัฐและภาคประชาสังคม ในการแก้ไขปัญหาดังกล่าวในประเทศไทย แต่ก็ยังไม่สัมฤทธิ์ผล ซึ่งปัญหาเหล่านี้มิได้ส่งผลกระทบต่อเพียงแก่กลุ่มผู้มีรายได้น้อย แต่ส่งผลกระทบต่อผู้คนในวงกว้าง รวมถึงกลุ่มองค์กรต่าง ๆ ที่ไม่มีทรัพย์สินเพียงพอในการจ้างที่ปรึกษากฎหมายหรือทนายความ หรือไม่สามารเข้าถึงการบริการดังกล่าวได้ด้วยเหตุผลอีกหลากหลายประการ

Pro bono หรือการให้ความช่วยเหลือทางกฎหมายโดยไม่คิดค่าใช้จ่าของนักกฎหมาย เป็นมาตรการหนึ่งที่ได้รับรับการยอมรับในระดับนานาชาติว่าช่วยส่งเสริมให้เกิดการเข้าถึงความยุติธรรมอย่างเท่าเทียมกันของทุกคนได้ pro bono เป็นการให้บริการที่ต้องอาศัยความเชี่ยวชาญเฉพาะด้านหรือวิชาชีพเฉพาะ ให้แก่บุคคลที่ต้องการความช่วยเหลือด้านดังกล่าว แม้คำว่า pro bono จะสามารถใช้ในการให้ความช่วยเหลือทางวิชาชีพด้านอื่นได้ แต่ส่วนมากมักใช้อ้างถึงการให้ความช่วยเหลือทางกฎหมายโดยไม่คิดค่าใช้จ่า

แม้ว่าจะไม่มีคำอธิบายที่ชัดเจนถึงอัตราการให้บริการ pro bono ในประเทศไทยที่ค่อนข้างต่ำ แต่ผู้เขียนเชื่อว่าหากรัฐบาลให้การสนับสนุนและส่งเสริม pro bono อย่างจริงจังแล้ว วัฒนธรรม pro bono จะสามารถเติบโตในธุรกิจกฎหมายไทยได้อย่างมั่นคงและยาวนาน ซึ่ง pro bono จะช่วยเพิ่มช่องทางให้สังคมและประชาชนในการบังคับใช้และปกป้องสิทธิของตนได้มากขึ้น โดยเฉพาะสิทธิในการเข้าถึงความยุติธรรม นักกฎหมายเองก็ได้รับโอกาสที่จะบรรลุตามหน้าที่ทางจริยธรรมและวิชาชีพที่ตนมีต่อสังคม ขณะที่ได้รับประโยชน์ในทางธุรกิจอย่างควบคู่กันไป รัฐบาลเองก็ได้รับการสนับสนุนจากเหล่านักกฎหมายและภาคเอกชนในการยกระดับการเข้าถึงความยุติธรรมอย่างเท่าเทียมกันของทุกคน ขณะเดียวกัน การสนับสนุนวัฒนธรรม pro bono ดังกล่าว ยังถือเป็นการเสริมสร้างให้เกิดการพัฒนาที่ยั่งยืนภายใต้กรอบการพัฒนาที่ยั่งยืนปี 2030 ของสหประชาชาติ (2030 Agenda for Sustainable Development of the United Nations) โดยเฉพาะเป้าหมายการพัฒนาที่ยั่งยืนที่ 16 (Sustainable Development Goal 16)

บทความนี้จะวิเคราะห์ถึงข้อจำกัดของระบบการให้ความช่วยเหลือทางกฎหมายของประเทศไทยในปัจจุบัน พร้อมศึกษาแนวทางการพัฒนาและส่งเสริม pro bono ในต่างประเทศ ซึ่งจะนำมาวิเคราะห์และปรับใช้ในฐานะต้นแบบเพื่อการพัฒนาวัฒนธรรม pro bono ในธุรกิจกฎหมายของประเทศไทยต่อไป

**คำสำคัญ:** pro bono, การให้ความช่วยเหลือทางกฎหมายโดยไม่คิดค่าใช้จ่า, การเข้าถึงความยุติธรรม, การพัฒนาที่ยั่งยืน

## **BACKGROUND ON PRO BONO AND ITS LINK TO SUSTAINABLE DEVELOPMENT**

‘Pro bono’ is short for a Latin term *pro bono publico*, meaning ‘for the public good.’ Some may simply refer the term as ‘law for free,’ which believed to inspire an interest in the provision of free legal services by lawyers employed in the for-profit sector in many countries.<sup>265</sup> While there is no definite definition of pro bono, some definitions have been developed, along with the working schemes and models to support pro bono. Most definitions of pro bono have the same similar factors that are the provision of legal assistance by a lawyer for those in need but unable to afford it or cannot access such services at all. Pro bono clients can either be an individual or an organization of public character (such as charitable and community organizations.) Such provision of legal assistance and legal services shall be free-of-charge or provided with no expectation of fee. However, some definitions of certain organizations may go further as allowing pro bono services to be provided with reduction of fee.<sup>266</sup>

Pro bono works cover a wide range of legal services. For example provision of legal advice, legal representation in all matters, participation in free legal education, assist with the drafting of legislation, provision of legal training and support through mentoring, project management and exchanging information resources, and so forth. In addition to the satisfaction of helping others, pro bono also provides other benefits in the business aspect. Some examples of such benefits are recruiting of new lawyers; retention of productive employees; marketing/reputation and business development; training and professional development/experience; and networking opportunities.<sup>267</sup>

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<sup>265</sup> In order to find a suitable and simplify English translation for pro bono, Lord Chief Justice Woolf ran a competition in England with the winning term being ‘law for free’.

<sup>266</sup> For example: the Law Council of Australia, the Law and Justice Foundation of New South Wales, the American Bar Association, and so forth.

<sup>267</sup> Esther F Lardent, *Making the Business Cases for Pro Bono 1* (1st edn, The Pro Bono Institute 2000); Esther F Lardent, ‘Pro Bono Work is Good for Business’ [2001] *The National Law Journal*; Jason M Thiemann, ‘The Past, The Present, And The Future Of Pro Bono: Pro Bono As A Tax Incentive For Lawyers, Not A Tax On The Practice Of Law’ (2005) 26 *Hamline Journal of Public Law & Policy*; Ellyn H Josef, ‘Is Bigger Better? The Large Law Firm Model of Meeting the Pro Bono Obligation’ (2010) 15 *South Texas Law Review*; April Faith-Slaker, ‘What We Know And Need To Know About Pro Bono Service Delivery’ (2016) 67 *South Carolina Law Review*; Lapp, Kevin

Pro bono has been recognized on an international stage as an effective mean to provide legal services and develop equal access to justice for all. Having the strong foundation of pro bono culture can also result as a contribution to sustainable development under the 2030 Agenda for Sustainable Development of the United Nations; particularly the Sustainable Development Goal 16.

The United Nations has set out several areas that they think need to be achieved to eradicate poverty, and provide equality and good life to the people of the world; that are access to justice, the rule of law, property rights, and right to make a living.<sup>268</sup> While access to justice is considered as one of the many factors of the rule of law, access to justice itself also has an importance of its own. It is considered to be one of the important factors in democratic society and is the issue that countries across the world have put their attention to it. By providing equal access to justice to the society, many believe it would also contribute to enhancing and strengthening the level of the rule of law.

When the 2030 Agenda for Sustainable Development was adopted by the United Nations General Assembly on 25<sup>th</sup> September 2015, the rule of law and access to justice was also mentioned as one of the goals to achieve sustainable development. Goal 16, to ‘[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level’<sup>269</sup>, appears to address rule of law broadly with a focus on peace and security, social justice, access to justice, and strong governance. In this regard, Goal 16.3 provides more focus on the rule of law as to ‘[p]romote the rule of law at the national and international levels and ensure equal access to justice for all.’

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and Alexa Shabecoff. *Pro Bono Guide: An Introduction to Pro Bono Opportunities in the Law Firm Setting* (2nd edn Cambridge, MA: Harvard Law School, nd).

<sup>268</sup> Chonticha Kiattisuk, 'People Access to Justice in Court Procedure: Study Case on the Provision of Legal Aid by the Government' (Masters' Degree, Thammasat University 2011), Introduction (ชลธิชา เกียรติสุข, “การเข้าถึงกระบวนการยุติธรรมของประชาชนในการดำเนินคดีทางศาล: ศึกษากรณีการให้ความช่วยเหลือทางด้านทนายความในคดีแพ่งโดยรัฐ,” (วิทยานิพนธ์ ปริญญาโทบัณฑิตศึกษาด้านนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554), บทนำ).

<sup>269</sup> The United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1), adopted by the General Assembly Resolution on 25 September 2015

<[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/L.85&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.85&Lang=E)> accessed 9 January 2017.

## **PRO BONO PRACTICES AND APPROACHES IN FOREIGN COUNTRIES**

Both the United States (US) and Singapore are identified as having innovative pro bono approaches. The US is arguably seen as a leader in the provision of pro bono services. Many pro bono initiatives were started by the US, such as the aspirational or mandatory pro bono targets and the inclusion of financial contributions as a compromised form of pro bono services. Singapore, while not a global leader like the US, has done several admirable initiatives and was considered as one of the leading countries in Asia in the provision of pro bono. It could be said that Singapore is the most advanced and strongest supporter among Southeast Asia countries in the provision of pro bono services.

While the US and Singapore may have different pro bono practices and approaches in detail, certain practices and approaches are well adopted in both countries. Such practices and approaches are:

### **1) Adoption of Pro Bono Targets**

For the US, there is no yearly mandatory pro bono targets imposed by state bars. However, the American Bar Association (ABA) has provided in its famous Model Rule 6.1: the 50 hours aspirational pro bono target that recommends lawyers to follow.<sup>270</sup> Although the ABA Model Rules does not have any enforcement; not mandatory or binding, several state bars have adopted the Model Rule or similar variations. The states that have adopted the Model Rule are Colorado, Idaho, Montana, North Carolina, Nebraska, Nevada, New Hampshire, Tennessee, Utah, Vermont, Washington and Wyoming. Other states are either have same hours of aspirational pro bono target with modification in the details, fewer hours with the minimum of 20 hours, totally different pro bono policies, or no aspirational pro bono targets at all.<sup>271</sup>

For Singapore, there is currently no mandatory pro bono target in Singapore. However, there were attempts in trying to increase pro bono activities in Singapore through the introduction of pro bono targets. In 2006,

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<sup>270</sup> 'Model Rules Of Professional Conduct: Table of Contents' (*Americanbar.org*) <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_content\\_s.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_content_s.html)> accessed 9 January 2017.

<sup>271</sup> 'State-By-State Pro Bono Services Rules' (*Americanbar.org*, 2010) <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html)> accessed 9 January 2017.



the Law Society of Singapore had made a recommendation that every Singapore qualified lawyers should commit to at least 25 hours of pro bono work per year. Many law firms have joined in the challenge; entering into agreements with the Pro Bono Services office of the Law Society of Singapore.<sup>272</sup> The Law Society of Singapore is also done an Annual Pro Bono Hour Survey of Practicing Lawyers every year since 2009. According to the Law Society of Singapore Annual Report 2015, it indicates that the total number of pro bono hours declared by Singapore qualified lawyers has increased every year from 2009 to 2014; from 35,634 hours in 2009 to 68,256 hours in 2014.<sup>273</sup> The aspiration pro bono target in Singapore stayed the same as at least 25 hours per year since its introduction until now.

## 2) Reporting of Pro Bono Activities

Pro bono reporting system has its purpose in getting lawyers' attention to their profession and ethical obligation concerning the provision of pro bono services. The information gained from the report would enable the relevant agencies in determining the current status of pro bono activities in the states, challenges occurred, and accomplishments done. It is also valuable for any research in relation to pro bono and provision of legal assistance. The availability of these information also enables lawyers who dedicate themselves to pro bono works to receive accreditation and admiration for their effort. Last but not least, it will also uphold lawyers' image in the eyes of the public.<sup>274</sup> There are two kinds of pro bono reporting systems. One is the mandatory pro bono reporting model, and another is the voluntary pro bono reporting model.

For the US, Florida is the first state that adopted mandatory pro bono reporting model in 1993. Other states are Maryland, Hawaii, Illinois,

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<sup>272</sup> *Law firm to support pro bono work for underprivileged*, STRAITS TIMES (21 March 2012). For more information, please go to <http://probono.lawsociety.org.sg/Pages/About-Us.aspx> accessed 10 July 2017.

<sup>273</sup> Law Society of Singapore, 'Annual Report 2015' (Law Society of Singapore 2015) <<http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2015/The%20Law%20Society%20of%20Singapore%20Annual%20Report%202015.pdf>> 56 accessed 9 January 2017. Others annual reports are available at <http://www.lawsociety.org.sg/AboutUs/AnnualReport.aspx> accessed 10 July 2017.

<sup>274</sup> Jason M Thiemann, 'The Past, The Present, And the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law' (2005) 26 *Hamline Journal of Public Law & Policy*; The American Bar Association, 'State Pro Bono Reporting: A Guide For Bar Leaders And Other Considering Strategies For Expanding Pro Bono.' (The American Bar Association) <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/guide\\_for\\_bar\\_leaders\\_and\\_others.html](http://www.americanbar.org/groups/probono_public_service/policy/guide_for_bar_leaders_and_others.html)> accessed 9 January 2017.

Mississippi, Nevada, New Mexico, New York and Indiana. Other states are either adopted the voluntary pro bono reporting model or do not require lawyers in the state to make any report at all.<sup>275</sup>

For Singapore, the new practice rules for mandatory reporting of specified pro bono services were introduced to the society on 1<sup>st</sup> March 2015.<sup>276</sup> The Rule requires lawyers with practice certificate to report their conduct of any pro bono activities as specified in Clause 2 of the Rule.

### 3) Creation of New Pro Bono Institutions

The US has the American Bar Association Standing Committee on Pro Bono and Public Service (hereinafter referred to as 'the Standing Committee') that was established with the mission of expanding and enhancing the provision of legal assistance, including pro bono, in order to ensure access to justice. Among many of their pro bono enhancement and support projects, the Standing Committee operates a huge data collections and surveys, which made great contribution to the monitoring of pro bono activities across the US, the finding of challenges and accomplishments in providing pro bono, and also for further research.

There are other pro bono institutions that work as a matchmaker between the legal service providers and those in need, or so called 'clearing house'. They connect law firms and legal teams around the world with high-impact NGOs and social enterprises working to create social and environmental change through their online platform.<sup>277</sup>

For Singapore, the Law Society of Singapore has established its Pro Bono Services Office on 10<sup>th</sup> September 2007. The Pro Bono Services Office provides a wide range of programme and activities that enhance and support the provision of legal assistance in Singapore, including Pro Bono. It also acts as a clearinghouse that matches the right law firms/individual lawyers to those

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<sup>275</sup> For more information, please go to

<[http://www.americanbar.org/groups/probono\\_public\\_service/ts/pbreporting.html](http://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html)> accessed 10 July 2017.

<sup>276</sup> 'Singapore Statutes Online - Legal Profession (Mandatory Reporting of Specified Pro Bono Services) Rules 2015' (*Statutes.agc.gov.sg*)

<<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=CompId%3A31cd008f-f2c5-4d38-ad2d-d6967e120856;rec=0>> accessed 9 January 2017.

<sup>277</sup> The service is highly valuable, since there are many legal providers that do not know where to find pro bono clients and many of those in need who do not know where to find legal assistance. In having a clearinghouse, the provision of pro bono would be a lot more effective as they are able to match the perfect couple on both demand and supply side, while cooperating between those two.

in need, which is considered a vital part in providing effective pro bono services.<sup>278</sup>

#### **4) Achievement Awards Honoring Pro Bono Services**

Usually, when we were young if we did something good, we would get a compliment and sometimes a recognition. The delegation of achievement awards honoring pro bono service is also built on the same idea. It may be considered as a standard incentive.<sup>279</sup> By giving out the awards, lawyers who dedicated themselves to pro bono cases would get the compliment, accreditation, and recognition that they deserve.

### **LIMITATIONS OF THE CURRENT SYSTEM**

The justice gap and the problem of unequal access to justice are still in evidence in many countries around the world, including Thailand. While there are many attempts and efforts in tackling such problem; either by the public or the civil society sectors in Thailand, the problem still exists. This analytical study will emphasize on the limitations of Thailand's current systems in providing equal access to justice and the shortcomings of the current legal aid services in Thailand.

#### **Limitations arise from the Clients Conditions: the Financial Eligibility to Receive Legal Aid Services**

As many of the legal aid services stated that a person who applies for their services must be an indigent person or must be considered poor enough, this would create a justice gap for many people who are not considered as 'poor' but also do not have enough resources to hire a legal representative of their own (such as many people in the middle-class range.)

This justice gap could be solved (maybe not all, but at least some part of it) by the provision of pro bono services. Pro bono, while set to render their services to those in need, which usually refers to the poor, do not have such specific requirement. There is no requirement that pro bono clients must be an indigent person or 'poor.' Pro bono lawyers are the one who would decide whether to do the case. Such considerations are usually on an ad-hoc basis where the clients would be considered case by case, and that there are many

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<sup>278</sup> For more information, please go to <<http://probono.lawsociety.org.sg/Pages/About-Us.aspx>> accessed 10 July 2017.

<sup>279</sup> Jason M Thiemann, 'The Past, The Present, and The Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law' (2005) 26 Hamline Journal of Public Law & Policy.

factors involve more than just the financial eligibility of the clients (such as the matching field of expertise of the lawyers and the pro bono matters, or whether or not such pro bono matters are a public matter).

### **Limitations arise from the Clients Conditions: the Legal Status of the Clients**

Many legal aid providers provide their services to an individual only. This would leave a justice gap for many organizations and institutions that need legal assistance and services. Many organizations and institutions of public characters; such as charitable, religious, civic, community, governmental and educational organizations, do not have much funding. Many of them do not have enough resources to afford a legal counsel or a legal representative of their own. Therefore, with the current system that most legal aid services cover only the individuals, these organizations and institutions would struggle to find free legal assistance and services, or a reduced-fee one.

This justice gap could be covered by the provision of pro bono. As many definitions of pro bono works also cover the provision of legal assistance to charitable, religious, civic, community, governmental or educational organizations. Mostly in the matters designed to address the needs of persons of limited means.

### **Limitations of the State-Assigned Counsel and the Lawyer Council of Thailand Volunteer-Lawyer Schemes**

The limitation of existing legal aid services mentioned in this clause will focus on the state-assigned counsel and the volunteer-lawyer of the Lawyer Council of Thailand. As the legal aid services provided by law schools are mostly limited to the dissemination of legal knowledge and the provision of basic legal advice, which in reality would not meet the level of unmet legal need of legal assistance.

One limitation of the state-assigned counsel schemes is that it does not cover civil and commercial matters. The use of the state-assigned counsel schemes in leveraging between normal citizens and the State in criminal case proceeding is encouraging because the State usually is the party in a case with more resources, more power, and more bargaining power. By giving an accused or a defendant their right to counsel is like providing them with a tool and resources to equalize between the parties and to be able to stand for their rights more effectively. However, it could be said that giving the right to counsel in a criminal proceeding only is not comprehensive enough. The reason for that is

because the difference in power, resources and bargaining power exist not only in criminal proceedings, but also in civil and commercial proceedings.

### **Practical Limitations**

On 13 June B.E. 2559 (2016), the National Reform Steering Assembly Commission on Law and Justice System has submitted their report on the Reform of Volunteer-Lawyer, Assigned Counsel, and Child or Juvenile Legal Counsel (hereinafter referred to as 'the Report') to the National Reform Steering Assembly for their consideration. The Report described the concerned limitations of the state-assigned counsel and volunteer-lawyer schemes, which are lack of human resources; low compensation; lack of experienced lawyers; and lack of sufficient training.

### **Limitations arise from the Unawareness of the Society**

Equal access to justice cannot be achieved by the initiative and conduct of the State only. It also requires awareness from the people of their rights and their obligations in protecting their rights. However, in reality, there are still many people in the society that are not aware of their rights and, therefore, cannot fully implement or protect their rights, including the right of access to justice.

## **CONCLUSION**

The term 'access to justice' can be defined in many different ways, broad or narrow. However, most generally, access to justice is usually referred to as means or mechanism to assure that the person in need will get the help they need to protect their legal rights, solve their law-related problems, and have access to the justice system.

It is the duty of the State to assure equal access to justice for all people, including foreigners within their territory. However, the problems of unequal access to justice and the justice gaps are overcoming barriers to accessing the justice system and involves many causes. Limitations of the current system in ensuring and enhancing equal access to justice for all may arise from many factors. It may arise from the laws which certified and provided approaches to enhance access to justice itself that is not comprehensive enough. For example: the provision of a State-Assigned Counsel under Thai Criminal Procedure Code that focused only on the right to counsel of an accused or a defendant, but not the victims. It may also arise from other factors; such as the financial eligibility required by the legal aid providers that the clients need to meet to receive their services; or the condition on the legal status of the clients that they need to be

an individual only not an organization. Also, there are other practical limitations such as lack of human resources, lack of sufficient funding, lack of experienced lawyers, and lack of sufficient training. With all these limitations and shortcomings, only the commitment from the public and the civil society sectors are not enough to close the justice gaps or solve all the problems. We also need the commitments from the private sector and individual lawyers in doing so.

Pro bono is usually referred to the professional work undertaken voluntarily and without payment. Unlike traditional volunteerism, it is a service that requires specific skills of professionals to provide services to those who are unable to afford them. Although the term 'pro bono' may be used by different professionals that involve the offering of free services, such as accountant or architect, it is usually referred to the provision of free legal services.

Pro bono culture can be driven by the firm itself, by a policy given by the head office to its branches requiring the work on pro bono, or by the promotion of a government. However, while the legal profession and the legal business in Thailand are quite flourished, the number of pro bono activity in Thailand is rather low. However, the author strongly believes that in taking a greater role in supporting and encouraging pro bono culture by the Thai government, the pro bono culture in Thailand's legal business would grow stronger than ever. It would also gives the public more options and channels to implement and protect their right of access to justice. At the same time, lawyers would have their opportunities to fulfill the professional and ethical obligations to the society, while gaining various benefits in business aspects. The State would have the support from the lawyers in providing and enhancing access to justice in Thailand, which would further result in the contribution to sustainable development under the 2030 Agenda for Sustainable Development of the United Nations with its 17 Sustainable Development Goals; in particular Goal 16.

Both the United States (US) and Singapore are identified as having innovative pro bono practices and approaches. While the US and Singapore may have different pro bono practices and approaches in detail, certain practices and approaches are well adopted in both countries that are (1) the adoption of pro bono targets; (2) the reporting of pro bono activity; (3) the creation of new pro bono institution; and (4) the granting of achievement

awards honoring pro bono services. The author used these pro bono practices and approaches as a model and recommendations for the development of pro bono culture in Thailand's legal business, with several attentions and remarks that need to be taken into consideration as provided in Clause 4.5 of this Thesis. The author fully hopes that the recommendations proposed by the author, which will be applied solely to the licensed lawyers in Thailand, would only be the beginning of a broader and stronger pro bono culture in Thailand's legal business.

## **RECOMMENDATIONS**

### **1) Adoption of Voluntary Pro Bono Targets**

The introduction of mandatory pro bono targets would be too dramatic of a change for Thailand's legal business. Nevertheless, if no pro bono targets were set at all, the lawyers in Thailand may not feel the pressure or the need to render pro bono services and eventually nothing might change. Therefore, the adoption of voluntary pro bono targets for licensed lawyers seems like the best option available. It would raise awareness of the licensed lawyers of their professional and ethical obligations to the society. The definition and scope of pro bono services may be similar to those introduced by Rule 6.1 of the American Bar Association.

However, further study needs to be conducted to see how many pro bono hours are appropriate to be set as a target, whether the online provision of legal assistance and services could be and should be counted as pro bono works, and so forth.

### **2) Mandatory Yearly Reporting of Pro Bono Activity**

By enforcing in parallel with the adoption of voluntary pro bono targets, the adoption of mandatory yearly reporting of pro bono activity would give licensed lawyers a subtle pressure to provide pro bono services. The mandatory yearly reporting would require licensed lawyers to look back throughout the year of what they have done to fulfill their professional and ethical obligations in term of the provision of pro bono services. Some lawyers may feel the pressure to render such pro bono services if they realize how far back they have fallen behind their professional and ethical obligations owed to the society.

The adoption of mandatory reporting of pro bono activity would also provide us with the information that can use to determine the current status of pro bono activities in Thailand. It is also valuable for any research about pro

bono. The availability of this information also enables lawyers who dedicate themselves to pro bono works to receive accreditation and admiration for their effort. It will also uphold lawyers' image in the eyes of the public.

However, there need to be further studies on how the reporting system should be, how to monitor the reporting system efficiently and effectively, how to ensure that such licensed lawyers provide the pro bono services as reported, and so forth.

### **3) Creation of New Pro Bono Institution**

The new pro bono institution would dedicate their work solely on the management, supervising, promoting and raising awareness about pro bono services that would be a great kick start in encountering the problem of unequal access to justice and the justice gaps.

By providing the services of a referral organization, or a clearinghouse, this new pro bono institution would actively refer and match those in need of legal assistance and services, both an individual and an organization/institution, to the pro bono service providers that have the field of expertise required for the case. The new pro bono institution would help raise awareness for both the people in need of help and the pro bono service providers that there is someone who is ready to provide and accept such help. The new pro bono institution would also dedicate itself to the promotion of pro bono services to the legal profession and the broader community, which would help in encountering the limitations, arises from the unawareness of the society as mentioned earlier.

The agency who will be responsible for this new pro bono institution may be the Lawyer Council of Thailand, as it is already the responsible agency in governing the conduct of licensed lawyers, including the registration and issuance of the lawyer license. The Lawyer Council of Thailand could establish this new pro bono institution as a new department or a new organization under them. However, the Lawyer Council of Thailand is currently experiencing a lack of funding. Therefore, they would need more funding from the government or other organizations/institutions if they will be responsible for the new pro bono institution.

The establishment of the new pro bono institution as an independent organization is also a considerable choice. As the provision of pro bono services could and should have a wider range than the provision by licensed lawyers only, it could cover the provision of pro bono services by law firms, in-house legal departments, and lawyers that do not hold a licensed lawyer. However, various issues still need to be taken into consideration; such as the



sources where this new pro bono institution would receive their funding from; how their organizational structure should be; how they could build/have enough credibility and reliability that lawyers and other organizations would join them; and so forth.

#### **4) Achievement Awards Honoring Pro Bono Services**

By giving out the awards, lawyers who dedicated themselves to pro bono cases would get the compliment, accreditation, and recognition that they deserve. It would also contribute to raising awareness of the society about the provision of pro bono services, which would tackle the limitations arise from the unawareness of the society as mentioned earlier.

#### **5) Amendment of Relevant Legislation**

In connection with the author's recommendation on the adoption of voluntary pro bono targets and the mandatory reporting of pro bono activity, there should be an amendment to the Lawyers Act B.E. 2528 (AD 1985). The voluntary pro bono targets should be put as another Section in the Act as the professional obligation that the licensed lawyers are expected to meet. The mandatory yearly reporting of pro bono activity should be put as another Section in the Act as the professional obligation that the licensed lawyers are required to do every year. Also, the definition of pro bono in Thailand context shall be added into Section 4 of the Lawyers Act, which provides definitions of various terms used in the Lawyers Act.

Another proposed amendment of the relevant legislations is on the Lawyer Council's Regulation on Lawyers Ethic B.E. 2529 (AD 1986), in particular, Clause 17. As mentioned earlier, many people are still unaware of their rights and the channels to implement or protect their rights. Therefore, there should be more advertisement, campaigns, and schemes in raising awareness of the people of their rights and the channels available for them. However, Clause 17 of the Lawyer Council's Regulation on Lawyers Ethics forbids the licensed lawyers from announcing or advertising that they are providing pro bono services. Therefore, Clause 17 of the Lawyer Council's Regulation on Lawyers Ethics should be amended to allow licensed lawyers to announce or advertise if they are providing their legal assistance and services for free so that the public would be aware of such services existed to help them.

## References

### Books

Esther F. Lardent. *Making the Business Cases for Pro Bono 1*. The Pro Bono Institute, 2000.

Chonticha Kiattisuk. *People Access to Justice in Court Procedure: Study Case on the Provision of Legal Aid by the Government*. Master's thesis, Faculty of law, Thammasat University, 2011.

Lapp, Kevin and Alexa Shabecoff. *Pro Bono Guide: An Introduction to Pro Bono Opportunities in the Law Firm Setting*. 2nd ed., Cambridge.

### Articles

Esther F. Lardent. "Pro Bono Work is Good for Business." *The National Law Journal* (2001).

Jason M. Thiemann. "The Past, The Present, And The Future Of Pro Bono: Pro Bono As A Tax Incentive For Lawyers, Not A Tax On The Practice Of Law." *Hamline Journal of Public Law & Policy* (2005): 26.

Ellyn H. Josef. "Is Bigger Better? The Large Law Firm Model of Meeting the Pro Bono Obligation." *South Texas Law Review* (2010): 15.

April Faith-Slaker. "What We Know And Need To Know About Pro Bono Service Delivery." *South Carolina Law Review* (2016): 67.

### Other Materials

The United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1) (2015)

<[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/L.85&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.85&Lang=E)>

The American Bar Assisciation, 'Model Rules Of Professional Conduct: Table of Contents'

<[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)>

The American Bar Association, 'State-By-State Pro Bono Services Rules' (2010) <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html)>

The American Bar Association, 'State Pro Bono Reporting: A Guide for Bar Leaders and other Considering Strategies for Expanding Pro Bono' <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/guide\\_for\\_bar\\_leaders\\_and\\_others.html](http://www.americanbar.org/groups/probono_public_service/policy/guide_for_bar_leaders_and_others.html)>

Law Society of Singapore, 'Annual Report 2015' (Law Society of Singapore, 2015) <<http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2015/The%20Law%20Society%20of%20Singapore%20Annual%20Report%202015.pdf>>

'Singapore Statutes Online - Legal Profession (Mandatory Reporting of Specified Pro Bono Services) Rules 2015' (Statutes.agc.gov.sg, 2015) <<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=CompId%3A31cd008f-f2c5-4d38-ad2d-d6967e120856;rec=0>>

**EXPORT CONTROL OF DUAL-USE ITEMS:  
A COMPARATIVE STUDY OF THAI AND  
FOREIGN LAWS\***

*Piyanat Umduang\*\**

**Abstract**

The terrorists attack on 9 September 2001 in the United States the World Trade Center and the Pentagon by the hijacked airplanes caused a great number of casualties. As a result, terrorism has affected and become a new important problem in global community.

Terrorists have developed complex processes to procure materials and equipment for producing or obtaining WMD. Therefore, to prevent WMD proliferation and terrorism, many developed states are trying to encourage other states to develop their own effective export control measures for any material or technology that can be used to develop WMD in order to prevent harm that may be caused to peace and security of global community. Thus, “Dual-Use Items (DUI)” which is referred to goods, software and technology that can be used for both civilian and military applications and/or can contribute to the proliferation of WMD, are subject to control under domestic export laws of each state. Thus, the United Nations Security Council (UNSC) adopted the Resolution 1540 in 2004 requires all member states to adopt domestic laws to prevent the proliferation of WMD by controlling concerned activities namely export, re-export, transit, transshipment, brokerage, provision of fund and service related to WMD or related materials which could be used for the design, development, production or use of nuclear, chemical and biological weapons specified by relevant multilateral treaties. Many states in Asia, as members of the United Nations, have developed domestic laws focused on export control measures of DUI such as Japan, Singapore and Malaysia etc. to fulfil its obligations under such Resolution.

As for Thailand, the Cabinet endorsed UNSCR 1540 since 10 August 2004 and the Thai government considered formulating national export control law following the adoption of such Resolution. The export control law of DUI

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\* \* This article is summarized and arranged from the thesis “Export Control of Dual-Use Items: A Comparative Study of Thai And Foreign Laws” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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was prescribed by the Ministry of the Commerce under the title of “The Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015),” on 16 October 2015, ten years after the endorsement of Resolution 1540. This Ministerial Notification will take effect on 1 January 2018. However, this Law has no provision regarding export permission measures of DUI. Thus, this may cause unclear practices in operation of the exporters. Moreover, this Ministerial Notification does not cover brokerage and intangible technology transfer. Likewise, this Law is issued under “Export and Import of Goods Act B.E.2522 (1979)” under which penalty is not specified on the basis of intention and knowledge of violator.

This thesis mainly focuses on the enforcement of the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) and the draft Trade Control on Weapons of Mass Destruction Related Items approved by the Cabinet in comparison with export control laws of DUI of Japan, Singapore and Malaysia in order to increase the effectiveness of export control system to prevent the proliferation of WMD together with to facilitate the permission process of controlled activities and to reduce difficulties caused to the operations of the entrepreneurs.

**Keywords:** Dual Use Items, Export Control, Weapon of Mass Destruction, WMD

**บทคัดย่อ**

จากเหตุการณ์ที่ผู้ก่อการร้ายใช้เครื่องบินพาณิชย์ พุ่งชนตึกเวิลด์เทรดเซ็นเตอร์และตึกเพนตากอนในประเทศสหรัฐอเมริกา เมื่อวันที่ 9 กันยายน ค.ศ. 2001 จนทำให้มีผู้เสียชีวิตจำนวนมาก ส่งผลให้การก่อการร้ายกลายเป็นปัญหาที่สำคัญของประชาคมโลก

ในปัจจุบันผู้ก่อการร้ายได้พัฒนาวิธีการจัดหาวัตถุดิบและเครื่องมือสำหรับการผลิตอาวุธที่มีอานุภาพทำลายล้างสูง ดังนั้น เพื่อป้องกันการแพร่ขยายของอาวุธที่มีอานุภาพทำลายล้างสูงและการก่อการร้าย ประเทศพัฒนาแล้วทั้งหลายจึงพยายามสนับสนุนให้ประเทศอื่น ๆ สร้างระบบการควบคุมการส่งออกวัตถุดิบหรือเทคโนโลยีใด ๆ ที่สามารถนำไปใช้ในการพัฒนาอาวุธที่มีอานุภาพทำลายล้างสูง เพื่อป้องกันอันตรายที่เป็นภัยคุกคามต่อความสงบสุขและความปลอดภัยของประชาคมโลก ส่งผลให้สินค้าที่ใช้ได้สองทาง ซึ่งหมายถึง สินค้า โปรแกรมคอมพิวเตอร์ และเทคโนโลยี ที่สามารถนำมาใช้ทั้งด้านการค้าและทางการทหาร และ/หรือ ช่วยสนับสนุนให้เกิดการแพร่ขยายของอาวุธที่มีอานุภาพทำลายล้างสูง จำเป็นจะต้องถูกควบคุมภายใต้กฎหมายภายในของแต่ละประเทศ ด้วยเหตุนี้ คณะมนตรีความมั่นคงแห่งสหประชาชาติจึงมีมติที่ 1540 ในปี ค.ศ. 2004 เรียกร้องให้บรรดาสมาชิกยอมรับข้อมติโดยออกกฎหมายภายในประเทศเพื่อป้องกันการแพร่ขยายของอาวุธทำลายล้างสูง โดยการควบคุมกิจกรรมที่เกี่ยวข้อง อันได้แก่ การส่งออก การส่งกลับออกไป การผ่านแดน การถ่ายทำ การเป็นคนกลาง การจัดหาเงินทุนและการบริการที่เกี่ยวข้องกับการแพร่ขยายของอาวุธทำลายล้างสูงและวัตถุดิบที่เกี่ยวข้องซึ่งสามารถนำไปใช้ในการออกแบบ พัฒนา ผลิต หรือใช้ทำอาวุธนิวเคลียร์ อาวุธเคมี และอาวุธชีวภาพตามที่ระบุไว้ในสนธิสัญญาพหุภาคี

ประเทศต่าง ๆ ในภาคพื้นเอเชียที่เป็นสมาชิกขององค์การสหประชาชาติได้มีการพัฒนากฎหมายภายในโดยมุ่งเน้นมาตรการควบคุมการส่งออกสินค้าที่ใช้ได้สองทาง เช่น ญี่ปุ่น สิงคโปร์ และมาเลเซีย เป็นต้น เพื่อปฏิบัติตามภารกิจภายใต้มติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 ดังกล่าว

สำหรับประเทศไทย คณะรัฐมนตรีให้การรับรองมติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 ตั้งแต่ 10 สิงหาคม ค.ศ. 2004 โดยรัฐบาลได้พิจารณาออกกฎหมายตามข้อเรียกร้องของมติดังกล่าว โดยกฎหมายควบคุมการส่งออกสินค้าที่ใช้ได้สองทางได้ถูกระบุไว้ในประกาศกระทรวงพาณิชย์ เรื่องกำหนดให้สินค้าที่ใช้ได้สองทางเป็นสินค้าที่ต้องขออนุญาต และกำหนดให้สินค้าที่ต้องปฏิบัติตามมาตรการจัดระเบียบในการส่งออกป็นราชอาณาจักร พ.ศ. 2558 (ค.ศ.2015) เมื่อวันที่ 16 ตุลาคม พ.ศ. 2558 หลังจากให้การรับรองมติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 เป็นเวลาถึงสิบปี โดยประกาศกระทรวงพาณิชย์ฉบับนี้จะมีผลใช้บังคับตั้งแต่วันที่ 1 มกราคม 2561 เป็นต้นไป อย่างไรก็ตาม ประกาศกระทรวงพาณิชย์ฉบับนี้ยังไม่ชัดเจนว่าด้วยวิธีการขออนุญาตส่งออกสินค้าที่ใช้ได้สองทาง ซึ่งอาจนำไปสู่ความไม่ชัดเจนในแนวทางการปฏิบัติงานของผู้ส่งออก นอกจากนี้ประกาศกระทรวงพาณิชย์ฉบับนี้ยังไม่ครอบคลุมถึงการเป็นคนกลางและการถ่ายโอนเทคโนโลยีที่จับต้องไม่ได้ และในขณะที่ประกาศกระทรวงพาณิชย์ฉบับนี้ออกมาโดยอาศัยอำนาจตามพระราชบัญญัติการส่งออกป็นราชอาณาจักรนำเข้ามาในราชอาณาจักรซึ่งสินค้า พ.ศ. 2522 (ค.ศ.1979) ซึ่งมีได้มีการกำหนดโทษตามเจตนาและความรู้สำนึกในการกระทำของผู้ฝ่าฝืน

บทความนี้ศึกษาถึงการบังคับตามกฎหมายของประกาศกระทรวงพาณิชย์ เรื่องกำหนดให้สินค้าที่ใช้ได้สองทางเป็นสินค้าที่ต้องขออนุญาต และกำหนดสินค้าที่ต้องปฏิบัติตามมาตรการจัดระเบียบในการส่งออกป็นออก

ราชอาณาจักร พ.ศ. 2558 (ค.ศ.2015) และร่างพระราชบัญญัติการค้าสินค้าที่เกี่ยวข้องกับการแพรร่ขายอาวุธที่มี  
อานุภาพทำลายล้างสูง พ.ศ.... ที่คณะรัฐมนตรีมีมติอนุมัติหลักการในเชิงเปรียบเทียบระบบการส่งออกสินค้าที่ใช้ได้  
สองทางของประเทศญี่ปุ่น สิงคโปร์ และมาเลเซีย เพื่อเพิ่มประสิทธิภาพในระบบการควบคุมการส่งออก ทั้งนี้ เพื่อ  
ป้องกันการแพรร่ขายของอาวุธที่มีอานุภาพทำลายล้างสูง พร้อมกับการอำนวยความสะดวกในขั้นตอนการพิจารณา  
อนุญาตให้ดำเนินกิจกรรมควบคุมต่าง ๆ เพื่อลดความยุ่งยากอันจะเกิดขึ้นในการดำเนินการของผู้ประกอบการ

**คำสำคัญ :** สินค้าที่ใช้ได้สองทาง การควบคุมการส่งออก อาวุธที่มีอานุภาพทำลายล้างสูง WMD

## **1. BACKGROUND OF EXPORT CONTROL OF DUAL-USE ITEMS**

Nowadays, terrorists have and continue to attempt to attack many states with WMD to inflict greater numbers of casualties and threaten to cause loss, damage, pain, death, sorrow, terror, and insecurity to the public. To achieve such objectives of terrorism, terrorists are trying to develop complex processes to procure materials and equipment for producing or obtaining WMD by using DUI as a composition.

From the incident mentioned above, proliferation of WMD could have extreme impact on humankind and global environment. Thus, it is the obligation of each state to prevent WMD proliferation and terrorism by developing its own systems to build up efficient export control of DUI to eliminate the risk that such DUI will be used for a part of WMD.

Scopes of DUI export control are generally specified by international cooperation and national laws that cover list of controlled items, classification, controlled activities, export measures, authorities, enforcement mechanism, penalties and sanctions applied to the violation of export control laws including provisions on restricted customers, users and destination on export control of DUI.

Non-proliferation of WMD and DUI export control could create an essential contribution in the global community to fight against terrorism by reducing risk of terrorists or any non-state actor for gaining access to WMD or related materials from illegal export of DUI. Therefore, any state subject to establish measures for international cooperation and domestic laws to control and prevent the increase of WMD and their means of delivery including related materials, equipment and technology for contribution and maintenance of international peace and security.

## **2. DEFINITION OF WEAPON OF MASS DESTRUCTION AND DUAL-USE ITEMS**

United Nations Security Council Resolution 1540 requires the member states of the United Nations to establish national control to prevent the proliferation of nuclear, chemical, or biological weapons that could be called “WMD” including their means of delivery and related materials<sup>1</sup> which include DUI.

According to the items subject to control under UNSC Resolution 1540, the definitions of such items are as follows.

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<sup>1</sup> United Nation Security Council Resolution 1540 (2004), Art 3.



1) Weapons of Mass Destruction (WMD) refers to all types of weapons such as nuclear, chemical, biological weapons which could cause harm to a large number of people or cause serious damage to the environment, including wire-guided missile system, missiles or any other unmanned control system of such weapons.<sup>2</sup>

2) Means of delivery refers to missiles, rockets and other unmanned systems which are designed for the use of delivery of nuclear, chemical, or biological weapons.<sup>3</sup>

3) Related Materials refer to any material, equipment, and technology which is controlled by multilateral treaties and arrangements, or national control list and these materials could be used for the purposes of design, development, production or use for nuclear, chemical and biological weapons and their means of delivery.<sup>4</sup>

4) Dual-Use Item (DUI) refers to a product, technology and software which can be used for civilian and military applications and/or can contribute to the increase of WMD.<sup>5</sup>

### 3. CONTROLLED ACTIVITIES

Export control of DUI is expanded to cover the following activities.

- 1) Export means the transfer of items from the exportation state to other state.<sup>6</sup>
- 2) Re-Export means the export of items that has been imported into the state.<sup>7</sup>
- 3) Transit means the transport of items through the state from the port or place of entry to the port or place of exit, whereby the beginning and ending points of transportation are outside the state, regardless

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<sup>2</sup> The Ministerial Notification Specifying Dual-Use Items as Goods Requiring Permission and Subject to Export Measures B.E.2558, Ministry of Commerce, Section 3.

<sup>3</sup> United Nation Security Council Resolution 1540 (2004), Definitions 1.

<sup>4</sup> Ibid.

<sup>5</sup> European Commission, 'Trade: Dual-Use Export Control' <  
<http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/> >  
accessed 18 Nov 2016.

<sup>6</sup> Anna Wetter, *Enforcing European Union Law on Exports of Dual-Use Goods* (1<sup>st</sup> edn, Oxford University Press 2009) Glossary.

<sup>7</sup> Ibid.

whether there is any transshipment, warehousing, changing of container or mode of transportation involved.<sup>8</sup>

- 4) Transshipment means transshipment of items from one mode of transport to another within the same port or place such as ship to ship or airplane to airplane, where the points of origin and destination are outside the state.<sup>9</sup>
- 5) Brokerage means negotiation or arrangement of deals involving the transfer of items between third states.<sup>10</sup>
- 6) Technology Transfer means of transfer technology whether it is tangible or intangible technology from the exportation state to other state or from the resident to non-resident.

Therefore, any person who would like to conduct activities mentioned namely export, re-export, transit, transshipment, brokerage or transfer of technology concerning DUI are controlled under the DUI export control laws and required to obtain permission in compliance with the export measures prior to conduct of such activities.

#### **4. THE IMPORTANCE OF PENALTY FOR VIOLATION**

To prevent illegal exports of DUI and the increase of WMD, administrative sanctions and criminal penalties such as prohibition of export, fine and imprisonment especially heavy fines and long prison sentences should be applied to the violation of DUI export control laws. Any person who is engaged in the controlled activities; in violation of such export control laws is subject to penalties because these sanctions or penalties could stop the violator from similar offences in order to protect the general public. Moreover, if the violator is a member of terrorism organization, the conviction could also obstruct other illegal activities of terrorists.

Moreover, the United Nations Security Council Resolution 1540 Resolution 1540 dictates all members of the United Nations to formulate proper laws to control export, re-export, transit, transshipment and to establish proper control system of funds and services related to the activities mentioned above as well as to apply proper criminal penalties or administrative sanctions for violation of such control measures.<sup>11</sup> Based on aforesaid reasons,

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<sup>8</sup> Department of Foreign Trade, Ministry of Commerce, Thailand.

<sup>9</sup> Ibid.

<sup>10</sup> Anna Wetter, *Enforcing European Union Law on Exports of Dual-Use Goods* (1<sup>st</sup> edn, Oxford University Press 2009) Glossary.

<sup>11</sup> United Nations Security Council Resolution 1540 (2004), Art 3.

appropriate penalties or sanctions applied to the violation of export control of DUI are very important.

## **5. INTERNATIONAL LAWS CONCERNING “EXPORT CONTROL OF DUAL-USE ITEMS”**

Currently, goods, technology and software which are classified as DUI are used not only for civilian applications but also for military purposes. Therefore, the increase of growth of international trade on DUI will increase the risks that such DUI will be used to develop WMD or other illegal activities.

In preventing the proliferation of WMD, there is international cooperation on non-proliferation and export control system of DUI as follows.

### **5.1 The International Non-Proliferation Agreement**

After the Cold War, international non-proliferation agreements went through improvement and reinforcement in order to maintain security and stability of global community. There are three major international non-proliferation agreements namely,

#### **(1) Treaty on the Non-Proliferation of Nuclear Weapons (NPT)**

The objective of NPT is to promote non-proliferation and disarmament of nuclear weapons together with peaceful uses of nuclear energy. Thus, the Treaty establishes a safeguard system to prevent the use of fissile material for weapons. This safeguard system is under the responsibility of the International Atomic Energy Agency (IAEA) the uses of nuclear energy for the peaceful purposes. Under the safeguard system, there are international organizations taking charge of inspections conducted by IAEA to verify the compliance with this Treaty.<sup>12</sup>

#### **(2) Biological Weapons Convention**

BWC is the first multilateral disarmament treaty which prohibits the development, production and stockpiling of WMD especially biological and toxin weapons.

#### **(3) Chemical Weapons Convention**

CWC is the multilateral disarmament treaty which prohibits the development, production, stockpiling, transfer or use of WMD especially chemical weapons.

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<sup>12</sup> Ibid.

## 5.2 United Nations Security Council Resolution 1540

The increase of WMD such as nuclear, chemical and biological weapons is the obstruction to the maintenance of international peace and security. There are the potentials that terrorists may possess, acquire, develop or use such WMD for terrorism activities. Thus, UNSC Resolution 1540 was adopted on April 28, 2004 under Chapter VII of the United Nations Charter in order to affirm that the increase of WMD as well as the means of delivery is the threat to international peace and security and thus dictates the members of the United Nations to take proper and effective actions against such threat and to fulfil all other obligations related to arms control and disarmament for the prevention of the proliferation of WMD in all aspects.<sup>13</sup>

This Resolution lays down obligations for all members of the United Nations to take steps decided by itself to prevent the increase of WMD and the means of delivery by requiring prohibition of non-state actors to obtain, possess, apply, manufacture, develop and transfer of WMD and related materials for terrorism purposes<sup>14</sup>

For legal status of United Nations Security Council Resolution, the power of United Nations Security Council to pass resolution is provided for in Article 24 of the United Nations Charter<sup>15</sup>. Then, the members of United Nations bound by Article 25<sup>16</sup> and 48<sup>17</sup> to implement obligations under United Nations Security Council Resolution 1540.

In implementing the UNSC Resolutions 1540 (2004) under Articles 25 and 48 of the Charter of the United Nations that requires Thailand and other members to establish its national export control measures with an aim to

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<sup>13</sup> United Nation Security Council Resolution 1540 (2004) 1.

<sup>14</sup> Ibid, 3-4.

<sup>15</sup> The Charter of United Nations, Article 24.

“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

<sup>16</sup> Ibid, Article 25.

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

<sup>17</sup> Ibid, Article 48.

“1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

prevent the proliferation of WMD or any related materials including to set up and enforce export control laws over DUI, Thailand, by the Minister of the Ministry of Commerce and upon authorization by the Cabinet, issued the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) by virtue of the provisions of Sections 5 (2), 5 (6) and 15 of Import and Export of Goods Act B.E. 2522 (1979) which is the first national export control law on DUI.

### **5.3 The Multilateral Export Control Regimes**

The multilateral export control regime is the voluntary groups of supplier states that have the objectives to restrict the trade on controlled items including DUI only for peaceful purposes. Under each regime, the members have the commitments to ensure that their activities shall not contribute to proliferation of WMD.

#### **(1) Nuclear Suppliers Group (NSG)**

The Nuclear Suppliers Group (NSG) is a cooperation of nuclear exporters which is a voluntary association founded in 1975 that has no formal measures to enforce all members on the compliance. Currently, there are 48 members.<sup>18</sup> All members are seeking to contribute to non-proliferation of nuclear by implementing two guidelines adopted by consensus. The first guideline controls the export of items designed or used for nuclear purposes and the second controls DUI and related technology. Both guidelines are consistent with relevant international non-proliferation agreements.

#### **(2) Australia Group (AG)**

This cooperation is an informal voluntary export control arrangement founded in 1985 seeking to ensure that any export does not contribute to the proliferation of biological and chemical weapons. It sets export guidelines and six common control lists. The lists are included dual-use chemical manufacturing, chemical weapons precursors, biological agents and biological equipment.<sup>19</sup>

#### **(3) Missile Technology Control Regime (MTCR)**

This cooperation is a voluntary export control arrangement founded in 1987 having the objective to limit the proliferation of ballistic missile,

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<sup>18</sup> Nuclear Treat Initiative, 'Nuclear Suppliers Group NSG' 31 January 2017 <<http://www.nti.org/learn/treaties-and-regimes/nuclear-suppliers-group-nsg/>> accessed 18 Feb 2017.

<sup>19</sup> The Australia Group, 'Home' <<http://www.australiagroup.net/en/index.html>> accessed 18 Nov 2016.

unmanned delivery systems capable of delivering WMD and other related items that could be used for WMD attacks. Members of the MTCR have to establish national export control measures for ballistic missiles and related items that appear on the MTCR.

#### **(4) Wassenaar Arrangement (WA)**

This arrangement calls for cooperation of export control system which was established in 1996 to contribute to the international security concerning the transfer of conventional arms, DUI and technologies and also to prevent the use of such items by terrorists. WA is the first system of multilateral export control designed to cover both conventional weapons and sensitive dual-use items. All parties agree that items on a Munitions List and List of DUI and Technologies shall be controlled in order to prevent unauthorized transfer or re-transfer of such items.

As mentioned above, all members of the United Nations are required to establish and implement national legislation and export control system to prevent any non-state actor to acquire, possess, develop, manufacture, transport, transfer or use WMD and their means of delivery to comply with the UNSC Resolution 1540.<sup>20</sup> Thus, DUI which are goods, software and technology that can be used for producing, developing or using in missile, nuclear, chemical or biological weapons will be focused and controlled under national export control laws of each member.

## **6. ANALYSIS ON THE PROBLEMS OF “EXPORT CONTROL OF DUAL-USE ITEMS” IN THAILAND COMPARING WITH FOREIGN LAWS**

After examining Thai laws on export control of DUI regarding the background, international law, foreign laws namely Japan, Singapore and Malaysia comparing with Thai laws, the Author found the problems as follows.

### **6.1 Non-Compliance with UN Resolution 1540 on the Control of Brokering**

Referring to the activities subjected to control under Thai laws, there is no provision on brokering both in the Import and Export of Goods Act B.E. 2522 (1979) and in the Ministerial Notification. Thus, this Ministerial Notification does not covers the requirements of UNSCR 1540 because its

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<sup>20</sup> United Nations Security Council Resolution 1540, Art 3 (d).

enforcement does not cover brokering and intangible technology transfer that are Controlled Activities under UNSCR 1540.

Comparing with the other countries namely Japan, Singapore and Malaysia as mentioned in the previous Chapter, all countries have the control provisions of brokering transactions related to DUI.

Thus, Thailand as a UN member state is required to comply with the Resolution by establishing “Export Control Measure” that covered DUI and technology transfer.

## **6.2 Non-Compliance with UN Resolution 1540 on the Control of Technology**

Referring to the definition of “Dual-Use Goods” under this Notification that refers to goods which can be used for both commercial and military applications, in design, development, manufacture, utilization, modification, storage, transport or act in any way in order to acquire weapon of mass destruction,<sup>21</sup> there is no other regulations issued under the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying with the Export Measures B.E.2558 (2015) which control transaction of brokering and technology transfer. Thus, this Ministerial Notification does not cover the requirements of UNSCR 1540 because its enforcement does not cover brokering and intangible technology transfer that is Controlled Activities under UNSCR 1540.

Comparing with the other countries namely Japan, Singapore and Malaysia as mentioned in the previous Chapter, all countries have the control provisions of technology transfer.

For Japan, the controlled list of technologies is under the Foreign Exchange Order issued by the Cabinet under Article 25 of Foreign Exchange and Foreign Trade Act that are separated into three cases as follows.

(1) Technology Transfer from Japan to Foreign Company that any person who would like to transfer technology specified in the controlled List from Japan to other countries is required to obtain permission. However, such permission is not applied in the case that the person would like to use such technologies by himself in other countries.<sup>22</sup>

(2) Transfer within Japan that a person who is a resident of Japan would like to transfer technologies controlled by the List under the Foreign

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<sup>21</sup>The Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015), Section 3.

<sup>22</sup> The Foreign Exchange and Foreign Trade Act, Art 25.

Exchange Order to a non-resident in Japan, the resident is also required to obtain the permission.<sup>23</sup>

(3) Technology Transfer in Foreign Country that the person who is a resident of Japan would like to transfer technologies controlled by the List under the Foreign Exchange Order to a non-resident in foreign countries, the resident is required to obtain permission.<sup>24</sup> Nevertheless, such permission is not applied to a case where such technology originates outside Japan and its transactions are accomplished outside Japan.<sup>25</sup>

For Singapore, the transfer of intangible technology in Singapore is required to obtain permission if it is strategic goods, software or technology under Dual-Use List or any software/technology under Catch-all Control.

For Malaysia, the transfer of intangible technology from Malaysia to the destination outside Malaysia including any oral or visual transmission of technology by any communication device<sup>26</sup> are required to obtain permission if it is related to strategic goods, software or technology under Dual-Use Items List or any software/technology which is Unlisted under the Strategic Trade Act 2010.<sup>27</sup>

Therefore, Thailand as a UN member state is required to comply with the Resolution by establishing “Export Control Measure” that covered DUI and technology transfer.

### **6.3 Export Control System**

Referring to the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Subject to Comply with the Export Measures B.E.2558 (2015), which cover the dual-used items that may have impact on big industries namely Automotive, Steel, pharmaceutical, Medical, Electronics, Semiconductors, Computer, Telecommunications, and Chemical.

This Ministerial Notification shall come into force on 1 January 2018<sup>28</sup>. However, there is no regulation under or related to this Notification that. Therefore, exporters could not prepare themselves for the compliance.

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Center for Information on Security Trade Control of Japan, Overview of Japan’s Export Control (4th edn, 2015) 12-13.

<sup>26</sup> Mohamed Shahabar Abdul Kareem, ‘The Strategic Trade Act (STA) 2010: Facilitating Trade in A Secure Trading Environment’, 7.

<sup>27</sup> Strategic Trade Act 2010, Sections 2, 7, 8 and 9.

<sup>28</sup> Ibid, Section 2.



After studying export control laws on Dual-Use Items in Thailand and comparing then with those of Japan, Singapore and Malaysia, there is no specific laws regarding the export license measures in Thailand that exporters are subject to apply for the permission prior to export DUI<sup>29</sup> under Ministerial Notification mentioned above. Thus, there are unclear procedures that may create an obstacle to exporters to comply with such laws.

#### **6.4 Penalty and Sanction**

In case of violation, the penalties for having no export license or for failure to comply with such Ministerial Notification is too high and not consistent with the act of violator because violator is subject to be liable under the provision of section 22 of Import and Export of Goods Act B.E. 2522 (1979) to be punished by imprisonment not exceeding ten years or fine equivalent to five times of the value of exported goods, or both whether by intention or mistake. Comparing applicable laws of Thailand with Japan, Singapore and Malaysia, there are some differences between those and those of Thailand. All countries except Thailand consider the penalty of each offense based on the ground of intention and knowledge of violator.

For Japan, the violator who export or brokerage of goods or technologies related to WMD without permission shall be punished by imprisonment or fine with the rate of penalty higher than the violator who export or brokerage of goods or technologies related to convention arms. Likewise, the administrative sanction will be applied for a violation of a petty offense that a violator shall be punished by prohibition of export not more than 3 years. Certain, the METI has the authority to issue a warning which is served upon a violator when the violation is not so serious.

For Singapore, to commit the offence regarding false declarations or failure to comply with conditions of permit, the violator shall be punished by imprisonment or fine with the rate of penalty higher than the offence regarding refusal or failure to keep or submit record.

For Malaysia, the violator who intended to export arms and related materials without the permit shall be punished by a death sentence or life imprisonment, if the result of violation causes death. But, in any other case, the violator shall be punished by imprisonment at least 10 years or with a fine at least of Ringgit Malaysia 10,000,000.

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<sup>29</sup> Ibid, Section 4 and 5.

Thus, from the author's point of view, the penalty and sanction of Thailand is not appropriate.

Although Thailand has ratified the International Covenant on Civil and Political Right (ICCPR) adopted by the United Nations General Assembly (UNGA) since 1996, death penalty could be imposed in case of most serious crimes. Death penalty in cases that the violators have intention to kill or result of the offences are the loss of life is not in conflict with the right to life under Article 6 of the ICCPR. Then, provisions of each offences and penalties under the new Draft Trade Control of WMD Related Items Act are more appropriate than those in the Ministerial Notification.

## **7. CONCLUSION AND RECOMMENDATIONS**

This thesis focuses on export control laws of DUI in Thailand that are controlled by Ministerial Notification specifying dual-use items as goods requiring permission and complying with the export measures B.E.2558 (2015).

As compared to the laws of Japan, Singapore and Malaysia, it can be concluded that the Thai Ministerial Notification specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) does not cover the requirements of UNSC Resolution 1540 because its implementation does not cover brokering and intangible technology transfer.

Furthermore, Thailand has no provisions regarding export permission measures of DUI. Thus, this may cause unclear practices in operation of the exporters. Based on the study in Chapter 3 of this thesis, Japan, Singapore and Malaysia have the export permission measures and the types of permission are categorized as Individual Permission and Bulk Permission that are convenient for exporters to apply and comply with such measures. Comparing with the laws of Japan, Singapore and Malaysia, Thailand should establish export control measures of DUI for trade management such as export license procedure, technology transfer procedures and internal control program for exporters etc. in order to ensure that the dual-goods are controlled and the entrepreneurs and their staffs are able to understand and comply with the Thai export control laws.

Moreover, the Ministerial Notification specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) is prescribed under the "Export and Import of Goods Act B.E.2522 (1979)" in which the penalty in case of violations of this Notification have to be

based on Section 22 of such Act. Thus, if there are a violation of this Notification whether by intention or mistake, violator shall be punished by imprisonment not exceeding ten years or fine equivalent to five times of the value of exported goods, or both, and the goods including containers and vehicles used in connection with such violation shall be confiscated. Comparing the laws of Thailand with those of Japan, Singapore and Malaysia, all countries except Thailand consider the penalty of each offense based on the ground of intention and knowledge of violator. This is the significant differences that Thai government should consider for developing Thai laws to encourage the investors to operate DUI business in Thailand.

Therefore, this thesis suggests that it be an appropriate time for Thailand to enact the “Trade Control on Weapons of Mass Destruction Related Items Act” that covers dual-use goods, intangible technology transfer and any activities related to WMD in order to ensure security and to protect the benefits of the state in compliance with international agreements and to protect Thai entrepreneurs from non-tariff trade barriers in other countries.

From the analysis mentioned above and the author’s perspectives, this thesis would like to provide the recommendations as follows.

### **7.1 Establishment of Export Control for Brokering and Technology Transfer**

The Ministerial Notification controls only export of Dual-Use Goods<sup>30</sup> from Thailand; but, it does not cover brokering and technology transfer<sup>31</sup> that Resolution 1540 requires all member states to take and enforce effective measures to establish domestic controls over WMD related materials, equipment and technology covered by relevant multilateral treaties which could be used for the design, development, production or use of WMD.<sup>32</sup> Therefore, Thailand as a UN member state is required comply with the Resolution by establishing “Trade Control on Weapons of Mass Destruction Related Items Act” that covered DUI, technology transfer and any activities of WMD namely export, re-export, transshipment, transit and brokering in order

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<sup>30</sup> The Ministerial Notification specifying dual-use items as goods requiring permission and subject to comply with the export measures B.E.2558 (2015), Ministry of Commerce, s 3.

<sup>31</sup> Tamotsu Aoi, *Historical Background of Export Control Development in Selected Countries and Regions* (2016) 17.

<sup>32</sup> United Nation Security Council Resolution 1540 (2004), Definitions 1.

to prevent the proliferation of WMD and to strengthen export control enforcement of Thailand.

### **7.2 Categories of Export License as Individual License and Bulk License**

Under the Trade Control on Weapons of Mass Destruction Related Items Act, the Thai government should formulate regulations for technology or software transfer and export license issuance on controlled transactions namely export, re-export, transshipment, bringing in transit and brokering by adopting Japanese laws because export permission under the Japanese laws is issued by item and shall be based on the country of destination together with the recipient entity; then, export license should be separated into two types of license as follows.

(1) Individual License: the permission is based on a transaction.

(2) Bulk License: the permission is valid for multiple transactions into with the specified period in which exporter is required to establish proper internal control system based on the requirements of Internal Compliance Program (ICP) designed by the Department of Foreign Trade.

Bulk License should be categorized as three types as follows

- (a) Bulk License for combination of items and destination that an exporter who obtains this License could export specific dual-use items to foreign countries. However, the exporter is prohibited to export such dual-goods items to the restricted countries specified by the Thai government.
- (b) Bulk License for the same customer that an exporter who obtains this License could export specific DUI to specific customer who is business partner repeatedly.
- (c) Bulk License for overseas subsidiaries that an exporter who is the manufacturer and obtains this License could export specific DUI to subsidiaries in foreign countries repeatedly

### **7.3 Establishment of Internal Control Program (ICP)**

Referring to Internal Compliance Program (ICP), this thesis suggests that the Thai government should require exporters to establish their own internal program for export control covering management policy, export control of organization, export procedures, record of shipment confirmation, internal audit, training, record keeping procedures and penalties of violation etc. that are necessary for Bulk License Approval. Due to the fact that ICP is a voluntarily commitment provided by an exporter to support the government

authorities by ensuring that internal controls and procedures are proper and satisfactory to the government that the exporter has the proper screening procedures such as items classification, customer screening, end-use or end-user verifying and transactions screening to certify that any DUEI exported by an exporter is not related to the proliferation of WMD before the approval of bulk license to allow the exporter carrying its business to facilitate trade of government.

#### **7.4 Infliction of the Penalties for Each Offences Based on Ground of Intention and Knowledge of Violator.**

Under the Ministerial Notification, the penalties for having no export license is too high and not consistent with the act of violator because violator is subject to liable under the provision of Section 22 of Import and Export of Goods Act B.E. 2522 (1979) that violator shall be punished by imprisonment not exceeding ten years or fine equivalent to five times of the price of exported goods, or both whether by intention or mistake.

The penalties are likely to be significant because the penalties for having no export license or should be consistent with the act of violator. Then, the Draft Trade Control of WMD Related Items Act should be revised with respect to penalties of any offence in case where the result of violation causes death to any person to be the death penalty for the violator. Although Thailand, as a member of United Nations and the International Covenant on Civil and Political Rights (ICCPR) has obligations to abolish death penalty, paragraph 2 of Article 6 of the ICCPR states that the sentence of death may be imposed only for the "most serious crimes" in countries that have not abolished the death penalty.

However, the penalty provisions in this Draft will include a presumption that the managing director, manager or any person responsible for the operations of an entity found to be in violation of this Draft; if a violation by such legal entity is due to an order or performance of any person, or a neglect of order or, a neglect of a duty required as a managing director or of any person who is responsible for carrying out the business of such entity, such person shall be penalized according to the provisions prescribed for such violations. Then, the government authorities have to consider and set the penalty for each offence based on the ground of intention and knowledge of violator. Although the representatives of legal entity are presumed innocent until proven guilty, all directors listed in the company registration would be named as defendants and each of them needs to prove to the satisfaction of the

court that such offense was committed without their knowledge or consent . Due to the fact that such presumption of liability was a heavy legal burden for the representatives of the entity who were forced to produce evidence to prove their innocence, the Thai government should reconsider the penalties under the Draft of Trade Control of WMD Related Items Act and setting each offence and penalty clearly. Nevertheless, violators are subject to penalties or sanctions, which may vary depending on the case.

#### **7.5 Establishment of Administrative Penalties for Violation without Intention.**

When a violation is not so serious or in case where of a minor technical offense is committed without the intention, only an administrative sanction may be imposed on the violator. Therefore, the Department of Foreign Trade should have the authority to take administrative measures such as revocation of a permit and to prohibit a person who has engaged in the transactions violating this law with the intention from the exporting and transferring technology for 2 years.

## Reference

### Books

Anna Wetter. *Enforcing European Union Law on Exports of Dual-Use Goods* Oxford: Oxford University Press, 2009.

Daniel H. Joyner. *International Law and the Proliferation of Weapons of Mass Destruction*. Oxford: Oxford University Press, 2009.

Jumphot Saisoonthorn. *International Law*, (The Project for the Promotion of Textbooks and Teaching Materials) Faculty of Law. Bangkok: Thammasat University, 2016.

Kari M. Meesen, Prof. Dr. *International Law of Export Control Jurisdiction Issues*. London: Graham & Trotman Ltd, 1992.

Olivia Bosch and Peter Van Ham. *Global Non-Proliferation and Counter-Terrorism The Impact of UNSCR 1540*. London: Brookings Institution Press, 2007.

The Weapons of Mass Destruction. *Weapons of Terror Freeing the World of Nuclear, Biological and Chemical Arms*. Sweden: EO Grafiska, Stockholm, 2006.

Yann Aubin and Arnaud Idiart. *Export Control Law and Regulations Handbook A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance*. The Netherlands: Kluwer Law International, 2007.

### Electronic Media

Cynthia Lian, Shearn Delamore & Co, "Malaysia: Transit and Transshipment of Dual-Use Items 2012",

<https://www.worlddec.com/wpcontent/uploads/2012/07/Malaysia.pdf>

Department of Foreign Trade of Thailand, "Examples of WMD-Related Strategic", [http://web.dft.go.th/Portals/2/ContentManagement/Document\\_Mod638/8%20Examples%20of%20WMD-Related%20Strategic%20Commodities%20\(Eng@25541019-1121508107.pdf](http://web.dft.go.th/Portals/2/ContentManagement/Document_Mod638/8%20Examples%20of%20WMD-Related%20Strategic%20Commodities%20(Eng@25541019-1121508107.pdf).

European Commission, “Trade: Dual-Use Export Control”,

<http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/>.

Ministry of International Trade and Industry of Malaysia, “Strategic Trade Act 2010: Frequently Asked Questions”,

<http://www.miti.gov.my/miti/resources/STA%20Folder/PDF%20file/FAQ.pdf?mid=280>.

National Nuclear Security Administration, Department of Energy of United States of America, “International Nonproliferation Export Control Program: Control Lists and Approaches”,

[https://csisprod.s3.amazonaws.com/s3fspublic/legacy\\_files/files/attachments/150624\\_LodenPresentation.pdf](https://csisprod.s3.amazonaws.com/s3fspublic/legacy_files/files/attachments/150624_LodenPresentation.pdf).

Nuclear Threat Initiative. “United Nations Security Council Resolution 1540 Database”, <http://www.nti.org/db/1540>. Official Portal of the Ministry of

International Trade and Industry, “Prohibited and Restricted End User List”, <http://www.miti.gov.my/index.php/pages/view/3420>.

Proliferation Security Initiative (PSI), <http://cns.miis.edu/inventory/pdfs/psi.pdf>.

Star Enterprises, “Titanium Alloys”, <http://www.starentps.com/titanium.html>

Sunry Petroleum Equipment Co., Ltd., “Stream Heat Exchanger”

[http://www.sunrypetro.com/steam\\_heat\\_exchanger.html](http://www.sunrypetro.com/steam_heat_exchanger.html)

Wassenaar Agreement, <http://www.wassenaar.org/introduction/index.html>.

กระทรวงการต่างประเทศ. “ข้อมูลเกี่ยวกับการต่อต้านการก่อการร้ายของไทย”,

<http://www.mfa.go.th/web/791.php>.

กรมการค้าต่างประเทศ. “การควบคุมการส่งออกของไทย”,

[http://www.dft.moc.go.th/the\\_files/\\$11/level14/2\\_Thailand%E2%80%99s\\_Export\\_Control\\_System\\_TH.pdf](http://www.dft.moc.go.th/the_files/$11/level14/2_Thailand%E2%80%99s_Export_Control_System_TH.pdf).

. “สาระสำคัญของพระราชบัญญัติการส่งออกไปนอกและการนำเข้ามาในราชอาณาจักรซึ่งสินค้า พ.ศ. 2522”,

<http://www.dft.go.th/Seminar/law/Pholawbor2522.pdf>.

### **Other Materials**

Center for Information on Security Trade Control of Japan, Overview of Japan’s Export Control (4th edn, 2015).

Charter of United Nations

Chen Yongquan, “Strategic Goods Control: Traders as Our Partners”.



Department of Foreign Trade, "Trade Management of Dual-Use Items: TMD/  
Trade Control of Weapons of Mass Destruction Related Items: TCWMD".

Draft Trade Control of WMD Related Items Act approved by the Cabinet on 4  
October 2016.

George Tan, "Export Controls".

Import and Export of Goods Act B.E. 2522

Ministerial Notification of Ministry Specifies Dual-Use Items as Goods  
Requiring Permission and Complying the Export Measures B.E.2558 (2015).

Mohamed Shahabar Abdul Kareem, "The Strategic Trade Act (STA) 2010:  
Facilitating Trade in A Secure Trading Environment".

Regulation (EC) No. 1334/2000.

Singapore Customs, "Strategic Goods Control and Self-Compliance".

Singapore Customs, "Singapore's Strategic Goods Control System".

Sudarat Pongpitak, "Investment Promotion for Dual-Use Items" (2013).

United Nation Security Council Resolution 1540 (2004)

**IMPLEMENTATION OF LAWS CONCERNING THE COMPULSORY  
USE OF CHILD CAR SEATS ON PERSONAL MOTOR VEHICLES  
AND SAFETY STANDARDS FOR CHILD CAR SEATS  
AND ISOFIX SYSTEMS\***

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**Abstract**

Road traffic injuries and fatalities are critical public health problems in Thailand. WHO estimates that road traffic fatalities in Thailand amount to 24,237 deaths each year, or according to the estimated rate by WHO, 36.2 deaths per 100,000 population. Every year, approximately 100 - 140 children, under the age of fourteen years, perish in motor vehicles as a result of traffic accidents. Unfortunately, there is currently no specific safety measures prescribed under Thai Traffic Laws whose purpose is preventing the injury and death of children in a personal motor vehicle.

In Thailand, Traffic Law does not require a child to be restrained with a child car seat but it requires all passengers in a motor vehicle to wear safety belts. This Traffic Law requiring a child in a motor vehicle to wear a safety belt is impractical and unenforceable. This means the use of a child car seat is a voluntary safety measure which depends on the parents' discretion. Furthermore, there is no national product standard for child car seats. Therefore, most of the low-price child car seats distributed in Thailand are manufactured and imported without passing any standard certification. In some cases, a standard child car seat cannot be used and installed in certain models of motor vehicle. Thus, it is necessary to amend the related Motor Vehicle Law to mandate that all newly manufactured motor vehicles must be equipped with a new automotive part in order to support the use of a standard child car seat both for manufacture in country and for importation.

This article mainly focuses on the Car Seat Law and car seat safety standards in developed countries where the fatality rates in traffic accidents are

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\* This article is summarized and arranged from the thesis "Implementation of laws concerning the compulsory use of child car seat on personal motor vehicles and safety standard of child car seat and ISOFIX systems" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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low, particularly the European Union, the United Kingdom and the United States of America.

According to research, the proposed appropriate solution to overcome child injury and fatality in a motor vehicle is compulsory measures through legal implementation and enforcement. The Road Traffic Act should be amended and the compulsory use of child car seats in a motor vehicle should be mandated by law. At the same time, the industrial product standard for child car seats should be set at a compulsory standard which conforms with UN Regulation No.44 or the equivalent a national standard. Moreover, the ISOFIX anchorage and ISOFIX top tether should be a compulsory automotive part that is required by law to be installed on all passenger motor vehicles.

**Keywords:** Car Seat Law, Child Car Seat, Child Restraint System, ISOFIX Car Seat, ISOFIX Anchorage Systems, Motor Vehicle and Automotive Product Safety Standards

**บทคัดย่อ**

การบาดเจ็บและเสียชีวิตจากอุบัติเหตุบนท้องถนนในประเทศไทยถือเป็นปัญหาสำคัญด้านสาธารณสุขที่ควรได้รับการแก้ไขอย่างเร่งด่วน จากประมาณการโดยองค์การอนามัยโลกการเสียชีวิตในประเทศไทยจากสาเหตุการเกิดอุบัติเหตุบนท้องถนนในแต่ละปีประมาณ 24,237 ราย หรือคิดเป็นอัตราผู้เสียชีวิต 36.2 ราย ในประชากรทุกๆ 100,000 คน และในทุกๆปีจะมีเด็กที่มีอายุต่ำกว่า 14 ปี เสียชีวิตจากอุบัติเหตุบนท้องถนนในรถยนต์ประมาณ 100 – 140 ราย แต่อย่างไรก็ตามในปัจจุบันยังไม่ปรากฏว่ามีมาตรการเฉพาะทางกฎหมายส่งเสริมความปลอดภัยสำหรับผู้โดยสารที่เป็นเด็กในรถยนต์ส่วนบุคคลเกิดขึ้น

ในประเทศไทยนั้น กฎหมายจราจรฉบับปัจจุบันยังไม่ได้กำหนดมาตรการเฉพาะเพื่อส่งเสริมความปลอดภัยสำหรับผู้โดยสารที่เป็นเด็กในรถยนต์ส่วนบุคคล โดยเฉพาะอย่างยิ่งการกำหนดให้เด็กที่โดยสารในรถยนต์ส่วนบุคคลนั้นต้องนั่งในเบาะนั่งสำหรับเด็กที่ติดตั้งในรถยนต์ตลอดการเดินทาง ซึ่งกฎหมายจราจรกำหนดไว้เพียงว่าให้ผู้ขับขี่และผู้โดยสารทุกคนในรถยนต์ต้องคาดเข็มขัดนิรภัยตลอดการเดินทาง แต่อย่างไรก็ตามการที่กฎหมายกำหนดให้ผู้โดยสารที่เป็นเด็กต้องคาดเข็มขัดนิรภัยไม่สามารถกระทำได้ในทางปฏิบัติและมาตรการทางกฎหมายนี้ก็ไม่สามารถบังคับใช้ได้จริงกับผู้โดยสารที่เป็นเด็ก และด้วยเหตุที่การใช้เบาะนั่งสำหรับเด็กในรถยนต์ส่วนบุคคลเป็นมาตรการเชิงสมัครใจ ดังนั้นความปลอดภัยของผู้โดยสารที่เป็นเด็กในรถยนต์ส่วนบุคคลจึงขึ้นอยู่กับดุลยพินิจของผู้ปกครองซึ่งเป็นผู้ขับขี่ว่าเห็นถึงความจำเป็นและประโยชน์ที่เด็กจะได้รับจากการใช้เบาะนั่งสำหรับเด็กหรือไม่ นอกจากนี้เบาะนั่งสำหรับเด็กในรถยนต์ที่มีจำหน่ายและวางขายในประเทศไทยทั้งผลิตขึ้นเองภายในประเทศหรือนำเข้ามาจากต่างประเทศยังไม่มีการควบคุมมาตรฐานทั้งด้านคุณภาพและความปลอดภัยของสินค้า โดยที่เบาะนั่งสำหรับเด็กในรถยนต์ยังไม่ได้ถูกกำหนดให้เป็นผลิตภัณฑ์ที่ผลิตหรือนำเข้าต้องเป็นไปตามมาตรฐานผลิตภัณฑ์อุตสาหกรรม และยิ่งไปกว่านั้นเบาะนั่งสำหรับเด็กในรถยนต์ระบบไอโซฟิกที่เป็นไปตามมาตรฐานระหว่างประเทศไม่สามารถติดตั้งในรถยนต์ได้ทุกคัน เนื่องจากรถยนต์ส่วนมากในประเทศไทยขาดอุปกรณ์สำคัญที่ช่วยรองรับการติดตั้งร่วมกับเบาะนั่งสำหรับเด็กระบบไอโซฟิก ดังนั้นจึงมีความจำเป็นที่จะต้องมีการแก้ไขกฎหมายเกี่ยวกับกรกำหนดส่วนควบและเครื่องอุปกรณ์สำหรับรถยนต์

บทความนี้จะมุ่งวิเคราะห์ถึงองค์ประกอบของข้อกำหนดการบังคับใช้เบาะนั่งสำหรับเด็กในรถยนต์ส่วนบุคคล รวมถึงมาตรฐานด้านความปลอดภัยและคุณภาพของผลิตภัณฑ์เบาะนั่งสำหรับเด็กในรถยนต์ และมาตรฐานด้านความปลอดภัยของรถยนต์ ส่วนควบและเครื่องอุปกรณ์สำหรับรถยนต์เพื่อรองรับการติดตั้งเบาะนั่งสำหรับเด็กระบบไอโซฟิก โดยศึกษากฎหมายของต่างประเทศโดยเฉพาะอย่างยิ่งในประเทศที่มีอัตราการเสียชีวิตจากสาเหตุการเกิดอุบัติเหตุบนท้องถนนในระดับต่ำ เช่น สหภาพยุโรป ประเทศอังกฤษและสหรัฐอเมริกา

จากการศึกษาวิจัยนี้ สมควรเสนอให้มีการแก้ไขกฎหมายจราจรให้มีการบังคับใช้เบาะนั่งสำหรับเด็กในรถยนต์ส่วนบุคคล มีการพิจารณามาตรฐานบังคับผลิตภัณฑ์เบาะนั่งสำหรับเด็กในรถยนต์โดยอ้างอิงจากมาตรฐานระหว่างประเทศ และแก้ไขกฎหมายการกำหนดส่วนควบและเครื่องอุปกรณ์สำหรับรถยนต์เพื่อรองรับการติดตั้งเบาะนั่งสำหรับเด็กระบบไอโซฟิก

**คำสำคัญ:** กฎหมายบังคับใช้เบาะนั่งนิรภัยสำหรับเด็กในรถยนต์, เบาะนั่งสำหรับเด็กในรถยนต์, ระบบยึดแบบไอโซฟิกและจุดยึด ไอโซฟิกทอปเทเทอร์, มาตรฐานด้านความปลอดภัยของรถยนต์ ส่วนควบและเครื่องอุปกรณ์สำหรับรถยนต์

## (I) INTRODUCTION

According to the global status report on road safety 2015, Thailand is on the verge of becoming the country with the highest fatality rate in road accidents in the world. The fatality rate in road accidents in Thailand is estimated by the World Health Organization to be approximately 36.2 per 100,000 populations,<sup>1</sup> compared to the global fatality rate in road accidents which is approximately 17.4 per 100,000 population.<sup>2</sup> At the current rate, Thailand is approximately two times beyond the global fatality rate in road accidents and it is estimated that three percent of estimated GDP of the nation is lost due to road accidents.<sup>3</sup> Every year, approximately 100 - 140 children, who are under fourteen years of age, perish in motor vehicles from traffic accidents.<sup>4</sup>

According to this information and statistics of fatality rate in road accidents, the severe situation in Thailand is evidence of the poor enforcement of Traffic Laws and the lack of legal measures to protect and reduce the fatalities and the bodily injury of children who travel in personal motor vehicles.

Passive safety systems on motor vehicles are determined to be one solution to reduce the risk of fatalities in road accidents. Most of the countries in the world have implemented passive safety systems on motor vehicles programs in the form of legal measures to enforce compulsory use of the adult safety belt. However, the benefits of these programs are intended to protect only mature persons not children whose bodies are unfit to use or utilize an adult safety belt.<sup>5</sup> Consequently, passive safety systems, especially for children, should be implemented in the form of legal measures enforcing compulsory use of child car seats on motor vehicles in order to reduce bodily injury and protect against the death of children from road accidents.

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<sup>1</sup> World Health Organization, 'Global status report on road safety 2015' (WHO Press, 2015) 235

<[http://www.who.int/violence\\_injury\\_prevention/road\\_safety\\_status/2015/en/](http://www.who.int/violence_injury_prevention/road_safety_status/2015/en/)> accessed 1 December 2016

<sup>2</sup> Ibid 5

<sup>3</sup> Ibid 235

<sup>4</sup> CSIP 'Be cautious when installing a child car seat' (Child Safety Promotion and Injury Prevention Research Center (CSIP), 7 April 2016

<<http://csip.org/wordpress/2016/04/07/>> accessed 25 May 2017

<sup>5</sup> Tami Toroyan and Margie Peden, 'Youth and Road Safety' (Geneva, WHO Press, 2007) 31

<[http://apps.who.int/iris/bitstream/10665/43607/1/9241595116\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/43607/1/9241595116_eng.pdf)> accessed 1 December 2016

According to research, child car seats are highly effective in protecting children. Children who are provided with an appropriate child car seat when travelling in motor vehicles are less likely to be injured or killed in road accidents than children who are unrestrained without any safety device and children who are using an adult safety belt. Although, the effectiveness of reducing injury and fatality rate in road accidents does vary and depends upon the type of child car seats. For example, an infant who occupies a rearward-facing child car seat will be far less likely to be injured or die in a road accident, 90% less when compared to an infant who does not occupy a child car seat at all time. Furthermore, a toddler who occupies a forward-facing child car seat will be far less likely to be seriously injured in a road accident when compared to a toddler utilizing an adult safety belt, 80% less likely. An older child who occupies a booster seat will have a 77% less chance of injury in a road accident compared to an older child who does not utilize any safety device.<sup>6</sup>

Reflecting on the effectiveness of reducing bodily injury and fatality rates in road accidents, child car seats should be designed and manufactured to conform with a national standard<sup>7</sup> or in line with international standards.<sup>8</sup> Thailand is also lacking a national standard controlling product safety, quality and efficiency of child car seats. Consequently, there are child car seats in Thai markets which are not qualified as safe and adequate products that are able to protect children from injury and death on road accidents.

In the world-leading countries where the laws on the compulsory use of child car seats are enforced, improper installation or misuse of a child car seat is the primary cause of reduced effectiveness of protection.<sup>9</sup> Parents have to study and pay strong attention to the manual or instruction materials on how to install a child car seat with an adult safety belt in motor vehicles. Additionally, the installation of child car seats in motor vehicles by means of securing it with an adult safety belt usually requires a fair amount of time to achieve the proper

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<sup>6</sup> Lotta Jakobsson, Isaksson-Hellman, Lundell, 'Safety For The Growing Child- Experiences From Swedish Accident Data' (Paper Number 05-0330) 1 <<http://www-nrd.nhtsa.dot.gov/pdf/esv/esv19/05-0330-O.pdf>> accessed 1 December 2016

<sup>7</sup> Tami Toroyan and Margie Peden, (n 5) 31

<sup>8</sup> World Health Organization, 'World Report On Road Traffic Injury Prevention' (WHO Press, 2004) 134 <[http://www.who.int/violence\\_injury\\_prevention/publications/road\\_traffic/world\\_report/en/](http://www.who.int/violence_injury_prevention/publications/road_traffic/world_report/en/)> accessed 1 December 2016

<sup>9</sup> Tami Toroyan and Margie Peden, (n 5) 30

fit. For this reason, child car seats with new technology systems for simple installation have been designed and introduced to parents as alternative safer products known as the “ISOFIX child car seat”. However, this type of child car seat requires motor vehicles to be compulsorily fitted with additional compatible new technology systems which are called the “ISOFIX anchorage systems and ISOFIX top tether anchorage” in order to support the installation systems of the ISOFIX child car seat. Consequently, motor vehicles in countries where parents recognized the benefit of the new technology to cope with the problem of improper installation or misuse of child car seats (securing child car seat with an adult safety belt), the law requires motor vehicles for carriage of passengers to be compulsorily fitted with the ISOFIX anchorage systems and the ISOFIX top tether anchorage.

In Thailand, under current Motor Vehicle Law, the ISOFIX anchorage systems and ISOFIX top tether anchorage are not compulsory equipment that are required by law to be fitted on motor vehicles. For this reason, Thailand is dependent on vehicle manufacturers to design and construct each model of motor vehicle to include the ISOFIX anchorage systems and the ISOFIX top tether anchorage. Therefore, on many vehicles in Thailand the ISOFIX child car seats cannot be installed as they are not fitted with the necessary compatible ISOFIX technology systems.

## **(II) THE COMPULSORY USE OF CHILD CAR SEATS IN MOTOR VEHICLES AND SAFETY STANDARDS FOR CHILD CAR SEATS AND ISOFIX SYSTEMS IN FOREIGN LAW**

### **I) European Union**

The very first EU legislation concerning the compulsory use of child car seat was introduced in the Council Directive 91/671/EEC<sup>10</sup> where it ensured that children who are under 12 years of age or less than 150 cm in height shall be restrained by an approved child car seat suitable for the height and weight of the child.<sup>11</sup> However, the Directive left some exceptions for children of particular ages who are allowed to be restrained by adult safety belts instead of child car seats.

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<sup>10</sup> Council Directive of 16 December 1991 on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3, 5 tonnes [1991] OJ L 373/26

<sup>11</sup> Dir 91/671/EEC, OJ L 373/27 Art 2 Para 2

In 2003, The Directive 91/671/EEC was amended by the Directive 2003/20/EC.<sup>12</sup> It provided a significant transformation in three elements related to the compulsory use of child car seats. First, exemptions under the Directive 91/671/EEC were eliminated<sup>13</sup>, secondly, appropriate child car seats should be approved in accordance with the technical requirements of UN-ECE Regulation 44.03 or its equivalent. Lastly, child car seats which are intended to be used in the front seat without deactivating the air bag system are prohibited.<sup>14</sup> Additionally, compulsory use of child car seats has been extended to motor vehicles other than passenger cars that have a number of seats not exceeding eight including the driver's seat, in particular, a vehicle for carriage of passengers consisting of more than eight seats and a motor vehicle for carriage of goods.<sup>15</sup>

Directive 2003/20/EC repealed the exception provided in Article 4 of Directive 91/671/EEC, therefore, a child who is shorter than 150 cm in height shall be restrained by an integral or non-integral child car seat suitable for the child's mass. However, Member States may allow particular children to be restrained by an adult safety belt<sup>16</sup> or not to be restrained in special circumstances.<sup>17</sup> However, children under three years of age are not allowed to be transported without any restraint by child car seat.<sup>18</sup> Additionally, children under three years of age are also not allowed to be transported with restraint by child car seat, used in the front seat of a motor vehicle without deactivation of the air bag system.<sup>19</sup>

Motor vehicles in category M (motor vehicles for carriage of passengers) and N (motor vehicles for carriage of goods) are required by

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<sup>12</sup> Directive 2003/20/EC amending Council Directive 91/671/EEC relating to the compulsory use of safety belts and child-restraint systems in vehicles [2003] OJ L115/63

<sup>13</sup> Dir 2003/20/EC [2003] OJ L115/65, Art 4

<sup>14</sup> Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/671/EEC on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3, 5 tonnes'[2001] OJ C260/30

<sup>15</sup> Dir 2003/20/EC [2003] OJ L115/64, Art 1 Para 2(1)

<sup>16</sup> Dir 2003/20/EC [2003] OJ L115/64, Art 1 Para 3(1)(a)(ii)

<sup>17</sup> Dir 2003/20/EC [2003] OJ L115/64, Art 1 Para 3(1)(a)(iii)

<sup>18</sup> Dir 2003/20/EC [2003] OJ L115/64, Art 1 Para 3(1)(a)(i)

<sup>19</sup> Dir 2003/20/EC [2003] OJ L115/64, Art 1 Para 3(1)(b)



Regulation (EC) 661/2009 to be compulsorily fitted with ISOFIX anchorage systems and ISOFIX top tether anchorage.<sup>20</sup>

### **ii) The United Kingdom**

There are many UK legislative and statutory instruments dealing with the compulsory use of child car seats. Under the Road Traffic Act 1988, abbreviated as 'RTA 1988' hereafter, the law empowers the Secretary of State to legislate regulations concerning requirements and exceptions for compulsory use of child car seats for persons who are under the age of fourteen occupying a motor vehicle for the carriage of passenger not exceeding eight seats including the driver's seat.<sup>21</sup>

Motor Vehicles (Wearing of Seat Belts) Regulations 1993, abbreviated as 'MV(WSB)R 1993' hereafter, the Motor Vehicles (Wearing of Seat Belts) (Amendment) Regulations 2006, abbreviated as 'MV(WSB)(A)R 2006' hereafter, and The Motor Vehicles (Wearing of Seat Belts) (Amendment) (No.2) Regulations 2015, abbreviated as 'MV(WSB)(A)(2)R' hereafter, lay down detailed definitions of child car seat and children who are required by law to occupy a child car seat, characteristics and prescriptions of appropriate child car seats. Some exemptions for the use of child car seats for children travelling in vehicles are also described in the said statutory instruments.

RTA 1988 requires that a person who is under the age of fourteen shall be restrained by an appropriate child car seat when travelling in vehicles. A small child who is under the age of twelve and less than 135 centimeters in height shall be restrained by an approved child car seat in accordance with UN-ECE Regulation No. 44 amendment series of 03 or 04, or UN Regulation No 129.<sup>22</sup> A large child who is under the age of fourteen but higher than 135 centimeters shall be restrained by an approved child car seat in accordance with UN-ECE Regulation No 44 amendment series of 03 or 04, or UN-

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<sup>20</sup> Regulations (EC) No 661/2009 of The European Parliament and of The Council concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor [2009] OJ L200/8 Art 5 Para 3(e)

<sup>21</sup> Road Traffic Act 1988 (RTA 1988), s 14 para 1, 6 and s 15 para 9

<sup>22</sup> MV(WSB)R 1993, reg 2 para 8(a) and reg 8 para (1)(a), (2)(a)-(c) amended by MV(WSB)(A)R 2006, reg 10 para 8 and amended by MV(WSB)(A)(2)R 2015, reg 4, 5

Regulation No 129,<sup>23</sup> or alternatively may be allowed to be restrained by an adult safety belt instead of an approved child car seat.<sup>24</sup>

Regulation (EC) 661/2009 is directly applicable to all Member States of the European Community without requiring ratification to the national domestic laws. However, on a national level, The Road Vehicles (Approval) Regulations 2009 which are the UK statutory instruments also ensures that technical requirements for type-approval of motor vehicle on general safety, in particular compulsory installation of ISOFIX anchorages systems and ISOFIX top tether anchorage on all new vehicles shall be applied effectively. Therefore, all new passenger vehicles in category M and motor vehicles for carriage of goods in category N are required to install the ISOFIX anchorage systems and ISOFIX top tether anchorage in order to be used in conjunction with the ISOFIX child car seat.

### **iii) The United States of America and The State of California**

In the US, the first compulsory use of child car seat was legislated in the State of Tennessee in 1978. The law obliged parents to restrain their children in the vehicle by means of a child car seat that meets the federal standard requirements.<sup>25</sup> After that, other States started emulating the law relating to young passengers riding in vehicles throughout the US until the last State enacted child car seat law in 1985.<sup>26</sup> In regards to child car seat law, all States require children who travel in vehicles to be restrained by child restraint devices. However, the detailed substantive law relating to compulsory use of child car seats is varied, differing from State to State.<sup>27</sup> The reason that all States have further differences of child passenger safety law is that there is no intention at the federal level to indicate or lay down substantive law relating to child car seats. The law depends upon the recognition of advanced scientific knowledge to support the effectiveness of child car seat policy in each State.

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<sup>23</sup> MV(WSB)R 1993, reg 2 para 8(b) and reg 8 para (1)(c), (2)(a), (2)(c) amended by MV(WSB)(A)R 2006, reg 10 para 8 and amended by MV(WSB)(A)(2)R 2015, rec 4

<sup>24</sup> MV(WSB)R 1993, reg 2 para 8(b) amended by MV(WSB)(A)R 2006, reg 10 para 8

<sup>25</sup> Deborah D. Stewart, 'More than Forty Years of Progress for Child Passenger Protection, A Chronicle of Child Passenger Safety Advances in the USA (Safe Ride News, 2009) 2

<<http://saferidenews.com/srndnn/LinkClick.aspx?fileticket=NIPfcuqNL1U%3D&tabid=375>> accessed 2 November 2016

<sup>26</sup> Ibid 3

<sup>27</sup> Child Passenger Safety Laws (Governors Highway Safety Association, November 2016) <[http://www.ghsa.org/html/stateinfo/laws/childsafety\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/childsafety_laws.html)> accessed 2 November 2016

Consequently, the law legislators tended to enact legislation and regulations based on their own State's scientific knowledge which may be different in substantial detail from child passenger safety measures.<sup>28</sup>

### **California Vehicle Code**

The law requires children who are under eight years of age to be restrained by appropriate child car seats, which is in conformity with the federal motor vehicle safety standards, in rear seat position of the vehicle.<sup>29</sup> All children who are under eight years of age shall be required by the law to use an appropriate child car seat related to their weight and size as described in the instructions, label, or manual of the child car seat that the manufacturer provided. In other words, parents shall select proper restraining device which is appropriate for their children's weight and/or height such as infant rearward facing car seat, or convertible forward facing child car seat, or booster seat. Additionally, all restraining devices shall be required to be manufactured in conformity with the FMSS No. 213 which is the federal motor vehicle safety standards for child restraint systems. Moreover, on January 1, 2016<sup>30</sup> the California Vehicle Code will be effective and enforceable on the compulsory use of rearward facing infant seats by children who are under two years of age unless their weight exceeds 40 pounds, or their height exceeds 40 inches.<sup>31</sup>

Children who are eight years of age or over but not exceeding sixteen years old are required to be restrained by an appropriate child car seat or adult safety belt if it is fitted properly for the children's body.<sup>32</sup> Furthermore, the law also requires children who are eight years of age but not exceeding sixteen years old to be restrained in child car seats which are manufactured in conformity with the federal motor vehicle safety standards for child restraint systems, also known as FMVSS No. 213. The law provides an alternative restraining device for a child who has outgrown eight years old by using an adult safety belt instead of a typical child car seat or booster seat. However, in

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<sup>28</sup> Jin Yang Bae, Evan Anderson, Diana Silver, 'Child Passenger Safety Laws in the United States, 1978-2010: Policy Diffusion in the Absence of Strong Federal Intervention' (Social Science & Medicine, January 2014) 2, 9  
<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3899584/>> accessed 2 November 2016

<sup>29</sup> California Vehicle Code, Art 3.3, s 27360 para (a)

<sup>30</sup> California Vehicle Code, Art 3.3, s 27360 para (b)

<sup>31</sup> California Highway Patrol 'Child Safety Seats' (California Highway Patrol)  
<<https://www.chp.ca.gov/programs-services/programs/child-safety-seats>> accessed 3 November 2016

<sup>32</sup> California Vehicle Code, Art 3.3, s 27360.5 para (a)

case a child is over eight years of age but an adult safety belt does not properly fit the child's body, the law still requires a child to use a booster seat lifting a child's body up to secure properly with an adult safety belt.<sup>33</sup>

The law requires a child who is under eight years of age to be restrained by an appropriate child car seat on the rear seat of the vehicle. However, the law lays down exemptions and allows a child to occupy the front seat of vehicle with appropriate child car seat in particular circumstances, for example, the vehicle has no rear seat, the rear seats of the vehicle are rearward facing seats, or the rear seats of the vehicle are fully occupied by other children who are under seven years of age.<sup>34</sup> However, the law prohibits a child occupying the front seat of a vehicle in rearward facing child car seat if the vehicle is fitted with an active front airbag.<sup>35</sup>

In the US, Child restraint anchorage systems, or also known as LATCH systems which stand for "Lower Anchors and Tethers for Children", are vehicle devices intended to be fitted in vehicles functioning in connection with child car seats that have lower anchorage attachment and top tether strap connector. LATCH systems were invented to eliminate improper installation or misuse of typical child car seats using an adult safety belt to secure child car seat within the vehicle's structure. The NHTSA has issued Federal motor vehicle safety standards on child restraint anchorage systems prescribed in 49 CFR 571.225 Standard No. 225: Child Restraint Anchorage Systems. The scope of this standard is applicable to child restraint anchorage systems providing requirements relating to the proper location of LATCH systems and strength performance assuring the effectiveness of securing child car seats within the vehicle's structure.<sup>36</sup> FMVSS Standard No. 225 applies to passenger car, truck and multipurpose passenger vehicle including buses.<sup>37</sup>

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<sup>33</sup> Car seat Organization 'Enforcing California Restraint Laws for Children' (23 February 2013)

<[http://www.carseat.org/Legal/99\\_Enf.pdf](http://www.carseat.org/Legal/99_Enf.pdf)> accessed 3 November 2016

<sup>34</sup> California Vehicle Code, Art 3.3, s 27363 para (e)(1)-(6)

<sup>35</sup> California Vehicle Code, Art 3.3, s 27363 para (f)

<sup>36</sup> 49 CFR 571.225 s 1

<sup>37</sup> 49 CFR 571.225 s 2

### **(III) ANALYSIS ON THE LEGAL APPROACH FOR IMPLEMENTING THE COMPULSORY USE OF CHILD CAR SEATS IN PERSONAL MOTOR VEHICLES AND ESTABLISHING CHILD CAR SEAT STANDARDS AND ISOFIX SYSTEMS IN THAILAND**

#### **I) The Absence of Law Concerning the Compulsory Use of Child Car Seat on Personal Motor Vehicles**

The Road Traffic Act imposes the compulsory use of safety belts on the driver and all passengers in a motor vehicle. This means that children or young passengers are defined as a typical passenger, therefore, they are required by the law to wear a safety belt while travelling without exception. Under current passenger safety law relating to compulsory use of safety belts, the law does not pay attention to children who are travelling with their family as passengers in motor vehicles. Only mature persons will be properly equipped with safety belts for reducing and protecting bodily injury or fatality in unforeseen accidents on the road. Meanwhile, the children, who are the subject of absolute rights of their bodies and lives, do not receive the same level of protection by the law when compared to their parents. Even though in some cases, children can apply, for safety protection, an adult safety belt. Such measures do not generate appropriate safety for children since an adult safety belt is designed and constructed for adult protection. Additionally, in car crash events, children who are restrained by adult safety belts may be further injured by the safety belt itself, not by a direct result of the car crash.

#### **ii) The Absence of Laws concerning Safety Standards of Child Car Seat**

In relation to child car seats under Thai Industrial Standards, there is currently no general standard or compulsory standard determined by the Ministry of Industry. Therefore, child car seats in Thailand lack a legal measure to control safety standards and requirements of child car seats that are manufactured by Thai entrepreneurs or imported from outside countries. In regards to the safety requirements, specifications, and inspection of child car seats prescribed by compulsory Thai Industrial Standards, the international standard concerning technical requirements of child car seats should be adopted and utilized instead of establishing national standards anew in order to develop safety standards and technical requirements for child car seats in a short period of time and to be in line with developed countries where child car seats have been invented by automotive specialists and used for children in motor vehicles for a long times.

**iii) Inadequacy of Motor Vehicle and Equipment Safety Standards**

Subject to the Motor Vehicle Act B.E. 2522 (1979), the vehicle type-approval is in the form of the combination of two legislative instruments; (1) the general requirement of compulsory component parts and equipment to be fitted on motor vehicles as prescribed by Ministerial Regulations and (2) the type-approval of vehicle's equipment prescribed by Notification of Department of Land Transportation.

The general requirement of compulsory component parts and equipment to be fitted on a motor vehicle is the administrative legislation that lays down component parts and equipment which are required by the law to be fitted on each type of motor vehicle. The Ministerial Regulations prescribes the required necessary component parts and equipment that must be fitted on each type of motor vehicle, not including the technical requirements, specifications, installations and approval procedures of the vehicle's equipment.

In relation to type-approval of the vehicle's equipment, the Notification of Department of Land Transport specifies the technical requirements, specifications, installation and approval procedures of each compulsory component part and equipment that are prescribed by the Ministerial Regulations. The ISOFIX anchorage systems and ISOFIX top tether anchorage are equipment used in connection with ISOFIX child car seats. If this equipment is not fitted on personal vehicles compulsorily, the ISOFIX child car seat would not be able to be installed on those motor vehicles. Consequently, it is necessary that ISOFIX anchorage systems and ISOFIX top tether anchorage shall be added as compulsory component parts and equipment that are required by Ministerial Regulation to be fitted on all personal motor vehicles.

Furthermore, the technical requirement, specifications, installation and approval procedure for the ISOFIX anchorage systems and ISOFIX top tether shall be implemented and determined by the Director-General of the Department of Land Transport and promulgated in Notification of Department of Land Transport. Additionally, the technical requirements of ISOFIX anchorage systems and ISOFIX top tether anchorage which will be annexed to the Notification of Department of Land Transport shall adopt the international standard in order to implement type-approval of this equipment in a short period of time and improve safety standards and requirements to be in line with international standards.

#### **iv) Incompatibility of ISOFIX Child Car Seat and Motor Vehicles without ISOFIX Systems**

Nowadays, there are two types of child car seat distributed in Thailand; (1) general child car seats and; (2) ISOFIX child car seats. Both general child car seats and ISOFIX child car seats may be approved in accordance with UN Regulation No. 44 if it is manufactured in European Countries and some countries outside EU that adopt the UN Regulation No.44 as a technical requirement and safety standard for child car seats. Thailand currently lacks improved law concerning the compulsory automotive equipment and parts which are required by the law to be fitted on motor vehicles, in particular, ISOFIX anchorage systems and ISOFIX top tether anchorage. Consequently, only general child car seats which are installed in motor vehicles by using an adult safety belt are compatible with all models of motor vehicle. On the other hand, ISOFIX child car seats which are fitted on motor vehicles by using ISOFIX attachment are compatible with specific models of motor vehicles which are fitted with ISOFIX anchorage systems and ISOFIX top tether anchorage. Therefore, parents who buy an ISOFIX child car seat for their children may encounter installation problems in a motor vehicle without ISOFIX anchorage systems and ISOFIX top tether anchorage fitted on their vehicle.

### **(IV) CONCLUSIONS AND RECOMMENDATIONS**

#### **I) Conclusions**

According to this study, Thailand is on the verge of becoming the country where the highest rate of fatality in road accidents occurs worldwide. The legal measures regarding intervention in severe situations, particularly the compulsory use of child car seats for children who travel in personal motor vehicles with their family, has never been introduced and prescribed in the form of legislation. National safety standards for child car seats have not been determined to ensure consumers that the product they buy will be safe for use and effectively protect their children from bodily injury and fatality caused by road accidents. The laws concerning the safety standards of motor vehicles, particularly compulsory component parts and equipment to be fitted on motor vehicles, needs to be improved in order to support the use of ISOFIX child car seats or new enhanced child car seats to eliminate the improper installation or misuse of child car seats.

For this reason, Thailand should implement legal safety measures on motor vehicles for children in the form of compulsory use of child car seats, determine and record a national compulsory product standard for child car

seats, and improve the general safety requirements of motor vehicles by adding enhanced technology equipment to be compulsory equipment fitted on every motor vehicle for supporting the use of child car seats. For effective legal enforcement, the law should be applicable to social and economic conditions in Thailand. Consequently, the law concerning compulsory use of child car seat, Thai Industrial Standards for child car seats and ISOFIX anchorage systems and ISOFIX top tether anchorage that are required by law to be fitted on motor vehicles should be implemented and amended phase by phase respectively.

### **ii) Recommendations**

According to the Road Traffic Act B.E. 2522 (1979), the legal provision concerning the compulsory use of child car seats should be added in Chapter XVII, following paragraph 2 of Section 123. The provision shall specify essential elements of young passenger safety in motor vehicle as follows;

For example “*The driver of a vehicle must render the passenger who is under the age of 12 or less than 135 centimetres in height, to be restrained with an appropriate child car seat while travelling.*”

In paragraph 3, the provision shall be amended in order to empower the Commissioner-General to be able to prescribe the category and type of vehicle, the procedure of using child car seat, the characteristics of an appropriate child car seat and the exception of non-compliance with the law.

For example, “The category or type of vehicle, character and procedure of using seat belt under paragraph two and *the use of child car seats under paragraph three* shall be prescribed by the Commissioner-General by publication in the Government Gazette.”

Under the Industrial Product Standards B.E. 2511 (1968), child car seats should be determined by a compulsory standard under Section 17. Thai Industrial Standard for child car seats (TIS: xxx - xxx for child car seat) shall be promulgated by Royal Decree and published in the Government Gazette.

In regard to TIS for child car seats, it should adopt the uniform provision concerning the approval of child restraint systems (child car seat) prescribed in UN-Regulation No. 44, amendment of series 04 annexed to the 1958 Agreement as Thai Industrial Standard.

Under the Motor Vehicle Act B.E. 2522 (1979), personal motor vehicles shall be compulsorily fitted with component parts and equipment prescribed in Ministerial Regulations on compulsory component parts and equipment to be fitted on motor vehicles B.E. 2551 (2008). Consequently, ISOFIX anchorage



systems and ISOFIX top tether anchorage should be compulsory component parts and equipment to be fitted on personal motor vehicles.

Thus, Article 3 of Ministerial Regulation on compulsory component parts and equipment to be fitted on motor vehicles B.E. 2551 (2008) shall be amended as follows;

“Inter-provincial taxi, taxi, service vehicles and personal vehicles shall be fitted with component parts and equipment specified in the following list;

***(29) ISOFIX anchorage systems and ISOFIX top tether anchorage***”

## References

### Books

Peden, Margie, and Scurfield, Richard and et al. World Report On Road Traffic Injury Prevention. Geneva : WHO Press 2004.

Toroyan, Tami and Peden, Margie. *Youth and Road Safety*. Geneva : WHO Press 2007. WHO Press 2015.

World Health Organization. *Global Status Report on Road Safety 2015*. Italy WHO Press 2015.

### Articles

Bae, Jin Yung and Anderson, Evan and Silver, Diana and Macinko, James. "Child Passenger Safety Laws in the United States, 1978-2010: Policy Diffusion in the Absence of Strong Federal Intervention." *Social Science and Medical*. 30. (January 2014)

### Electronic Media

California Highway Patrol. "Child Safety Seats."

<https://www.chp.ca.gov/programs-services/programs/child-safety-seats>.

November 3, 2016

Car seat Organization "Enforcing California Restraint Laws for Children" (23 February 2013) [http://www.carseat.org/Legal/99\\_Enf.pdf](http://www.carseat.org/Legal/99_Enf.pdf). November 3, 2016

Child Safety Promotion and Injury Prevention Research Center (CSIP). "Be cautious when installing a child car seat." <http://csip.org/wordpress/2016/04/07/>.

May 25, 2017

Governors Highway Safety Association. "Child Passenger Safety Laws."

[http://www.ghsa.org/html/stateinfo/laws/childsafety\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/childsafety_laws.html). November 2, 2016

Jakobsson, Lotta and Isaksson-Hellman, Irene and Lundell, Björn. "Safety For The Growing Child-Experiences From Swedish Accident Data."

<http://www.nrd.nhtsa.dot.gov/pdf/esv/esv19/05-0330-O.pdf>. December 1, 2016

Stewart, Deborah D. "More than Forty Years of Progress for Child Passenger Protection, A Chronicle of Child Passenger Safety Advances in the USA."  
<http://saferidenews.com/srndnn/LinkClick.aspx?fileticket=NIPfcuqNL1U%3D&tabid=375>. November 2, 2016

## **TRANSPARENCY IN TRANSFER OF VALUE TO NON-PHYSICIAN HEALTHCARE PROFESSIONALS \***

*Suwapitcha Sinutok \*\**

### **Abstract**

As we know that healthcare service is one of the important factors that affect Thai people quality of lives. Healthcare professional is one of the occupations that gain public creditability. Public trusts that healthcare professionals expert in treatment and provide service by taking patients' benefits as their priorities. However, healthcare service is similar to other businesses in term of competition. Pharmaceutical companies have to compete in the market in order to gain profits. The said competition leads to marketing tactics aiming at healthcare professionals. Those marketing tactics cause conflicts of interests which are the roots of numerous problems such as irrational drug use, high price of drugs, negative effects on patients' health and et cetera.

Healthcare service sector consists of various kinds of healthcare professionals, thus, physician is not the only professional providing service in such sector. There are other non –physician healthcare professionals providing service in healthcare sector as well. For example, there are pharmacists and other healthcare service providers in the process of drugs and medical supplies selection and procurement of drugs and medical supplies. Hence, physicians are not the only healthcare professionals that conflicts of interests can arise in their relationship with pharmaceutical companies. Conflicts of interest can also arise in the relationship between pharmaceutical companies and non –physician healthcare professionals.

Accordingly, legal measure which aims to reduce conflicts of interests and enhance transparency should also focuses on relationship between non –physician healthcare professionals and pharmaceutical companies. Focusing merely on the relationship between physicians and pharmaceutical companies leaves loophole in the law which can cause ineffectiveness in conflicts of

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\* This article is summarized and arranged from the thesis “Transparency in Transfer of Value to Non – Physician Healthcare Professionals” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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interest reduction and transparency enhancement. Therefore, any benefit given by pharmaceutical companies to non –physician healthcare professionals should be disclosed to the public as well.

Since there is no legal measure concerning the disclosure between pharmaceutical companies and non –physician healthcare professionals, in this article, the author aims at studying foreign laws as a guideline in order to find the most suitable recommendation for conflict of interest reduction and transparency enhancement in the relationship between non –physician healthcare professionals and pharmaceutical companies in Thailand.

**Keywords:** Healthcare, Non –Physician Healthcare Professionals, Transparency, Disclosure

## บทคัดย่อ

เป็นที่ทราบกันดีว่า การให้บริการด้านสุขภาพนั้นเป็นหนึ่งในปัจจัยสำคัญที่ส่งผลกระทบต่อคุณภาพชีวิตของประชาชนชาวไทย ผู้ให้บริการด้านสุขภาพนั้นเป็นหนึ่งในวิชาชีพที่ได้รับความเชื่อถือจากสาธารณชนซึ่งเชื่อมั่นว่าผู้ให้บริการด้านสุขภาพนั้นมีความรู้ความเชี่ยวชาญเป็นอย่างดีในการที่จะให้การดูแลรักษา และให้บริการโดยคำนึงถึงประโยชน์ของผู้รับบริการเป็นสิ่งสำคัญ อย่างไรก็ตาม การให้บริการด้านสุขภาพนั้นก็มีความคล้ายคลึงกับธุรกิจอื่น ๆ กล่าวคือ มีการแข่งขันในตลาดและผู้ประกอบการ คือ บริษัทฯและเวชภัณฑ์นั้นต่างมุ่งทำกำไรให้แก่บริษัทของตนซึ่งนำไปสู่การทำการตลาดต่าง ๆ โดยบริษัทฯและเวชภัณฑ์เหล่านั้นต่อผู้ให้บริการด้านสุขภาพ การทำการตลาดต่าง ๆ ซึ่งมีผู้ให้บริการด้านสุขภาพเป็นเป้าหมายนั้นส่งผลให้เกิดผลประโยชน์ทับซ้อนซึ่งเป็นต้นเหตุของปัญหาหลายประการ เช่น การโฆษณาโดยไม่จำเป็น ราคาที่เพิ่มสูงขึ้น ผลกระทบด้านลบต่อสุขภาพของประชาชน เป็นต้น

ในการให้บริการด้านสุขภาพนั้น ประกอบด้วยผู้ให้บริการด้านสุขภาพในหลาย ๆ ด้าน ไม่ได้จำกัดเพียงเฉพาะแพทย์เท่านั้น แต่ยังมีผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์ประเภทอื่น ๆ ด้วย เช่น ในกระบวนการคัดเลือกเวชภัณฑ์และยา กระบวนการจัดซื้อจัดหาและเวชภัณฑ์นั้น ประกอบด้วยเภสัชกรและผู้ให้บริการด้านสุขภาพประเภทอื่น ๆ ผลประโยชน์ทับซ้อนระหว่างบริษัทฯและเวชภัณฑ์นั้นจึงไม่จำกัดอยู่เพียงแพทย์เท่านั้น แต่ยังเกิดกับผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์อีกด้วย ด้วยเหตุนี้ หากจะมีบทบัญญัติกฎหมายเพื่อลดผลประโยชน์ทับซ้อนและสร้างความโปร่งใสในความสัมพันธ์ระหว่างบริษัทฯและเวชภัณฑ์กับผู้ให้บริการด้านสุขภาพแล้วนั้น บทบัญญัติแห่งกฎหมายนั้นพึงมุ่งไปที่ความสัมพันธ์ระหว่างบริษัทฯกับผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์ด้วย การที่กำหนดให้บริษัทฯและเวชภัณฑ์มีหน้าที่ต้องเปิดเผยประโยชน์ที่ตนให้แก่ผู้ให้บริการด้านสุขภาพโดยจำกัดเฉพาะแพทย์เท่านั้นจึงส่งผลกระทบต่อความโปร่งใสของข้อมูลซึ่งทำให้การลดผลประโยชน์ทับซ้อนและเพิ่มความโปร่งใสไม่สัมฤทธิ์ผลเท่าที่ควร ด้วยเหตุนี้ ผลประโยชน์ต่าง ๆ ที่บริษัทฯและเวชภัณฑ์ให้แก่ผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์นั้นจึงควรถูกกำหนดให้ต้องเปิดเผยแก่สาธารณะเช่นกัน

เนื่องจากประเทศไทยยังไม่มีบทบัญญัติเกี่ยวกับการเปิดเผยความสัมพันธ์ระหว่างบริษัทฯและเวชภัณฑ์กับผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์ ในบทความฉบับนี้ ผู้เขียนจึงมีจุดมุ่งหมายในการศึกษากฎหมายจากต่างประเทศเป็นแนวทางเพื่อให้ได้ข้อเสนอแนะที่เหมาะสมที่สุดในการลดผลประโยชน์ทับซ้อนและสร้างความโปร่งใสในความสัมพันธ์ระหว่างบริษัทฯและเวชภัณฑ์กับผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์ในประเทศไทย

**คำสำคัญ:** การให้บริการด้านสุขภาพ, ผู้ให้บริการด้านสุขภาพที่ไม่ใช่แพทย์, ความโปร่งใส, การเปิดเผย

## 1. INTRODUCTION

Nowadays Thailand is one of those countries with advanced medical practice with numbers of foreigners coming to Thailand for medication and treatment. Besides, healthcare has grown as a vital part of Thai citizens' quality of life. Physicians and other healthcare professionals are respectable professions with trust from public's eyes. Drugs and medical supplies are viewed as moral products to improve and sustain people's health. However, the market of drugs and medical supplies are like other products' market with companies trying to earn more profits and companies being competitive to each other which bring about various kinds of promotion that can lead to conflicts of interest between healthcare professionals, pharmaceutical companies and their sale representatives. Those promotion methods can sustain or build relationship between pharmaceutical companies and healthcare professionals and they can be viewed as an incentive to use the companies' products. The said promotion methods can impair the decision of healthcare professionals, affect greatly to the consumers' health as they give their trust to healthcare professionals and do damages to our country since it can lead to irrational drug use and high priced drugs which will result in the loss of national budget. Hence, conflicts of interest reduction and transparency enhancement is much needed in such marketing field in order to bring light to the public about the relationship from the professionals they trust and pharmaceutical companies and it can make those parties reconsider about the relationship and incentives since such things are to be disclosed to the public's eyes. However, Thailand remains no such disclosure provision to supervise the said issue.

The practice of pharmaceutical and medical supply companies providing benefits such as gifts, product samples, and other benefits to healthcare professionals through companies' pharmaceutical sales representatives which can be viewed as an incentive to make the healthcare professionals feel familiar with their products and end up in using the products with the patients. The practice of conferences or meeting set up by pharmaceutical companies can be viewed as incentive when the accommodation, trips abroad, or banquets are provided. Moreover, it is questionable whether the information is given in all aspects; both downside and upside of the products or the products are presented only for their benefits since the information is given by the companies. Hence, the accuracy of

information is questionable. Consequently, it can affect transparency and impair healthcare professionals' opinion on the companies' products.

In Thailand, there are legal provisions, self -regulations and voluntary code related to the area of relationship and behavior between pharmaceutical companies and healthcare professionals. In international level, there are various kinds of regulations in many levels such as international organization, membership organizations, European legal provisions, and national laws trying to enhance transparency and reduce conflicts of interest. On the aspect of disclosure, EFPIA Code on Disclosure of Transfers of Value is the self -regulation which contains disclosure duty towards its member companies operating in Europe. In France and United States, there has been an eagerness on the disclosure duty of pharmaceutical companies which leads to Law NO 2011 -2012 Regarding the Reinforcement of the Safety of Medicinal and Health Products (Bertrand Act) and Physician Payment Sunshine Act (The Patient Protection and Affordable Care Act 2010) in both countries respectively. In Thailand, on the other hand, there is no specific legal provision on the disclosure of relationship between pharmaceutical companies and non -physician healthcare professionals. Hence, in order to enhance transparency, lighten public's concern about such relationship which can cause many downsides such as conflicts of interests, irrational drug use, loss of national budget, high priced drugs and et cetera, there should be a legal provision concerning such issue with the most comprehensive model used at present in order to contribute to the best result of transparency enhancement and conflicts of interest prevention.

## **2. RELATIONSHIP BETWEEN PHARMACEUTICAL COMPANIES AND NON -PHYSICIAN HEALTHCARE PROFESSIONALS**

Pharmaceutical Manufacturers pay large amount of money on drug promotion; sale representatives, samples, drug advertisement both on television, radio and publication media such as newspaper, including being a sponsor on events relating to education and conferences. In 2002, it has been found that around US\$21 billion paid on drug promotion. Nowadays, it is more vital to see the ways that drug promotion affects on drug prescribing and the use of medicines that resulting in increasing of money in the said execution. As it has been mentioned that in 2002, nearly US\$21 billion are paid on USA drug



promotion<sup>1</sup>, the said sum of money is meagerly 30 times comparing with the money that national governments in many countries paid on informing about drug. In USA, there are more than 300,000 events arranging for physicians. Usually in developing countries, sale representatives are almost solely drug information given by pharmaceutical companies. In those developing countries, there are big amounts of sale representative, for example, there might be one representative to every five physicians.<sup>2</sup>

Pharmaceutical industry is similar to other industries in the sense that companies aim at boosting their product sale and making the most profits which bring about various kinds of promotional methods. Using sale representatives is one of those promotional methods in order to boost product sale by forming connection with healthcare professionals. Sale representatives are not the only promotional methods used by pharmaceutical companies, promotional methods can be provided in other means such as scholarship, conferences, trips, meals, seminars and et cetera. Those mentioned promotional methods have effects on attitude of healthcare professionals toward pharmaceutical companies' products which can bring about bias and affect the use of drugs which can damage patients' health. Since promotional methods can cause bias of healthcare professionals toward each product which can cause irrational drug use, bad effects to patients' health and loss in national expenditure. International organizations and government in many countries take an effort to intervene in such conduct by imposing both guidelines and legal provisions. In United States, in order to reduce conflicts of interests, Physician Payment Sunshine Act has been enacted in order to enhance transparency in the relationship between healthcare professionals and pharmaceutical companies, however, such Act aims only at physicians, hence, pharmaceutical companies take advantages of the law's loophole and aim at non-physician healthcare professionals in order to boost their product sale.

The situation in developing countries is quite similar in the sense that pharmaceutical companies also aim at physicians and healthcare professionals. In Thailand, promotional methods are also conducted by pharmaceutical

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<sup>1</sup> Canadian Medical Association Journal (2003);169:699

<sup>2</sup> Pauline Norris, Andrew Herxheimer, Joel Lexchin, Peter Mansfield, "Drug Promotion, What We Know, What We Have Yet to Learn – Reviews of Materials in WHO/HAI Database on Drug Promotion. World Health Organization and Health Action International"(2005)

companies targeting at healthcare professionals in various forms such as conferences, meals, product samples and et cetera.

Some might think that physicians are the only profession working in the process of drug use, however, there are other kinds of healthcare professionals in the process of drug and medical supplies use. For example, pharmacists play vital role in selection of drugs and medical supplies working in the committee form such as “Pharmacy and Therapeutic Committee or PTC” which holds authority in setting policy in drugs and medical supplies selection. Hence, in order to bring the best result in transparency enhancement, physicians should not be the only professionals covered by the legal scope, non-physician healthcare professionals should also be included in the scope of covered recipients that pharmaceutical companies hold responsibility to disclose their interactions to the public.

### **3. LEGAL MEASURES CONCERNING TRANSPARENCY IN TRANSFER OF VALUE IN FOREIGN COUNTRIES**

Medical payment and transfer of value have been considered as a significant issue in public health in many countries. Therefore, there are various kinds of solutions to handle with such ethic concern, both non-legislative and legislative approach. In 1988, WHO issued Ethical Criteria for Medicinal Drug Promotion as a guideline that many countries can adopt.<sup>3</sup> In United States, the Pharmaceutical Research and Manufacturers of America or PhRMA which is representative organization of research-based pharmaceutical and biotechnology companies issued PhRMA Code on Interactions with Healthcare Professionals to be enforced among its member companies.<sup>4</sup> On the regulatory side in the United States, there is The Patient Protection and Affordable Care Act 2010 Section 6002 as known as Physician Payments Sunshine Act to control the sale promotion and relationship between pharmaceutical companies and healthcare professionals.<sup>5</sup> In Europe, there is EU Directive 2001/83/EC of 6 November 2001 on the Community Code relating to Medicinal Products for Human Use which is enforceable among EU members.<sup>6</sup> On the self-regulation or voluntary side in Europe, EFPIA or European Federation of Pharmaceutical

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<sup>3</sup> WHO Ethical Criteria for Medicinal Drug Promotion 1988

<sup>4</sup> PhRMA Code on Interactions with Healthcare Professionals 2008

<sup>5</sup> Patient Protection and Affordable Care Act, Section 6002 (2010)

<sup>6</sup> EU Directive 2001/83/EC of 6 November 2001 on the Community Code relating to Medicinal Products for Human Use (2001) L 311/67

Industries and Associations issues EFPIA Code on Disclosure of Transfers of Value from Pharmaceutical Companies to Healthcare Professionals and Healthcare Organizations to be enforced among its member companies.<sup>7</sup> In France, there is the Decree No.2011 -2012 on the Strengthening of Health Protection for Medicinal and Health Products (aka the decree), such act is called Bertrand Act, which puts the duty to companies which are manufacturers or distributors of the products stated in Article L. 5311 - 1 of the French Code of Public Health to make disclosure concerning agreements and benefits made with the recipients.<sup>8</sup>

Since drugs and medical supplies are moral products which can cause great effects on humans' quality of life, unethical drug use is one of the top issues among others, guidelines and legal measures are imposed by international organizations, associations and countries. World Health Organization also raises concern about such issue by enacting WHO Ethical Criteria for Medicinal Drug Promotion 1988 as fundamental ethical standard to be applied in various levels. It can be used as a framework to be adapted into each country's measure.

Associations of professionals and business sectors in healthcare industry also concern about such issue by imposing their own ethical standards for their members. PhRMA Code on Interactions with Healthcare Professionals drafted by the Pharmaceutical Research and Manufacturers of America (PhRMA) to be used with its members which are R & D companies on the area of biotechnology. EFPIA Code on Disclosure of Transfers of Value from Pharmaceutical Companies to Healthcare Professionals and Healthcare Organizations is the Code governing EFPIA members which are pharmaceutical companies operating in Europe.

Unethical drug promotion is one of the main concerns in the European Union as EU Directive 2001/83/EC of 6 November 2001 on the Community Code relating to Medicinal Products for Human Use has been enacted in order to be a framework for EU member countries to implement into their own national laws.

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<sup>7</sup> EFPIA European Federation of Pharmaceutical Industries and Associations "Who we are" <<http://www.efpia.eu/about-us/who-we-are>> accessed 25 January 2017

<sup>8</sup> Baker & McKenzie "Interactions between life sciences companies and health care professionals: can the French Sunshine Act push transparency so far?" (Baker & McKenzie France, 13 April 2012)

In United States and France, unethical drug promotion is also one of important issues, United States Physician Payment Sunshine Act and Law NO 2011 –2012 Regarding the Reinforcement of the Safety of Medicinal and Health Products or Bertrand Act of France share similar core idea to enhance transparency in interactions between pharmaceutical companies and healthcare professionals. Both legal provisions impose duty to pharmaceutical companies to disclose their interactions with healthcare professionals in order to shine the light to the public about such relationship reduce conflicts of interests and enhance transparency. However, the said legal provisions contain different issue in the definition of “covered recipients”. According to the US Physician Sunshine Act, scope of covered recipients consists of physicians and teaching hospitals, non –physician healthcare professionals are excluded from such scope, hence, pharmaceutical companies do not hold responsibility to disclose their interactions with non –physician healthcare professionals. Such narrow scope of covered recipients in the US Physician Sunshine Act has caused controversial issue concerning its loophole since pharmaceutical companies tend to use the loophole targeting promotional marketing methods at non –physician healthcare professionals instead which lead to the question that whether the law itself can bring the best transparency enhancement and conflicts of interests prevention. The France Bertrand Act, on the other hand, contains much broader scope of covered recipients than the US Physician Payment Sunshine Act. The scope of covered recipients in France Bertrand Act covers non –physician healthcare professionals such as pharmacists, assistants to physicians, nurses and et cetera, in this author’s point of view, the France Bertrand Act tends to leave less loophole than the US Physician Payment Sunshine Act since conflicts of interests can also occur with non –physician healthcare professionals. Accordingly, The France Bertrand Act which imposes duty to pharmaceutical companies to disclose their relationship with non –physician healthcare professionals tends to be more effective in transparency enhancement and conflicts of interests prevention than the US Physician Sunshine Act.

#### 4. RELATED THAI LAWS IN HEALTHCARE SECTOR

At present, existing legal provisions in Thailand healthcare sector consists of private organization self –regulation, ethical standard of public committee, code of conduct of administrative organization, ethical standards and regulations of government organizations and legal provisions, which will be explained in the following paragraphs.

PReMa Code of Practice for Ethical Channel 10<sup>th</sup> Edition 2016, issued by Pharmaceutical Research and Manufacturers Association (PReMa) which is a non –profit association for new medicine research and development companies. Most of its members are international and big pharmaceutical companies. The Code covers pharmaceutical companies' interactions with healthcare professionals. Violated members may face various kinds of sanctions such as fines and membership violation. The Code contains no disclosure provision and does not contain enforcement over non –member pharmaceutical companies.<sup>9</sup>

Announcement of National Pharmaceutical System Development Committee concerning the Ethical Criteria on Thailand Medicinal Promotion B.E. 2559 is an ethical standard issued by National Pharmaceutical System Development Committee. The Ethical Criteria contains ethical standard on drug promotion regarding various players in healthcare industry such as healthcare professionals and pharmaceutical companies. It aims to be used as a framework to be implemented for players in healthcare sector. There is no sanction stated in such Ethical Criteria.<sup>10</sup>

The Medical Council Regulations on Medical Ethics Preservation B.E. 2549 issued by Medical Council which holds administrative power over medical practitioners, the said Regulations contain provisions concerning medical practitioners' interactions with healthcare professionals by prohibiting medical practitioners to accept money or any object which exceeds 3,000 Thai Baht. Such provision is enforced by filing complaint to Medical Council. The said Regulations contain sanction for violated medical practitioners.<sup>11</sup>

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<sup>9</sup> PReMa Code of Practice for Ethical Channel 10<sup>th</sup> Edition 2016

<sup>10</sup> ประกาศคณะกรรมการพัฒนาระบบยาแห่งชาติ เรื่อง เกณฑ์จริยธรรมว่าด้วยการส่งเสริมการขายยาของประเทศไทย พ.ศ. 2559 (Announcement of National Pharmaceutical System Development Committee concerning the Ethical Criteria on Thailand Medicinal Promotion B.E. 2559)

<sup>11</sup> The Medical Council Regulations on Medical Ethics Preservation, B.E. 2549

Ministry of Public Health issues the Ministry of Public Health Regulation on the Administration of Drugs and Medical Supplies in Government Sector and Organizations under Ministry of Public Health B.E. 2557 to be used as a main framework on drugs and medical supplies managements for organizations under the Ministry of Public Health. Such Regulation sets broad and general guidelines with a set of secondary Notifications of Ministry of Public Health on further specific issues. Using as general framework, there is no penalty stated in such Regulation.<sup>12</sup>

The Notification of the Ministry of Public Health on the Ethical Standard concerning the Procurement and the Promotion on Drug Sale and Medical Supplies B.E. 2557 is a standard practice used for organizations under Ministry of Public Health which aims to enhance transparency in such organizations. It contains good practices for related parties on drug promotion issue such as prescribers, healthcare professionals, pharmaceutical companies, sale representatives. Hospitals and organizations under Ministry of Public Health hold duty to implement such Notification into their own standard practice. However, since it only aims to be guideline, there is no penalty stated in such Notification.<sup>13</sup>

The Notification of the Ministry of Public Health concerning the Practice in Drugs and Medical Supplies Management by Committee, Co – Committee or Sub –Committee B.E. 2557<sup>14</sup> aims to be a guideline for the management in each type of drugs and medical supplies to be managed efficiently and with good governance. It sets standard for drugs and medical supplies management of organizations under Ministry of Public Health in 4 levels which are organization level, district level, and medical supplies management, there is no penalty in the Notification.<sup>15</sup>

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<sup>12</sup> ระเบียบกระทรวงสาธารณสุขว่าด้วยการบริหารจัดการด้านยาและเวชภัณฑ์ที่มีใช้ของส่วนราชการและหน่วยงานในสังกัดกระทรวงสาธารณสุข พ.ศ. 2557 (The Ministry of Public Health Regulation on the Administration of Drugs and Medical Supplies in Government Sector and Organizations under Ministry of Public Health B.E. 2557)

<sup>13</sup> ประกาศกระทรวงสาธารณสุขว่าด้วยเกณฑ์จริยธรรมการจัดซื้อจัดหาและการส่งเสริมการขายยาและเวชภัณฑ์ที่มีใช้ของกระทรวงสาธารณสุข พ.ศ. 2557 ลงวันที่ 30 ตุลาคม พ.ศ. 2557

<sup>14</sup> (The Notification of the Ministry of Public Health on the Ethical Standard Concerning the Procurement and the Promotion on Drug Sale and Medical Supplies B.E. 2557 on 30<sup>th</sup> October B.E. 2557)

<sup>15</sup> ประกาศกระทรวงสาธารณสุขว่าด้วยแนวทางการบริหารจัดการด้านยาและเวชภัณฑ์ที่มีใช้ยาโดยคณะกรรมการหรือคณะกรรมการร่วมหรือคณะกรรมการย่อย พ.ศ. 2557 (The Notification of the Ministry of Public Health

Related provision in Thai Criminal Code which consists of the provisions related to the offense against official and misconduct of the government officers. Although being convicted by criminal charges are considered grave since it has high penalty such as imprisonment, the relationship between healthcare professionals and pharmaceutical companies is questionable whether it is considered the violation of Criminal Code since the nature of such relationship can be claimed to build good relationship and for academic purpose.<sup>16</sup>

Drug Act B.E. 2510 contains provisions concerning drugs and drug advertisements. The Act contains committee body which holds authority in medicinal issues drug committee administrative power such as granting permission on drug manufacturer. There is penalty for violation of this Act.<sup>17</sup>

At present, there are two legal provisions concerning procurement of government supplies which are Regulation of Prime Minister's Office on Procurement B.E. 2535<sup>18</sup> and Procurement and Management of Government Supply Act B.E. 2560, the Procurement and Management of Government Supply Act was published on Thailand Royal Gazette on 24<sup>th</sup> February 2017<sup>19</sup> and shall be taken into effect on 23<sup>rd</sup> August 2017, which the former Regulation of Prime Minister's Office on Procurement shall soon to be replaced by such Act. Procurement and Management of Government Supply Act governs broader scope of organizations such as independent organizations and state enterprises. These two legal provisions on procurement show that the process of drug and medical supply selection is not limited only for physicians but there are other officers working in such process.

Since this part mainly explains on Thai laws in such related matters, the analysis shall be in the following part.

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concerning the Practice in Drugs and Medical Supplies Management by Committee, Co – Committee or Sub – Committee B.E 2557)

<sup>16</sup> English Version of Thai Criminal Code B.E. 2499 <<http://library.siam-legal.com/thai-criminal-code>> accessed on 29 June 2016

<sup>17</sup> Drug Act B.E. 2510

<sup>18</sup> ระเบียบสำนักนายกรัฐมนตรีว่าด้วยการพัสดุ พ.ศ. 2535 (Regulation of Prime Minister's Office on Procurement B.E 2535)

<sup>19</sup> พระราชบัญญัติการจัดซื้อจัดจ้างและการบริหารพัสดุภาครัฐ พ.ศ. 2560 (Procurement and Management of Government Supply Act B.E 2560)

## 5. COMPARATIVE ANALYSIS OF THAI AND FOREIGN LAWS

Irrational drug use, unethical drug promotion and conflicts of interests between healthcare professionals and pharmaceutical companies have been major concerns in international level. Thailand, although there are legal provisions and self-regulations addressing those concerns, irrational drug use caused by unethical drug promotion continues. In foreign countries, there have been efforts in shining the light in the interactions between healthcare professionals and pharmaceutical companies which the US Physician Payment Sunshine Act and France Bertrand Act impose duty of disclosure on pharmaceutical companies. However, the US Physician Payment Sunshine Act might be too narrow in the means of covered recipients which covers only physicians, leaving other healthcare professionals out of scope and pharmaceutical companies take such loophole to conduct their promotion on other non-physician healthcare professionals. France Bertrand Act, on the other hand, covers much wider range of healthcare professionals with non-physician healthcare professionals included. In Thailand, although there are various legal provisions and guidelines which address that unethical drug promotion occurs in our country, there is no solid legal provision concerning disclosure of relationship between healthcare professionals and pharmaceutical companies. At present, drug consumption in Thailand has been skyrocketed, the rise of drug consumption in Thailand is caused by unethical drug use which is harmful for Thai people's health. One of the main roots causing irrational drug use is influence that pharmaceutical companies have toward healthcare professionals. The study by Dharmniti Internal Audit Co., Ltd. has found that parties which are the cause of rise of unnecessary drug consumption in government officers is not caused by physicians only but also non-physician healthcare professionals who are related in the drug use such as auditors and pharmacists.<sup>20</sup> Considering those mentioned foreign legal provisions and current situation in Thailand, this author sees the opportunity to bring foreign laws as models for better transparency in the industry that will help reduce irrational drug use and contribute positive effects to Thai patients as a whole.

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<sup>20</sup> บริษัท ตรวจสอบภายในธรรมนิติ จำกัด “เปิดกลโกงค่ายา ค่ารักษาพยาบาล สูงจนกว่าหมื่นล้าน” 10 กุมภาพันธ์ 2560 (Dharmniti Internal Audit Co., Ltd “Corruption in Cost of Medical Care, losing more than Millions Thousands” 10 February 2017) <<https://dir.co.th/>>accessed 24 July 2017



## 6. CONCLUSION AND RECOMMENDATIONS

Pharmaceutical products are merit goods which can effect greatly on both national level and patients' health, therefore, rational drug use is the critical factor to save our nation budget spent on drugs and protect patients' benefit. However, due to the competition in the industry, pharmaceutical companies have to carry various methods in order to boost their circulation, hence, there are many kinds of promotions provided to people in the circle of drug and medical supply use such as conferences sponsored by pharmaceutical companies, sponsored overseas trips or even small souvenir, these mentioned examples to build the relationship by pharmaceutical companies' sale representatives for the said reason to boost the circulation, can contribute to conflicts of interest, lack of transparency and irrational drug use. However, conflicts of interest between pharmaceutical companies and healthcare professionals might not limit only between pharmaceutical companies and physicians.

Since there is no provision concerning the disclosure of agreements, benefits, payments and transfers of value in Thailand self-regulations, voluntary codes and legal provisions, moreover, self-regulations and voluntary codes do not contain strong legal enforcement or some are hard to be enforced, the author's preliminary suggestions are to draft specific provisions concerning the disclosure of the transfer of benefits, agreements and payments pharmaceutical companies made with healthcare professionals. The author believes that having specific legal provisions on such disclosure will acknowledge the consumers about their physicians and healthcare professionals' relationship with pharmaceutical companies, such disclosure will also raise awareness and public concern on the point of transparency and reduce conflicts of interest which affect consumer's health and cause irrational drug use. According to Alfonso case in USA, it shows that conflicts of interest not only occur between physicians but also other kinds of healthcare professionals. Therefore, it indicates that the United States version of Physician Payment Sunshine Act has its loophole in leaving non-physician healthcare professionals out of the scope of disclosure. Moreover, in Thailand, the process of drug selection and procurement is not limited only for physicians. Thus, using the model that limits only physicians is not the best way to prevent conflicts of interest and enhance transparency. Hence, this writer believes that the better way to prevent conflicts of interest and reduce irrational drug use is

to include non –physician healthcare professionals in the definition of covered recipients by choosing Law NO 2011 –2012 Regarding the Reinforcement of the Safety of Medicinal and Health Products or Bertrand Act as a model for Thai legislation since Law NO 2011 –2012 is a legal provision with strong legal enforcement which will carry more effective outcome than voluntary code that has lax enforcement. Moreover, it contains wide range of covered recipients, including pharmacists and other non –physician healthcare professionals, which fulfills the loophole left by United States version of Physician Payment Sunshine Act.

The scope of covered recipients using Bertrand Act as a model should be extended to cover non –physician healthcare professionals in order to cover more staffs working in the line of drugs and medical supplies use to have better transparency enhancement. The scope should cover wider range such as physicians, dieticians, dentist, pharmacists, nurses, assistant to healthcare professionals, medical students and et cetera. Moreover, it should cover healthcare professionals associations, medical student associations, foundations in healthcare sector and et cetera. The scope of companies holding duty of disclosure should be pharmaceutical companies and drugs and medical supplies manufacturers in Thailand. The threshold of benefits and platform of disclosure can further be made by law. The disclosure principles should be made by amending Drug Act B.E. 2510, the responsible body should be the existing Drug Committee. The punishment such as fines, warnings or even license suspension can further be made by law.

Although this writer believes that only disclosure might not be enough to distinguish good and advantageous support on finance from the ones that arouse conflicts of interests and form inappropriate relationship. However, enhancing transparency on these kinds of relationships will be a good opportunity to prevent the forming of improper relationship and avoid the costs of healthcare which may rise as an inessential and extravagant ones causing by conflicts of interests.

## REFERENCES

### Book

Canadian Medical Association Journal (2003);169:699

Norris, Pauline, Andrew Herxheimer, Joel Lexchin, and Peter Mansfield.  
 “Drug Promotion, What We Know, What We Have Yet to Learn – Reviews of  
 Materials in WHO/HAI Database on Drug Promotion, World Health  
 Organization and Health Action  
 International” (2005) <<http://apps.who.int/medicinedocs/en/d/Js8109e/3.2.html>>  
 accessed 15 July 2016

### Laws

#### English

“Code of Practice for Ethical Channel” (10th Edition, 2016) Pharmaceutical  
 Research & Manufacturers Association (PhRMA)

English Version of Thai Criminal Code B.E. 2499 <<http://library.siam-legal.com/thai-criminal-code>> accessed on 29 June 2016

EU Directive 2001/83/EC of 6 November 2001 on the Community Code  
 relating to Medicinal Products for Human Use (2001)L 311/67

Patient Protection and Affordable Care Act, Section 6002 (2010)

PhRMA Code on Interactions with Healthcare Professionals 2008

The Medical Council Regulations on Medical Ethics Preservation, B.E. 2549  
 (2006)

WHO Ethical Criteria for Medicinal Drug Promotion 1988

#### Thai

ประกาศกระทรวงสาธารณสุขว่าด้วยเกณฑ์จริยธรรมการจัดซื้อจัดหาและการส่งเสริมการขายยาและเวชภัณฑ์ที่มีโฆษณา  
 ของกระทรวงสาธารณสุข พ.ศ. 2557 ลงวันที่ 30 ตุลาคม พ.ศ. 2557

(The Attachment of Notification of the Ministry of Public Health on the Ethical  
 Standard Concerning the Procurement and the Promotion on Drug Sale and  
 Medical Supplies B.E. 2557 on 30th October B.E. 2557)

ประกาศกระทรวงสาธารณสุขว่าด้วยแนวทางการบริหารจัดการด้านยาและเวชภัณฑ์ที่มีไซยาโดยคณะกรรมการหรือคณะกรรมการร่วมหรือคณะกรรมการย่อย พ.ศ. 2557

(The Notification of the Ministry of Public Health concerning the Practice in Drugs and Medical Supplies Management by Committee, Co - Committee or Sub - Committee B.E 2557)

ประกาศคณะกรรมการพัฒนาระบบยาแห่งชาติ เรื่อง เกณฑ์จริยธรรมว่าด้วยการส่งเสริมการขายยาของประเทศไทย พ.ศ. 2559

(Announcement on Ethical Criteria on Thailand Medicinal Promotion B.E. 2559 issued by National Pharmaceutical System Development Committee)

พระราชบัญญัติการจัดซื้อจัดจ้างและการบริหารพัสดุภาครัฐ พ.ศ.2560 (Procurement and Management of Government Supply Act B.E. 2560)

พระราชบัญญัติยา พ.ศ. 2510 (Drug Act B.E. 2510)

ระเบียบกระทรวงสาธารณสุขว่าด้วยการบริหารจัดการด้านยาและเวชภัณฑ์ที่มีไซยาของส่วนราชการและหน่วยงานในสังกัดกระทรวงสาธารณสุข พ.ศ. 2557 (The Ministry of Public Health Regulation on the Administration of Drugs and Medical Supplies in Government Sector and Organizations under Ministry of Public Health B.E. 2557)

ระเบียบสำนักนายกรัฐมนตรีว่าด้วยการพัสดุ พ.ศ. 2535 (Regulation of Prime Minister's Office on Procurement B.E. 2535)

### **Electronics Media**

Baker &McKenzie “Interactions between life sciences companies and health care professionals: can the French Sunshine Act push transparency sofar?”(Baker&MckenzieFrance,13April2012)

<<http://www.lexology.com/library/detail.aspx?g=44eeeadc-6a49-4c46-8a8e-df6d776dabde>> (accessed 15 February 2017)

## Other Materials

บริษัท ตรวจสอบภายในธรรมนิติ จำกัด “เปิดกลโกงค่ายา ค่ารักษาพยาบาลสูงจนกว่าหมื่นล้าน”

10 กุมภาพันธ์ 2560 (Dharmniti Internal Audit Co., Ltd “Corruption in Cost of Medical Care, losing more than Millions Thousands” 10 February 2017)  
<<https://dir.co.th/th>> (accessed 24 July 2017)

## **DIVESTITURE UNDER COMPETITION LAW: A COMPARATIVE STUDY OF FOREIGN AND THAI LAWS\***

*Thanapont Thongnoi\*\**

### **Abstract**

Foreign competition laws recognize divestiture as a structural remedy. The functions of divestiture order always result in restructuring the market, corporations or activities in order to maintain fair competitiveness of the market. Maintaining fair competition of the market is the primary goal for competition law. The government can decrease any market concentration which restraint the competition by enforcing divestiture order to restructure the market. Divestiture is the most famous structural remedy for US's antitrust law as well as EU's competition law. Despite enormous numbers of failure of divestiture orders that drew-back their enforcement in monopolization cases, divestiture is more acceptable and suitable as a structural remedy for the unlawful merger cases.

Recognition of divestiture in all major foreign competition laws remarkably reflects the importance of divestiture. As said, divestiture has been used as the most powerful structural remedy for violation of competition law therefore it would be benefit for Thailand to apply divestiture and use it as a powerful structural remedy under competition law.

In Thailand, divestiture is commonly known as a strategic tool of business sector to eliminate unprofitable business or division, financial exigency or change in the strategic orientation of the business. Whereas, Thailand's Trade Competition Act B.E. 2542 (1999) (TTCA) implies availability of divestiture application under Section 30 which prescribes power of Thai Trade Commission to issue a written order to amend market share that said to be in common with respect to the outcome of restructuring the market but the Thai Trade Commission has never applied divestiture order to any case where applicable. Therefore, sufficient knowledge and in-depth understanding about divestiture application under competition law together with the appropriate and

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\* This article is summarized and rearranged from the thesis "Divestiture under Competition Law: A Comparative Study of Foreign and Thai Laws" of the Master of Laws Program in Business Law (English Program), Faculty of Law, Thammasat University.

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sufficient determination of violation are vital elements and needed for Thailand to uphold its competition law enforcement. Thus, learning from foreign competition law's experience should be the most suitable solution for Thailand, as well as the TTCC in implementing the divestiture under its competition law.

**Keywords:** Thailand, competition law, divestiture

**บทคัดย่อ**

กฎหมายแข่งขันทางการค้าของต่างประเทศถือว่า การโอนขายกิจการเป็นมาตรการเยียวยาแก้ไขการผูกขาดทางการตลาดอย่างหนึ่ง โดยมีผลลัพธ์เป็นการแก้ไขโครงสร้างของตลาดหรือโครงสร้างองค์กรธุรกิจหรือกิจกรรมเพื่อดำรงรักษาไว้ซึ่งการตลาดที่มีการแข่งขันกันอย่างเป็นธรรม การดำรงรักษาไว้ซึ่งการตลาดที่มีการแข่งขันกันอย่างเป็นธรรมดังกล่าวเป็นแนวคิดพื้นฐานที่สำคัญของกฎหมายการแข่งขันทางการค้า การที่ประเทศสหรัฐอเมริกาและสหภาพยุโรป ซึ่งเป็นประเทศผู้นำในด้านการบังคับใช้กฎหมายการแข่งขันทางการค้า ได้ใช้การโอนขายกิจการเป็นมาตรการเยียวยาทางโครงสร้างตลาดที่สำคัญและเป็นเครื่องมือที่ทรงอำนาจที่สุดในการแก้ไขโครงสร้างตลาดที่มีการผูกขาด ประเทศไทยจึงควรนำเอาแนวคิดหลักการโอนขายกิจการของต่างประเทศมาปรับใช้กับกฎหมายการแข่งขันทางการค้าของประเทศไทย สำหรับประเทศไทยนั้นพบว่าพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 มาตรา 30 ได้กำหนดให้คณะกรรมการการแข่งขันทางการค้ามีอำนาจออกคำสั่งเป็นหนังสือ ให้ผู้ประกอบการซึ่งมีอำนาจเหนือตลาดที่มีส่วนแบ่งตลาดเกินกว่าร้อยละเจ็ดสิบห้า เปลี่ยนแปลงการมีส่วนแบ่งตลาด ซึ่งคำสั่งดังกล่าวถือเป็นมาตรการเยียวยาทางโครงสร้างตลาดเพื่อให้มีการเปลี่ยนแปลงโครงสร้างตลาดเพื่อลดการผูกขาด อันมีผลลัพธ์เป็นเช่นเดียวกับคำสั่งการโอนขายกิจการของกฎหมายการแข่งขันทางการค้าของต่างประเทศ แต่จากปัญหาหลายประการทั้งในทางกฎหมายและในทางปฏิบัติ รวมทั้งการขาดความรู้และความเข้าใจในการบังคับใช้คำสั่งการโอนขายกิจการถือว่าเป็นอุปสรรคสำคัญ อันทำให้คณะกรรมการการแข่งขันทางการค้าไม่เคยออกคำสั่งดังกล่าวแต่อย่างใด บทความนี้ได้ศึกษาแนวคิดและแนวปฏิบัติของการโอนขายกิจการภายใต้กฎหมายการแข่งขันทางการค้าของสหรัฐอเมริกาและสหภาพยุโรป และความเป็นไปได้ของการบังคับใช้หลักการโอนขายกิจการภายใต้กฎหมายการแข่งขันทางการค้าของประเทศไทย ซึ่งปรากฏผลการศึกษาว่าประเทศไทยควรบังคับใช้หลักการโอนขายกิจการ โดยต้องมีการออกระเบียบ ข้อบังคับ และแก้ไขเพิ่มเติมกฎหมายที่เกี่ยวข้อง

**คำสำคัญ** ประเทศไทย กฎหมายการแข่งขันทางการค้า การโอนขายกิจการ



## **Introduction**

Under foreign competition laws, divestiture is commonly used as a structural remedy. Divestiture order always results in restructuring the market shares, corporations or activities in order to maintain fair competitiveness of the market. To maintenance of the fair competition in the market is the primary goal of competition law. Under certain circumstances, if the government found unlawful market concentration which lessens the competition, restructuring of market is the basic resolution using divestiture as the tool.

In the US's antitrust law, divestiture is the most famous structural remedy. However, failure enormous number of divestiture orders has controversially drew-back its enforcement in monopolization cases. On the other hand, similar to the EU's competition law, the divestiture is more acceptable and suitable to be used as a remedy for the unlawful merger cases.

Since divestiture is recognized by several major foreign competition laws, it would be a great benefit for Thailand to implement the application of divestiture. Therefore, study of foreign divestiture would help us decide whether or not Thai competition law should apply divestiture to what cases and how.

In Thailand, divestiture is commonly known as a strategic tool of business sector to eliminate unprofitable business or division, financial exigency or change in the strategic orientation of the business. Whereas, Thailand's Trade Competition Act B.E. 2542 (1999) (TTCA) implies availability of divestiture application as embodied in Section 30 which empowers Thai Trade Commission (TTCC) to issue a written order to amend market share despite of that the TTCC has never applied divestiture order to any case where applicable.

This article examines divestiture application under foreign competition laws, the US and the EU, and reveals availability of divestiture order possibly applicable under existing competition law and other relevant laws of Thailand. This article points out problems in implementing divestiture under Thai competition law and proposes solutions for Thai Trade Commission to adopt, apply and carry out implementation of divestiture under existing laws, and to implement divestiture order more effectively.

## **Foundations of Competition law**

Competition law is about economics and economic behavior, and it is essential for anyone involved (i.e. – lawyers, regulators, civil servants in any capacity) to have some knowledge of the economic concepts concerned.<sup>1</sup> Economics is the study of how people make choices under conditions of

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<sup>1</sup> Richard Whish, *Competition Law* (5th edn, Oxford University Press 2005) 1.

scarcity and of the results of those choices for society.<sup>2</sup> In addition, economics is a science that deals with the allocation of limited resources to satisfy unlimited human needs.<sup>3</sup> The aim of the competition law is to promote efficient economic allocation.<sup>4</sup> The competition policy is shaped by economic analysis in determining the proper treatment for competition rules and regulations of practices distorting economic efficiency. Professor Posner said<sup>5</sup> ‘...in an economic analysis, we value competition because it promotes efficiency...’ Therefore, economics is an integral part of policy making of the competition law.

The most basic economic concept of competition law concerns basic needs and wants of human being. A human need is a state of felt deprivation.<sup>6</sup> While, the human wants are described in terms of objects that will satisfy needs, and shaped by culture and individual personality.<sup>7</sup> Economics is the science that deals with the allocation of limited resources to satisfy unlimited human wants.<sup>8</sup> Economics is basically separated into two general areas: microeconomics and macroeconomics. Microeconomics is the study of individual choices and of group behavior in individual markets. By contrast, macroeconomics is the study of the performance of national economies and of the policies that governments use to try to improve that performance such as the national unemployment rate, the overall price level, and the total value of national output.<sup>9</sup>

The concept of the free market policy was basically introduced by the most famous classical economist, Adam Smith, who had prominently introduced economy as a social science,<sup>10</sup> described in his masterpiece published in 1776, the *Wealth of Nations*, that the government should not restraint competition of the market but allow the market to be freely competed and led by the invisible hand (where supply is driven by demand and moving toward equilibrium) to achieve the goal of the free market economy.<sup>11</sup> For the

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<sup>2</sup> Robert H. Frank & Ben S. Bernanke, *Principles of Economics* (4th edn, McGraw-Hill 2009) 4.

<sup>3</sup> David Besanko et al., *Macroeconomics* (3rd edn, John Wiley & Sons Inc. 2008) 3.

<sup>4</sup> Stephen F. Ross, *Principles of Antitrust Law* (The Foundation Press 1993) 3.

<sup>5</sup> Richard A. Posner, *Antitrust Law: An Economic Perspective* (The University of Chicago Press 1976) 22.

<sup>6</sup> Philip Kotler et al., *Principles of Marketing* (5th edn, Prentice-Hall Inc. 1991) 4.

<sup>7</sup> *Ibid* 5.

<sup>8</sup> Besanko et al. (n4) 3.

<sup>9</sup> Frank and Bernanke (n3) 15-16.

<sup>10</sup> Alison Jones and Brenda Sufrin, *EU Competition Law 1* (4th edn, Oxford University Press 2011) 2-4.

<sup>11</sup> Robin Bade and Michael Parkin, *Foundations of Economics* (3<sup>rd</sup> edn, Pearson Education Inc. 2007) 17.

US, two prominent schools of thought proposes different approaches that the Harvard and Chicago emphasizes theories of collusive behavior that is to say the Harvard School embraces structuralism as a means of approaching antitrust analysis but the Chicago School reject it.<sup>12</sup>

### **Nature of Business Divestiture**

Generally, divestiture is a disposition or sale of an asset by a business, such as through sales, spin-off, split-up, split-off, equity carve-outs, recapitalizations, merger securities, post-bankruptcy and liquidations.<sup>13</sup>

There are four types of divestiture which are basically found in the corporate divestiture, namely: (1) Spin-Off; (2) Split-Off; (3) Split-Up; and (4) Equity Carve-Out.

Firstly, ‘Spin-Off’ is a corporate divestiture in which a division of a corporation becomes an independent company and stock of the new company is distributed to the corporation’s shareholders.<sup>14</sup>

Secondly, ‘Split-Off’ is the creation of a new corporation by an existing corporation that gives its shareholders stock in the new corporation in return for their stock in the original corporation.

Thirdly, ‘Split-Up’ involves creation of a new class of stock for each of the original corporation’s operating subsidiaries, paying current shareholders a dividend of each new class of shares and then dissolving the remaining corporate shell.<sup>15</sup> On the other hand, split-up is the division of a corporation into two or more new corporations. Whereas the shareholders in the original corporation typically receives shares in the new corporations, and the original corporation goes out of business.

Fourthly, ‘Equity Carve-Out’ is the separation from equity of the income derived from the equity. The equity carve-out is sharing similarity with the spin-off that they both result in the subsidiary’s stock being traded separately from the original corporation’s stock. Unlike the spin-off, the original corporation retains control of the subsidiary in the equity carve-out. There are two basics forms of the equity carve-out:<sup>16</sup> (1) ‘Initial Public Offering’ (IPO), it is first offering to the public of common stock of a formerly privately held firm; and (2) ‘Subsidiary Equity Carve-Out’, it is a transaction in

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<sup>12</sup> See Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L.Rev. 919 (2003) (reviewing Richard A. Posner, *Antitrust Law* (2001)) <<http://www.jstor.org/stable/1342585> > (accessed 16 March 2016)

<sup>13</sup> See USLegal.Com, *Divestiture Law & Legal Definition*, <<http://definitions.uslegal.com/d/divestiture/> > accessed 26 March 2012.

<sup>14</sup> Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* (3rd edn, Elsevier Academic Press 2005) 516.

<sup>15</sup> *Ibid* 519.

<sup>16</sup> *Ibid* 521-523.

which the original corporation creates a wholly owned independent legal subsidiary, with stock and a management team that is different from the original corporation's and issues a portion of the subsidiary's stock to the public.

In a business perspective, divestiture basically is a sale of a portion of the company to an outside party resulting in a cash infusion to the parent company.<sup>17</sup> To be more specific, divestiture is referred to as a strategic solution of corporate restructuring whereas the corporation that has acquired other companies or developed other divisions through activities such as product extensions may decide that the divisions no longer fit into the corporation's plan. Moreover, the poor performance of a division, financial exigency, or change in the strategic orientation of the corporation may cause the corporation to sell part(s) of its division.<sup>18</sup> The merger and acquisition of the businesses or corporations usually involve the sales of divisions, subsidiaries and operations.

#### **Nature of Competition Law Divestiture**

Competition law's divestiture is referred to an order of court or competition law enforcement to a defendant alleged for have been violated the competition law.<sup>19</sup> The court may order divestiture in preventing business combination that may result in restraint trade or competition,<sup>20</sup> or making a problematic merger or acquisition, or a restrictive monopolization unacceptable to the federal antitrust enforcement authorities.<sup>21</sup> The US's antitrust law interchangeably refers the two, dissolution and divorcement, as divestiture.<sup>22</sup>

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<sup>17</sup> Ibid 516.

<sup>18</sup> Patrick A. Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (4th edn, John Wiley & Sons Inc. 2007) 18.

<sup>19</sup> Michael Rosenthal et al., *European Merger Control* (Verlag C.H. Beck Munchen 2010) 244.

<sup>20</sup> Daniel J. Gifford & Leo J. Raskind, *Federal Antitrust Law: Cases and Materials*, (West Publishing Co. 1983 ) at 379. (cited *United States v. Aluminum Co. of America*, 91 F.Supp. 333, 418 (S.D.N.Y. 1950) that: The Alcoa case that the purpose of this divestiture was to prevent Alcoa and Aluminium Ltd. from combining to the detriment of Reynolds and Kaiser and to provide competition from an independent Canadian firm.)

<sup>21</sup> Douglas F. Broder, *A Guide to U.S. Antitrust Law* (Sweet & Maxwell 2005) 209.

<sup>22</sup> Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L.J. 1, 1 (1951) < <http://www.repository.law.indiana.edu/ilj/vol27/iss1/1> > accessed 20 March 2012; See also, Michael Stepanek, *Implied Powers of Federal Agencies to Order Divestiture*, 39 Notre Dame L. Rev. 581, 581 (1964) < <http://scholarship.law.nd.edu/ndlr/vol39/iss5/4> > accessed 15 March 2012; See also, Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 49 (2001) < : <http://www.jstor.org/discover/10.2307/1600442> > accessed 23 January 2012; See also,

The divorcement has similar purpose as divestiture and dissolution, to reduce the degree of concentration in the market.<sup>23</sup> Divorcement may be used to determine the effect of a decree if certain types of divestiture are ordered, especially the antitrust case against vertically integrated ownership.<sup>24</sup>

The primary objective of divestiture order is to restore the competition.<sup>25</sup> At the passage of the Sherman Act the first antitrust law of the US, divestiture had begun with attempt of the US's government to create competition by breaking up a trust that found conspiring monopoly in the oil market and ended up by the dissolution order to dissolve the trust creating 38 independent companies.<sup>26</sup> The Ma Bell breakup reflected strong preference of the antitrust agencies in imposing divestiture as the structural remedy as it deemed the fastest and cleanest tool to restore the competition.<sup>27</sup>

The divestiture simply allows the government to restructure an industry and restores the competition increasing number of player in the market. Generally, divestiture order aims to restore the competition of the market and fixing a competition problem and preserving the economic

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Spencer Weber Waller, *The Past, Present and Future of Monopolization Remedies*, 76 Antitrust L.J. 11,16 (2009) <<http://lawcommons.luc.edu/cgi/viewcontent.cgi?Article=1075&context=facpubs>> accessed 11 March 2013; See also, *Private Divestiture: Antitrust's Latest Problem Child*, 41 Fordham L. Rev. 569, 588 (1973) <<http://ir.lawnet.fordham.edu/flr/vol41/iss3/4>> accessed 25 February 2013.

<sup>23</sup> Fordham L. Rev (n23) 106.

<sup>24</sup> See note 1 and note 18 cited in, Adams (n23) (“...United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). ...the Government's greatest economic victory in the sixty year history of antitrust enforcement...battled through three court decisions, a war, and two intervening consent decrees in order finally to achieve the complete divorcement of the major motion picture producers from their affiliated exhibition outlets....obtained, in addition to vertical divorcement, a considerable measure of horizontal dissolution on the exhibition level...”).

<sup>25</sup> See U.S. v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

<sup>26</sup> Robert W. Crandall, *Costly Exercise in Futility: Breaking Up Firm to Increase Competition* (The Brookings Institution) <<http://www.brookings.edu/research/papers/2003/12/competition-crandall.pdf>> accessed 28 December 2013.

<sup>27</sup> Philip J. Weiser, *Rethinking merger remedies: toward a harmonization of regulatory oversight with antitrust merger review*, in *Antitrust and Regulations in the EU and US: Legal and Economic Perspectives*, MPG Books Group 2008, (Francois Leveque & Howard Shelanski eds., 2008) 84.

efficiency.<sup>28</sup> In merger case, the DOJ pursues divestiture as to preserve the competition and eliminate any anticompetitive merger.<sup>29</sup>

Divestiture is functioned as a structural remedy<sup>30</sup> for violation of antitrust law. U.S. Supreme Court noted that, “divestiture serves three remedial functions:

- (1) ending illegal combinations or conspiracies;
- (2) depriving antitrust violators of the benefits of their unlawful action;
- and
- (3) breaking up or neutralizing monopoly power.”<sup>31</sup>

William F. Baxter,<sup>32</sup> an architect of the AT&T divestiture, believes that the remedy should end the conduct that is harmful to the consumer welfare.<sup>33</sup> In the US, antitrust law enforcement reviews divestiture as an equitable remedy proportionate to monopoly or abuse of dominance. The court or antitrust law enforcement may impose divestiture order on violating corporation to divest itself of the stock, or other shares capital or asset.<sup>34</sup> Divestiture order includes requirements that violating

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<sup>28</sup> Penelope Papandropoulos & Alessandro Tajana, *The Merger Remedies Study – In Divestiture We Trust?*, 27 Eur. Competition L. Rev. 443, 443 (2006)  
<[http://crai.co.nz/ecp/assets/Papandropoulos\\_and\\_Tajana.pdf](http://crai.co.nz/ecp/assets/Papandropoulos_and_Tajana.pdf). > accessed 16 March 2012.

<sup>29</sup> U.S. Department of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies, (Jun. 2011), 5.

<sup>30</sup> There are two types of remedies available under competition law: structural and behavioral. Structural remedies may consist of Divestiture, Dissolution and Divorcement. Behavioral remedies may consist of order to cease or desist and injunctive relief to stop or eliminate any unlawful conduct.

<sup>31</sup> See *Schine Train Theatres v. United States*, 334 U.S. 110, 128-29 (1948). Cited in Jith Jayarantne & Carl Shapiro, *Simulating Partial Asset Divestitures to ‘Fix’ Mergers*, 7 Int’l J. Econ. Bus. 179, 180 (2000)

<<http://faculty.haas.berkeley.edu/shapiro/divestitures.pdf> > accessed 30 June 2013.

<sup>32</sup> William F. Baxter (1929 – 1998) was Assistant Attorney General the head of the DOJ (1981 – 1983) and chief of the seven years old antitrust litigation case against AT&T which finalized in 1982 with the most successful antitrust divestiture of AT&T breakup. Then he returned to the law school becoming a law professor at Stanford University. His devotion in AT&T case has been remarkably named the Bell Doctrine or the Baxter’s Law.

<sup>33</sup> Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 1-2 (2001)

<<http://www.jstor.org/discover/10.2307/1600442> > accessed 23 January 2013.

<sup>34</sup> See, *Aspects of Divestiture as an Antitrust Remedy*, 32 Fordham L. Rev. 135, 139 (1963) <<http://ir.lawnet.fordham.edu/flr/vol32/iss1/4> > accessed 20 February 2013, note 46 cited 38 Stat. 734 (1914), as amended, 15 U.S.C. s. 21 (1958).

corporation must divest in whole or part of its stocks or assets, or liquidation of assets or line of businesses.<sup>35</sup>

### ***Divestiture as Structural Remedy***

US Supreme Court addressed the choice of remedy for antitrust violations as to unfetter a market from anticompetitive conduct and to terminate the illegal monopoly, deny the defendant the fruits of its statutory violation and ensure that there remain no practices likely to result in monopolization of the future.<sup>36</sup>

The DOJ prefers structural remedies more than conduct remedies because they are relatively clean and certain, and avoid costly government entanglement in the market.<sup>37</sup> The remedy must not be harmful to the business itself, the remedy is more drastic than the underlying offense.<sup>38</sup>

Structural involves the separation of a firm by sale of the tangible and intangible asset, and licensing the intellectual property for the buyer to be viable for competition. In many case the structural remedies can be simple, easy to administer and certain for preserving the competition.<sup>39</sup>

### ***Divestiture Differentiated by Integration***

The horizontal merger creates restraint of trade and threat to the competition, horizontal divestiture tentatively is a reversion of horizontal merger. The horizontal divestiture is the breakup of a corporation into two or more independent companies have equally ability to competition.<sup>40</sup> The antitrust law enforcement may pursue divestiture remedy to defendant to divest its securities, business and other asset in the manner that the divesting business or asset must be capable and viable to compete in the same market with the defendant.<sup>41</sup>

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<sup>35</sup> Michael Stepanek, *Implied Powers of Federal Agencies to Order Divestiture*, 39 Notre Dame L. Rev. 581, 581 (1964) < : <http://scholarship.law.nd.edu/ndlr/vol39/iss5/4> > accessed 15 March 2013.

<sup>36</sup> Ford Motor Co. v United States, 405 U.S. 562, 577 (1972); United States v united Shoes Machine Corp., 391 U.S. 244, 250 (1968); United States v Grinnell Corp., 384 U.S. 563, 577 (1966) Cited in Richard A. Epstien, *Antitrust Consent Decrees in Theory and Practice* (National Book Network 2007) 9.

<sup>37</sup> Dionne C. Lomax, *Merger Remedies After Evanston: Analysis of the FTC's Adoption of a Conduct Remedy in Lieu of Structural Relief*, < [http://www.velaw.com/uploaded/Files/VEsite/Overview/Evanston Remedies PaperFinal.pdf](http://www.velaw.com/uploaded/Files/VEsite/Overview/Evanston%20Remedies%20PaperFinal.pdf) > accessed 30 June 2013.

<sup>38</sup> Epstien (n37) 47.

<sup>39</sup> USDOJ (n30) 6-7.

<sup>40</sup> Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, The Brooking Institution <<http://www.brookings.edu/research/papers/2001/03/monopoly-crandall>> accessed 25 March 2013.

<sup>41</sup> See USDOJ (n30), "Consequently, if a competitive problem exists with a horizontal merger, the typical remedy is to prevent common control over some or all of the assets, thereby effectively preserving competition. Thus, the Division will pursue a

On the other hand, vertical divestiture is opposite to the vertical merger. The vertical divestiture involves the separation or divestment of asset or property of corporation in order to prevent anticompetitive conduct. Result of a vertical divestiture is the creation of separate company at different stages of the same production.<sup>42</sup> Generally, antitrust law enforcement will step forward to resolve the vertical integrated corporations only if it finds that the vertical integration reduces the efficiency of downstream market or harms consumers.<sup>43</sup> The most successful vertical divestiture case was the breakup of the Ma Bell that resulted in creation of 7 Baby Bells. However, the cost of a vertical divestiture is extremely high.<sup>44</sup>

### ***Elements Essential for Divestiture Considerations***

Structural relief is appropriate and straightforward to eliminate the monopoly. Divestiture should be favor if three goals are achieved, firstly, it should introduce the workable competition into the market within a short period of time, secondly, should reduce the applications barrier to entry to establish economic condition that are conducive to workable competition in the market, and thirdly, it should reduce the ability of the monopoly to project its current monopoly power into other markets, to preventing new monopolies in those other market and inhabiting the monopoly from reinforcing its monopoly power in current market.<sup>45</sup>

However, there several reason that the court would reluctant to order structural remedy. Court is likely to disapprove the dissolution if the procedure of such relief is too difficult to accomplish, if the speculative outcome of such relief is not utilities, and if there will be any harmful to the firm itself, shareholders, employee and any other interests.<sup>46</sup>

In contrast, in merger, the structural relief is the most effective remedy suitable for merger. Merger law enforcement prefers divestiture more than conduct remedies because they are relatively clean and certain, and avoid

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divestiture remedy in the vast majority of cases involving horizontal mergers. ...can effectively preserve competition that the merger otherwise would eliminate".

<sup>42</sup> Crandall (n41).

<sup>43</sup> Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 *Stan. L. Rev.* 1249, 1255 (1999) < : <http://www.jstor.org/stable/1229409> > accessed 25 March 2013.

<sup>44</sup> Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, *The Brookings Institution* < <http://www.brookings.edu/research/papers/2001/03/monopoly-crandall> > accessed 25 March 2013.

<sup>45</sup> Robert E. Litan & William D. Nordhaus, *Effective Structural Relief in U.S. v. Microsoft*, *AEI Brookings* (May, 2000) < : <http://www.brookings.edu/research/papers/2000/05/microsoft-litan> > accessed 23 January 2012.

<sup>46</sup> Waller (n23).



costly government entanglement in the market.<sup>47</sup> The remedy must not be harmful to the business itself, the remedy is more drastic than the underlying offense.<sup>48</sup> Divestiture involves the separation of a firm by sale of the tangible and intangible asset, and licensing the intellectual property for the buyer to be viable for competition. In many case the structural remedies can be simple, easy to administer and certain for preserving the competition.<sup>49</sup> Furthermore, allocation of proposing divestiture must be adequate and must be sufficient to purchaser to compete in the long-term.

### **Divestiture under Foreign Competition Laws**

#### **Divestiture under U.S. Antitrust Law**

In monopolization cases, Section 2 of the Sherman Act prohibits unilateral monopolization and attempted monopolization, as well as monopolization by combination or conspiracy. The offense of unlawful monopolization is defined as the possession of monopoly power – the power to control prices and/or exclude competition – plus an element of deliberateness, that is, a general intent or purpose to acquire, use, or preserve this power.<sup>50</sup>

Violation of Section 2 is a felony, punishable by a fine up to \$100 million for a corporation and \$1 million for individual and/or imprisonment up to 10 years. However, The Criminal Fine Improvements Act 1984,<sup>51</sup> applying to criminal offenses, allows courts to impose even larger fines than those prescribed by the Sherman Act, up to double the amount gained by the violator or lost by the victim.<sup>52</sup> Furthermore, Section 4<sup>53</sup> of the Sherman Act authorizes the district courts with the jurisdiction to prevent and restrain violations of Section 2. Remedies for violations of Section 2 are desirable including structural and conduct remedies, and imposition of monetary penalties.

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<sup>47</sup> *Lomax (n38)*.

<sup>48</sup> *Epstien (n37) 47*.

<sup>49</sup> *USDOJ (n30) 6-7*.

<sup>50</sup> Section of Antitrust Law of American Bar Association, *Antitrust Law Developments* (2nd student edn, ABA Press 1984) 109 – 110.

<sup>51</sup> 18 U.S.C. §§ 3621 - 3624.

<sup>52</sup> *Broder (n22) 39 – 40*.

<sup>53</sup> 15 U.S.C. S. 4 provides that: “The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.”.

Typically, US Courts have issued injunctions against the continuation of the conduct found to be illegal and have included provisions to eliminate the effects of the unlawful conduct in the marketplace.<sup>54</sup>

Structural remedies include divestiture. Divestiture allows the court to restructure an unlawful monopolizing market to enhance market competition. Section 4 of the Sherman Act grants jurisdiction to the district court to favor actions brought by the competent government. Injunctions relief sought by government enforcement may also be to alter the structure of the corporation or industry (market).<sup>55</sup>

The Supreme Court has recognized divestiture as the “most dramatic” remedy available.<sup>56</sup> In the Microsoft case, the Court of Appeals for the District of Columbia stated that “... *divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain ...*”<sup>57</sup>

In merger cases, the principal statutory provision for merger control is Section 7 of the Clayton Act.<sup>58</sup> Section 7 implies that, stock and asset acquisitions including mergers and joint ventures, may be held illegal where their effect “... *may be substantially to lessen competition, or to tend to create a monopoly ...*”<sup>59</sup> in any particular geographic and product market. Violations of Section 7 also constitute “unfair methods of competition” and are deemed unlawful under Section 5 of the Federal Trade Commission Act.<sup>60</sup>

Richard A. Posner stated that divestiture is the natural and normal remedy in a merger case and is simpler to effectuate where the firm to be broken up is itself the product of mergers.<sup>61</sup> Divestiture of an entire business is more likely to be successful than the divestiture of parts of a business. Buyers who must rely on respondents for continuing support to enter a business with the divested assets are more vulnerable than buyers who do not need that

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<sup>54</sup> Alistair Davey, Report prepared for Coles Pty Ltd, *The Introduction of a General Divestiture Provision under Australian Competition Law* <<http://www.coles.com.au/~media/Files/Coles/PDFs/Industry%20Reports/General-divestiture-provision-under-Australian-competition-law.pdf> > accessed 28 December 2013.

<sup>55</sup> Thomas Sullivan, Herbert Hovenkamp & Howard A. Shelanski, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (6th edn, LexisNexis 2009) 155 – 157.

<sup>56</sup> See, *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

<sup>57</sup> See, *United States v. Microsoft Corp.*, 253 F.3d 34, 171 (D.C. Cir. 2001).

<sup>58</sup> 15 U.S.C. S. 18.

<sup>59</sup> 15 U.S.C. S. 18.

<sup>60</sup> 15 U.S.C. S. 45.

<sup>61</sup> Posner (n6) 84 – 85.

support. Small entrepreneurial firms have been at least as successful with divested assets as large corporations.<sup>62</sup>

The Supreme Court affirmed the District Court's decision that only divestiture would correct the condition caused by the unlawful acquisition.<sup>63</sup>

The original of the enforcement of Section 7 dealt with the apparent death blow by the Supreme Court in *Arrow-Hart & Hegeman Elec. Co. v. FTC*<sup>64</sup> that "... section 7 was merely held for divestiture of illegal held stock and not to apply to assets acquired by direct purchase or otherwise. ..."<sup>65</sup>

#### ***U.S.'s Enforcement Agency - DOJ***

The DOJ<sup>66</sup> is responsible for enforcing the Sherman, Clayton and Robinson-Patman Acts. The DOJ may bring civil lawsuit under Sections 1, 2 and 3 of the Sherman Act, Section 2, 3 and 8 of the Clayton Act (as amended by the Robinson-Patman Act) and Section 14 of the Clayton Act with enforcement by either the DOJ or the FTC.<sup>67</sup>

The DOJ usually applies the "fix-it-first" policy which the merging companies must divest themselves before completion of their merger. If the divestiture is not possible before the merger, the DOJ would allow the merger to be consummated if the parties enter into a bidding consent agreement to divest the merged company within a certain period, usually six months, after the merger is consummated.<sup>68</sup>

In 2004, the DOJ announces its policies on merger remedies known as the "Antitrust Division Guide to Merger Remedies". The Guide emphasizes the following essential points: (1) structural remedies involving the divestiture of physical or intangible assets are preferred to conduct remedies in limited circumstances; (2) the divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets; (3) the divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture; (4) if the DOJ believes the merger will result in a violation, the Division will be willing to forego filing a case and

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<sup>62</sup> William J. Baer, the Federal Trade Commission, *A Study of the Commission's Divestiture Process* < <http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf> > accessed 20 March 2011.

<sup>63</sup> See, *Ford Motor Co. v. United States*, 405 U.S.562, (1972).

<sup>64</sup> See, *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S.587, (1934).

<sup>65</sup> Fordham L. Rev (n28).

<sup>66</sup> The Antitrust Division of the Department of Justice (DOJ).

<sup>67</sup> Keith N. Hylton, *Antitrust Law: Economic Theory & Common Law Evolution* (Cambridge University Press 2003) 47 – 48.

<sup>68</sup> J. William Rowley & Donald I. Baker, *International Mergers: The Antitrust Process Volume II* (2nd edn, Sweet & Maxwell 1996) 1671 – 1672.

accept instead a structural “fix” that the parties implement before the merger is consummated as long as it fully eliminates the competitive harm arising from the merger; and (5) the Division will ensure that remedies are completely implemented and will fully enforce its judgments.<sup>69</sup>

#### ***U.S.’s Enforcement Agency – FTC***

The FTC<sup>70</sup> is an independent regulatory agency that has authority to enforce the Clayton Act and the Federal Trade Commission Act. FTC has five commissioners nominated by the President and reconfirmed by the Senate for terms of seven years. The Chairman of the commissioners is designated by the President and act as the chief of the agency. The FTC has power to investigate, prosecute and exercise adjudicative authority.<sup>71</sup>

#### ***U.S.’s Enforcement Agency - State Attorneys***

The State Attorneys have investigative and prosecutorial authority, and most of their offices have special sections devoted to antitrust enforcement under both antitrust and merger laws. In 1990, the Supreme Court’s decision in *United States v. American Stores Co.* makes clear that the State Attorneys General have the full range of merger remedies including divestiture.<sup>72</sup>

#### ***Divestiture under E.U. Competition Law***

Divestiture is solely imposed in merger case under the EU competition law. The EU Treaty does not contain specific provisions on mergers. Even though Articles 81 and 82 catch some concentration (relatively merger) but these provisions were inadequate as a tool for merger control. The ECMR<sup>73</sup> adopted by the EU Council of Ministers as the tool for the merger control entered into force on September 21, 1990.<sup>74</sup> The EU Commissioner will ensure that the businesses are divested to a suitable purchaser within a specific time period. The Commissioner may require the parties to find a buyer prior to completion of the notified operation (fix-it-first). The Commissioner sometimes may accept alternative remedies packages, recognizing that divestiture option preferred by the parties may be uncertain or difficult to complete.

Alternative divestiture commitments or “crown jewel” is an implementation for preferred divestiture option of the parties who may review themselves as being at the risk of uncertainty in the third parties’ pre-emption

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<sup>69</sup> Broder (n22) 154 – 155.

<sup>70</sup> The Federal Trade Commission (FTC).

<sup>71</sup> Rowley and Baker (n69) 1642 – 1645.

<sup>72</sup> Ibid 1645 – 1646.

<sup>73</sup> The European Community Merger Regulation (ECMR) adopted by EU Council of Ministers in 1989.

<sup>74</sup> Whish (n2) 793 – 797.

rights, transferability of key contracts, intellectual property rights or finding the suitable purchaser. The parties may propose the divestiture commitments to the Commissioner. The commitment must provide that the first divestiture proposed would consist of a viable business, and the parties will have to propose a second alternative divestiture if they are not able to implement the first commitment within the given time frame. The commitment also has to establish clear criteria and a strict timetable as to how and when the alternative divestiture obligation will become effective and the Commissioner may require shorter period for its implementation.<sup>75</sup>

In all analyzed divestiture remedies, it was up to the parties to steer the divestiture process and to find a suitable purchaser for the divested business. The preferred method of divestiture lay largely in the hands of the divesting parties. This corresponded to a current practice. Different sales processes are acceptable to the Commission, as long as they result in finding a suitable purchaser and concluding a final binding SPA within the foreseen divestiture period. In only one of the analyzed remedies did the Commission object to the parties' proposal to make an IPO of the shares on the stock exchange.<sup>76</sup>

The Commissioner prefers to impose the structural remedies – divestiture – rather than the behavioral remedies for the merger cases whereby structural problem, such as the accretion of the market shares, is directly addressed by the merger.<sup>77</sup> The Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98 states the types of remedy acceptable to the Commissioner that divestiture is applied where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition. The most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture.<sup>78</sup>

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<sup>75</sup> Jones and Sufrin (n11) 973 – 974.

<sup>76</sup> European Commission, *Merger Remedy Study* < [http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf) > accessed 24 January 2012.

<sup>77</sup> Whish (n2) 852 – 853.

<sup>78</sup> European Commission, *The Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98* <

### ***E.U.'s Enforcement Agency***

The Merger Task Force within the DGIV deals with all notifications under the Regulation. The director of the DGIV will report directly to the Commissioner.

The Commissioner requires divestiture commitment from the merging parties who are required to strictly comply with the conditions and timeframe as stated therein. Divestiture commitments have to be implemented within a fixed time period the length of which is considered by the Commission on a case-by-case basis and should in general be as short as feasible. Long implementation periods would unnecessarily prolong the uncertainty hanging over the divested business, affecting its viability and ability to compete in the market and thus reduce the chances of effective competition being restored by the remedy.<sup>79</sup>

Finally, if divestiture periods are long, the Commission has long-standing monitoring responsibilities with associated costs both to the parties and the Commission. Also, after a long divestiture period, it becomes increasingly difficult to roll-back the original transaction in case the divestiture fails. Excessively short divestiture periods could also pose a problem: the parties may not have enough time to find a suitable purchaser, or candidate purchasers may have more scope to act strategically with delaying tactics to improve their bargaining position artificially, knowing that parties are faced with a forced-sale scenario at the end of the deadlines. Equally, prospective purchasers may not have sufficient time to carry out their due diligence and may end up offering too much for the divested business or they may unwittingly miss out on obtaining some vital assets.<sup>80</sup>

### **Divestiture under Thai competition law**

At the early era of Thailand's competition laws, Thailand had two major antimonopoly laws, the price fixing law and the antimonopoly law. Unlike the US and the EU, Thailand was just been aware the importance of economic laws that may help the country to keep free market competition. Before 1997<sup>81</sup>, Thailand, by the Ministry of Commerce, had commenced the

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<http://ec.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:068:0003:0011:EN:PDF> > accessed 24 January 2012.

<sup>79</sup> Rowley and Baker (n182) 465 – 470.

<sup>80</sup> European Commission (n201).

<sup>81</sup> In 1997, Thailand's economy was drastically plunged into its bottom due the economic crisis famously known as Tom Yum Kong crisis. The Tom Yum Kong crisis

study of international competition law of many countries, such as: the United States, Canada and Japan.<sup>82</sup> Moreover, the 1997 Constitution had remarkably enabled the enactment of the TTCA in 1999. By virtue of the article 50 of the 1997 Constitution,<sup>83</sup> Thailand eventually had promulgated its competition law, the Trade Competition Act, in 1999.

### **Existence of Divestiture under Existing Competition Law**

Under existing competition law, the TTCA is similar to the US's antitrust law and EU's competition law that they do not clearly state in its provisions that divestiture is applicable. Section 30 of the TTCA implies the applicability of the divestiture as follows:

*“The Commission shall have the power to issue a written order instructing a business operator who has market domination, with market share of over seventy five percent, **to suspend, cease or alter the market share**. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith”*

As highlighted in bold letter, section 30 empowers the TTCC to issue written order in three categories, namely: (1) to suspend the market share; (2) to cease the market share; or (3) to alter the market share. The three categories pointed out previously reflect the application of structural remedy as an injunctive relief. Particularly, altering the market share and restructuring the market share have the same outcome as the market must be restructured. Similar to the outcome of divestiture order the primary purpose is to restructure the market share. Initially, the drafters of the Act did not include Section 30, as a structural remedy, into the draft Act. Section 30 was included into the Act at the stage of consideration the draft Act by the House of Senate.<sup>84</sup>

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was a financial crisis which vastly affected many Asian countries, such as: Thailand, Indonesia, Malaysia, Philippines, Singapore and South Korea.

<sup>82</sup> Sakda Thanitkul (ศักดิ์ ธานีตกุล), *Explanation and Case Study of Trade Competition Act A.D. 1999* (คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542) (2nd edn, Winyuchon Publication House 2010).

<sup>83</sup> Deunden Nikomborirak, *Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries* <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1636&context=njilb>> accessed 25 June 2017.

<sup>84</sup> Anan Chantara-opakorn (อนันต์ จันทร์โอภากร), *Basic Understanding of Trade Competition Law* (ความรู้พื้นฐานเกี่ยวกับกฎหมายการแข่งขันทางการค้า) Thammasat L. Rev. 29 (Sept. 2012) (Thammasat University Press 2012) 359.

Under Section 30, the business operator must be a market dominant and holding more than 75 percent of market share. On the other hand, any business operator who has market domination is not automatically qualified unless such business operator held more than 75 percent of the market share and of course the sale volume must be greater than one billion baht in one goods or service market. Presently, it is possibly rare for Thailand to have a large scale market of any single product available for this application. Nevertheless, any business operator who is a market dominant holding market share more than 75 percent and sale volume more than one billion baht is qualified to be given the TTCC's order under Section 30. Once a person is qualified, that person has just pulled the trigger ready for the TTCC to fire.

Apparently, no investigation is required by law at the pre-issuance stage. None of any provision of the TTCA provides that duly investigation must be taken place prior to issuance of the order. Moreover, the alleged business operator will not be able to defense or present any evidence against the issuing order. In this regard, the TTCC can issue the order without investigation and the TTCC has absolute discretion to decide whether to take action by issuing the order or do nothing. However, Section 30 requires the TTCC to prescribe rules, procedures, conditions and time limit for compliance of the order.<sup>85</sup> Therefore, theoretically, prior to issuance of order, the TTCC should carry out in-depth study of targeting market. So, the TTCC can make better judgment.

#### ***Appeal of the Divestiture Order***

Nevertheless, section 30 of the TTCA does not provide the appeal process of the TTCC's order issued under section 30. In this regard, administrative order issued under section 30 may not be appealable unlike any administrative order issued by the TTCC. For instance, TTCC's order issued under section 31 for violation of section 25, 26, 27, 28 or 29<sup>86</sup> is appealable to the Appellate Committee.<sup>87</sup>

TTCC's order made under the TTCA is administrative order by virtue of Section 3 of the Establishment of Administrative Court and the Procedural of Administrative Court Act B.E. 2542 (TEACP). Therefore, even though the

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<sup>85</sup> TTCA S. 30's last sentence provides that "For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith".

<sup>86</sup> TTCA S. 31.

<sup>87</sup> TTCA S. 46.



TTCA does not provide the process of the appeal against the TTCC's order made under section 30 but the alleged business operator who received the order may appeal against the order by carrying out administrative legal proceeding.

### ***Enforcement of Divestiture Order***

If the business operator fails to comply with the order, the TTCC shall appoint an inquiry sub-committee to conduct investigation and inquiry.<sup>88</sup> After completion of investigation and inquiry, the TTCC shall submit its opinions to prosecute alleged business operator to the public prosecutor.<sup>89</sup> The public prosecutor shall institute the criminal proceedings with the competent court imposing punishment to the default business operator according to section 52 of the TTCA.<sup>90</sup> However, the TTCA is merely empowered to provide sanctions for person who fails to comply with its order under section 30 but the TTCC may not be able to enforce its divestiture order by conducting the divestiture process directly. Thus, the TTCC may take to carry out the measure of enforcement which is an administrative enforcement measure under to the TAPA<sup>91</sup> to enforce the divestiture order or bring the case to the court of justice seeking the enforcement of the order.<sup>92</sup>

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<sup>88</sup> TTCA S. 14 provides that "...The Commission shall appoint one or more inquiry sub-committees consisting of, for each sub-committee, one person possessing knowledge and experience in criminal cases who is appointed from police officials, public prosecutors and, in addition, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, as members, with the representative of the Department of Internal Trade as member and secretary...The inquiry sub-committee shall have the power and duty to conduct an investigation and inquiry in relation to the commission of offences under this Act and, upon completion thereof, submit opinions to the Commission for further consideration. The inquiry sub-committee shall elect one member as the Chairman...".

<sup>89</sup> TTCA S. 15 provides that "...In the case where the Commission submits to the public prosecutor the opinion for prosecution, an objection to the public prosecutor's non-prosecution order under the Criminal Procedure Code shall be the power, vested in the Commissioner-General of the Thai Royal Police Force of the Changwad Governor as the case may be, to be instead exercised by the Chairman of the Commission...".

<sup>90</sup> TTCA S. 52 provides that "...Any person who fails to comply with the order of the Commission under section 30...shall be liable to imprisonment for a term of one year to three years or to a fine of two million to six million Baht, and to a daily fine not exceeding fifty thousand Baht throughout the period of such violation...", section 15 provides that "...a member of the Commission and member of an inquiry sub-committee...shall have the same powers and duties as an inquiry official under the Criminal Procedure Code", and section 16 provides that "...the Commission submits to the public prosecutor the opinion for prosecution..."

<sup>91</sup> Thailand's Administrative Procedure Act B.E. 2539 (1996) (TAPA) specifies the procedure for enforcement of an administrative order in section 55 to section 63 of Part VIII under Chapter II. Under these provisions, the TAPA authorizes power to the

### ***Thailand's Enforcement Agency***

The TTCC is the sole agency who has full power and authorization to issue order and enforce divestiture order. The TTCC has power to appoint or authorize competent officials to carry out or supervise the implementation of divestiture order on behalf of the TTCC and the TTCC can also appoint a sub-committee<sup>93</sup> to perform any act necessary to implement the divestiture order. The TTCC and the inquiry sub-committee are empowered by law to have the same power and duty as those of the inquiry officials under Thai Criminal Procedure Code.<sup>94</sup> Thus, after completion of investigation and inquiry, the TTCC shall submit its opinions of prosecution to the public prosecutor to precede the criminal case with the competent court. Therefore, in case where the business operator fails to comply with divestiture order, the TTCC may also seek power of the court to enforce divestiture order and the public prosecutor will undertake to represent the TTCC and submit the motion or case to the competent court.

#### **Problems of Divestiture Implementation under Existing Laws**

The problems of implementation of divestiture order can be summarized as follows:

1. Section 30 provides broad power to the TTCC to significantly exercise its powerful structural remedy to restructure the market share while the lack of sufficient information and knowledge may lead to the misuse of the power.

2. The law, the TTCA, does not provide legal process for decision making of issuing order under section 30, unlike section 31.

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administrative officials to enforce their administrative orders or acts by using the measure of enforcement. For an administrative order that instructs one to perform or not to perform any act, the officials may take the measure of enforcement either by themselves or authorize other person enforce the order with the alleged party's expenses or order payment of administrative fine of an amount not exceeding twenty thousand baht per day.

<sup>92</sup> Ruethai Hongsiri (ฤทัย หงส์ศิริ), *The Administrative Court and Administrative Court Procedure* (ศาลปกครองและการดำเนินคดีในศาลปกครอง) (4th edn, Thai Bar Association 2012) 57-8.

<sup>93</sup> TTCA S. 11 provides that "...The Commission may appoint a sub-committee to consider and make recommendations on any matter or perform any act as entrusted and prepare a report thereon to the Commission...".

<sup>94</sup> TTCA S. 15 provides that "...In the performance of duties under this Act, a member of the Commission and member of an inquiry sub-committee under section 14 shall have the same powers and duties as an inquiry official under the Criminal Procedure Code...".

3. Divestiture order severely affects the business operator and marketplace and creates large disobedience. Culture and society perception are the great barriers to the implementation of divestiture order.

4. There is a lack of economic experts who are capable to handle the large scale of the market.

5. Implementation of divestiture order is costly and time consuming in inquiring whether or not the business has truly been divested to other.

### **Conclusion and Recommendation**

Divestiture under competition law is referred to order of competition law enforcement or court instructs defendant to divest property, securities, or other assets to prevent monopolization, restraint of trade or unlawful merger or acquisition.<sup>95</sup> Also, divestiture is simply referred to as a remedy for violation of competition law.<sup>96</sup>

Divestiture is structural remedy and in many case it can be simple, easy to administer and certain for preserving the competition. The divestiture order will be made when the government finds unlawful market concentration which threatens market competition. The restructuring of market is the basic and most reasonable resolution. The divestiture order will be in favor if three goals are achieved, firstly, it should introduce the workable competition into the market within a short period of time, secondly, should reduce the applications barrier to entry to establish economic condition that are conducive to workable competition in the market, and thirdly, it should reduce the ability of the monopoly to project its current monopoly power into other markets, to preventing new monopolies in those other market and inhabiting the monopoly from reinforcing its monopoly power in current market.

A divestiture order is said to be successful if its outcome has met these criteria, such as: market's competition increased, industry output has risen, price of goods or services reduced, the divested businesses are still viable and operative.<sup>97</sup>

For US' antitrust law, divestiture is applicable in cases of monopolization and unlawful merger. The US is the most prominent country in enforcement of divestiture. The US's court uses divestiture order as a tool to restructure an unlawful monopolizing market to enhance market competition.

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<sup>95</sup> Douglas F. Broder, *A Guide to U.S. Antitrust Law* (Sweet & Maxwell (2005) 209.

<sup>96</sup> Rosenthal (n20).

<sup>97</sup> Crandall (n45).

Many leading cases in the US, in this paper played the model role of divestiture implementation, such as: *Standard oil*, *Alcoa*, *AT&T*. Major antitrust law enforcements include DOJ, FTC and State Attorney.

For EU's competition law, divestiture is solely imposed in merger case. The EU Commissioner prefers to impose the structural remedies – divestiture – rather than the behavioral remedies for the merger cases.<sup>98</sup> The EU Commissioner the sole competition law enforcement.

For Thailand, divestiture is commonly known as a strategic tool for business resolution. Despite that Section 30 of the TTCA implies possibility of divestiture implementation but Thailand has never implemented divestiture under the existing provision of competition law due to lacking of sufficient knowledge and understanding function of divestiture.

The author's recommendation is that Thailand should adopt, apply and carry out implementation of divestiture under its competition law. The author encourages the TTCC to apply divestiture implementation by exercising its legitimate power under Section 30 to restructure market share and may also be applied to any merger or business combination that violates any provision of the TTCA. Prior to issuance of the divestiture order, the TTCC should carry out the analysis and evaluation of the consequences of divestiture order. The TTCC may appoints a sub-committee which consists of a number of experts covering all related fields, such as economic, law, accounting and finance to carry out the said analysis and evaluation.

The TTCC is recommended to prescribe rules of procedure of the issuance of divestiture order. These rules should consist of the determination of the process of issuance, implementation and enforcement of divestiture order. Distinctively, the TTCC should also prescribe the divestiture rules to determine divestiture process, requirement for party who involves in divestiture, TTCC roles in divestiture process and obligations of involved parties.

The TTCC should recruit more personnel who have expertise in finance, accounting, judgment execution, property assessment and litigation. And the TTCC is encouraged to work closely with the Department of Judgment Execution.

Furthermore, the TTCC may propose the amendment to the TEACP law to include lawsuits for violation of competition law to be under the jurisdiction of the administrative court.

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<sup>98</sup> Whish (n2).

## References

Adams W, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L.J. 1,1 (1951)

<<http://www.repository.law.indiana.edu/ilj/vol27/iss1/1> > accessed 20 March 2012

*Aspects of Divestiture as an Antitrust Remedy*, 32 Fordham L. Rev. 135, 139 (1963) < <http://ir.lawnet.fordham.edu/flr/vol32/iss1/4> > accessed 20 February 2013

Bade R and Parkin M, *Foundations of Economics* (3<sup>rd</sup> edn, Pearson Education Inc. 2007)

Baer W, the Federal Trade Commission, *A Study of the Commission's Divestiture Process* <<http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf> > accessed 20 March 2011

Besanko D, *Macroeconomics* (3rd edn, John Wiley & Sons Inc. 2008)

Black's Law Dictionary, (9th edn, West 2005)

Broder D, *A Guide to U.S. Antitrust Law* (Sweet & Maxwell 2005)

Chantara-opakorn A (อนันต์ จันทร์โอภากร), *Basic Understanding of Trade Competition Law* (ความรู้พื้นฐานเกี่ยวกับกฎหมายการแข่งขันทางการค้า) Thammasat L. Rev. 29 (Sept. 2012) (Thammasat University Press 2012)

Chantara-opakorn A, *Thailand's Competition Law and Its Implications in International Mergers and Acquisitions*, 18 Wis. Int'l L.J. 591, 608 (2000) < <http://dspace.library.tu.ac.th/handle/3517/324> > accessed 19 December 2012

Crandall R, *Costly Exercise in Futility: Breaking Up Firm to Increase Competition* (The Brookings Institution)

<<http://www.brookings.edu/research/papers/2003/12/competition-crandall> > accessed 28 December 2013

Crandall R, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, The Brookings Institution <<http://www.brookings.edu/research/papers/2001/03/monopoly-crandall> > accessed 25 March 2013

Davey A, Report prepared for Coles Pty Ltd, *The Introduction of a General Divestiture Provision under Australian Competition Law*

<<http://www.coles.com.au/~media/Files/Coles/PDFs/Industry%20Reports/Genera>

l-divestiture-provision-under-Australian-competition-law.pdf > accessed 28 December 2013

DePamphilis D, *Mergers, Acquisitions, and Other Restructuring Activities* (3rd edn, Elsevier Academic Press 2005)

Epstien R, *Antitrust Consent Decrees in Theory and Practice* (National Book Network 2007)

European Commission, *Merger Remedy Study* < [http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf) > accessed 24 January 2012

Frank R and Bernanke B, *Principles of Economics* (4th edn, McGraw-Hill 2009)

Gaughan P, *Mergers, Acquisitions, and Corporate Restructurings* (4th edn, John Wiley & Sons Inc. 2007)

Gole W, *Corporate Divestitures, a Merger and Acquisitions Best Practices Guide* (John Wiley & Sons, Inc. 2008)

Hovenkamp H, *The Rationalization of Antitrust*, 116 Harv. L.Rev. 919 (2003) (reviewing Richard A. Posner, *Antitrust Law* (2001)) <<http://www.jstor.org/stable/1342585> > accessed 16 March 2016

Jayarantne J and Shapiro C, *Simulating Partial Asset Divestitures to 'Fix' Mergers*, 7 Int'l J. Econ. Bus. 179, 180 (2000) <<http://faculty.haas.berkeley.edu/shapiro/divestitures.pdf> > accessed 30 June 2013

Jones A and Sufrin B, *EU Competition Law I* (4th edn, Oxford University Press 2011)

Joskow P and Noll R, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249, 1255 (1999) < <http://www.jstor.org/stable/1229409> > accessed 25 March 2013.

Kotler P, *Principles of Marketing* (5th edn, Prentice-Hall Inc. 1991)

Litan R and Nordhaus W, *Effective Structural Relief in U.S. v. Microsoft*, AEI Brookings (May, 2000) < <http://www.brookings.edu/research/papers/2000/05/microsoft-litan> > accessed 23 January 2012

Lomax D, *Merger Remedies After Evanston: Analysis of the FTC's Adoption of a Conduct Remedy in Lieu of Structural Relief* < [http://www.velaw.com/uploadedFiles/VESite/Overview/Evanston\\_Remedies\\_PaperFinal.pdf](http://www.velaw.com/uploadedFiles/VESite/Overview/Evanston_Remedies_PaperFinal.pdf) > accessed 30 June 2013

Parker J and Majumdar A, *UK Merger Control* (Hart Publishing 2011)  
Penelope Papandropoulos P and Tajana A, *The Merger Remedies Study – In Divestiture We Trust?* 27 Eur. Competition L. Rev. 443, 443 (2006) < [http://crai.co.nz/ec\\_p/assets/Papandropoulos\\_and\\_Tajana.pdf](http://crai.co.nz/ec_p/assets/Papandropoulos_and_Tajana.pdf) > accessed 16 March 2012

Posner R, *Antitrust Law: An Economic Perspective* (The University of Chicago Press 1976)  
*Private Divestiture: Antitrust's Latest Problem Child*, 41 Fordham L. Rev. 569, 588 (1973) < [http://ir.lawnet.fordham.edu/flr/vol\\_41/iss3/4/](http://ir.lawnet.fordham.edu/flr/vol_41/iss3/4/) > accessed 25 February 2013.

*Restrictions on Vertical Integration (Divorcement)*, Institute for Local Self-Reliance < <http://www.ilsr.org/rule/antitrust-policies/2210-2/> > accessed 25 February 2013.

Rosenthal M, *European Merger Control* (Verlag C.H. Beck Munchen 2010)

Ross S, *Principles of Antitrust Law* (The Foundation Press 1993)

Rowley W and Baker D, *International Mergers: The Antitrust Process Volume II* (2<sup>nd</sup> edn. Sweet & Maxwell 1996)

Saweangsak C (ชาญชัย แสวงศักดิ์), *Texts Book of the Establishment of Administrative Court and Administrative Procedure Laws* (คำอธิบายกฎหมายจัดตั้งศาลปกครองและวิธีพิจารณาคดีปกครอง) (8th edn, Winyuchon 2013)

Section of Antitrust Law of American Bar Association, *Antitrust Law Developments* (2nd student edn, ABA Press 1984)

Shea E, *Guide to Acquiring and Divesting Businesses*, (McGraw-Hill 1999)

- Shelanski H and Sidak G, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 1-2 (2001) < <http://www.jstor.org/discover/10.2307/1600442> > accessed 23 January 2013
- Stepanek M, *Implied Powers of Federal Agencies to Order Divestiture*, 39 Notre Dame L. Rev. 581, 581 (1964) < <http://scholarship.law.nd.edu/ndlr/vol39/iss5/4> > accessed 15 March 2012
- Sullivan T, Hovenkamp H and Shelanski H, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (6th edn, LexisNexis 2009)
- Supanit S (สุธีร์ สุภนิตย์), *Principles and Rules of the Competition Act of 1999* (หลักการและกฎเกณฑ์แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542) (edited by Kamolwan Jiravisit (กมลวรรณ จิรวชิษฎ์), Thammasat University Press 2012)
- Thanitkul S (ศักดา ธนิตกุล), *Explanation and Case Study of Trade Competition Act A.D. 1999* (คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542) (2nd edn, Winyuchon Publication House 2010)
- USLegal.Com, *Divestiture Law & Legal Definition*, < <http://definitions.uslegal.com/d/divestiture/> > accessed 26 March 2012
- Waller S, *Remedies for Monopolization and Abuse of Dominance: A Little History and Some Thoughts on Disclosure and Access* < [http://www.biicl.org/files/34\\_12\\_antitrust\\_marathon\\_\(weber\\_weller\)](http://www.biicl.org/files/34_12_antitrust_marathon_(weber_weller)) > accessed 20 March 2011
- Waller S, *The Past, Present and Future of Monopolization Remedies*, 76 Antitrust L.J. 11,16 (2009)  
<<http://lawecommons.luc.edu/cgi/viewcontent.cgi?Article=1075&text=facpubs> > accessed 11 March 2013
- Weiser P, *Rethinking merger remedies: toward a harmonization of regulatory oversight with antitrust merger review*, in *Antitrust and Regulations in the EU and US: Legal and Economic Perspectives*, MPG Books Group 2008, (Francois Leveque & Howard Shelanski eds., 2008)
- Whish R, *Competition Law* (5th edn, Oxford University Press 2005)



**SUSTAINABILITY CLAIMS AND LABELLING IN THAILAND\****Wongploi Tongsup\*\****Abstract**

Sustainability concerns are changing the way the products are made and how they are marketed to the consumers. In other countries, there are implementations of control measure over the practice of advertisement of the products or services that claim to have sustainability values. In Thailand, the practice of self-declared or unqualified claiming or labelling sustainability values by the producers or the marketers may leads to confusion and skepticism over the truthfulness of sustainability value of the products or the production processes, which may eventually dissuade the interest of the consumers in supporting of the sustainable products.

This study finds that the consumer protection law of Thailand is inadequate to resolve the disputes which may arise over the issue of sustainability claims and labelling. By exploring the legal frameworks of the United States of America and the European Union in the area of consumer protection regarding sustainability advertisements, this study concluded that Thailand should issue regulation as the legal control measure in order to protect the rights of consumer and proposed the recommendations of compliance criteria for a regulation on advertising of sustainability values in Thailand.

**Keywords:** Consumer Protection, Sustainability Claim, Sustainability Advertisement, Advertisement Law

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\* This article is summarized and rearranged from the thesis “Sustainability Claims and Labelling in Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University 2016.

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**บทคัดย่อ**

หลักการและคุณค่าแห่งความยั่งยืนได้เปลี่ยนวิถีทางของธุรกิจในการสร้างผลิตภัณฑ์และการโฆษณาสินค้าที่ประกอบด้วยคุณค่าแห่งความยั่งยืนต่อผู้บริโภค และมาตรการควบคุมการโฆษณาคุณค่าแห่งความยั่งยืนได้มีขึ้นในประเทศต่างๆ ทว่าพฤติกรรมของผู้ผลิตหรือผู้โฆษณาในการโฆษณาข้อความที่เกี่ยวข้องกับคุณค่าแห่งความยั่งยืนซึ่งไม่ได้ผ่านการตรวจสอบหรือการรับรองนั้นสามารถทำได้ในประเทศไทย เนื่องจากกฎหมายคุ้มครองผู้บริโภคด้านการโฆษณาไม่อาจใช้แก้ปัญหาในกรณีนี้เนื้อหาของการโฆษณาคุณค่าแห่งความยั่งยืนนั้นสามารถตีความหมายได้หลายแบบระหว่างผู้โฆษณาและผู้บริโภค จากการศึกษาพบว่าหากเกิดกรณีพิพาทขึ้นถึงเนื้อความที่สื่อถึงหลักการหรือคุณค่าแห่งความยั่งยืน มาตรา 22 ประกอบมาตรา 28 แห่งพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 นั้น ไม่เพียงพอที่จะแก้ข้อพิพาทที่อาจเกิดขึ้นได้ ดังนั้น จึงได้ศึกษามาตรการทางกฎหมายในการคุ้มครองผู้บริโภคกรณีนี้จากประเทศสหรัฐอเมริกาและสหภาพยุโรป เพื่อเสนอแนวทางการในออกกฎกระทรวงในการแก้ไขปัญหาสำหรับประเทศไทยต่อไป

**คำสำคัญ:** คุ้มครองผู้บริโภค, การโฆษณาคุณค่าแห่งความยั่งยืน, กฎหมายคุ้มครองผู้บริโภค, การคุ้มครองผู้บริโภคด้านโฆษณา

## Introduction

Over the past decade, there are a large number of initiatives promoting 'Sustainable Consumption and Production' (SCP), led by the United Nations Environmental Programme (UNEP) together with many intergovernmental organisations that have created a platform of knowledge, instruments and tools for promoting sustainability value at the global level<sup>1</sup>. The rising of access and availability of information has been enabling the public to raise a question of environmental and social impacts of the businesses and their products. Some report found that the consumers are increasingly concerned about environmental, social and economic issues, hence they are willing to act on such concerns by supporting and buying sustainable products and services<sup>2</sup>. While the consumers are playing the key role in driving towards sustainable consumption, the businesses also enhance their marketing of sustainability value to meet the consumers' demands and to create a value to their sustainable products and companies. It appears that some market research firms are applying new sustainability marketing terms, or, sustainability claims on the products and services; however, the credibility of those claims and labelling are often inconsistent because of the lack of mutual understanding and common ground in definitions of those sustainability terminologies. Several products started to have the on-pack claims or labels to inform the consumers about their environmental or social commitments, in addition, some brands appeared to have developed their own labels stating their sustainability attributes<sup>3</sup>, however, how could the consumers assessing, interpreting or verifying such claims relating to sustainability value is a question to be studied further.

Access to information requires time and verification needs resource and money, which is the reason why individual as a consumer usually does not bother to seek the truth behind claims and labelling of products. Without tools for verification or clarification, the sustainable products with its added-value are indifferent from unsustainable ones in the market which may leads to reduction of motivation and preference to purchase and support sustainability. An instrument to enhance a sustainability environment in consumption and

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<sup>1</sup> UNEP, 'SCP Global Outlook' at 40, available for download at <<http://www.unep.org/resourceefficiency/Default.aspx?tabid=78405>>.

<sup>2</sup> World Business Council for Sustainable Development (WBCSD), 'Sustainable Consumption Facts and Trends: The Role of the Consumer' at 15, available for download at <<http://www.wbcsd.org/contentwbc/download/479/5182>>.

<sup>3</sup> *Id.* at 19.

production is needed in order to achieve a goal in sustainable development. Therefore, it is the role of government to help and protect the consumers from misleading or deceptive action in sustainability claims or labelling and to inform and promote sustainable practices to the consumers for an inclusive and transformative economy<sup>4</sup>.

This study will further discuss the control measures or regulatory framework in consumer protection on sustainability claims and labelling in the United States and the European Union, together with analysing current consumer protection laws of Thailand, and, proposing appropriate solution or framework for a Thai legislation.

### **1. Concept of Sustainability and Definition of Sustainability Claims**

Sustainability refers to the relationship between economic viability and ecological constraint that our society shall sustain resources for future generations by considering the management and distribution of resources including equity and accessibility of those resources to everyone in the society for our prosperous development. Thus, the three aspects which are essential to the sustainability concept or principles are:

- (a) Environmental sustainability - the ability to maintain the resources and services that future generation will require without sacrificing the long-term health of the ecosystems in doing so. Environmental sustainability is a prerequisite to create a sustainable socio-economic system<sup>5</sup>;
- (b) Social or Ethical sustainability - a "life-enhancing condition within communities, and a process within communities that can achieve that condition"<sup>6</sup>, in particular, "social sustainability is a positive condition marked by a strong sense of social cohesion, and equity of access to key services (including health, education, transport, housing and recreation)"; and,
- (c) Economic sustainability - the durability of economic performance variables without necessarily consider a wider environmental and

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<sup>4</sup> Consumer International, 'The role of consumer protection in meeting the SDGs' available for download at <  
[http://www.consumersinternational.org/media/1488820/the-role-of-consumer-protection-in-meeting-the-sdgs\\_updated-jan15.pdf](http://www.consumersinternational.org/media/1488820/the-role-of-consumer-protection-in-meeting-the-sdgs_updated-jan15.pdf)>.

<sup>5</sup> John Morelli, 'Environmental Sustainability: A Definition for Environmental Professionals' (2011) Vol 1 Issue 1 Art 2 at 4.

<sup>6</sup> Stephen McKenzie, 'Social Sustainability: Towards Some Definitions' (2004) at 14.

social impact. Hence, some researchers<sup>7</sup> illustrated that economic sustainability is used to “refer to the durability of human welfare levels or utility; the extent of which integrated environmental and social issues on how welfare is defined or determined”.

Therefore, sustainability claims can be defined as any statement that represent the commitment to sustain either one or more aspect of environment, society or economy in the advertisement, it is a practice of making claim or labelling that the products or services have contributed to or sustained the environment or have ethical or social merits.

## **2. Problems on Claiming or Labelling Sustainability Value**

Claiming or labelling sustainability value is a marketing strategy that a sustainability-oriented vision of marketing emphasizes integration of sustainability principles into both marketing theory and the practical decision making of marketing professionals that the enterprises choose to replace conventional marketing<sup>8</sup>. The growing influence of environmental and social sustainability has made the concept of sustainability an essential factor of today's commerce. Businesses embrace sustainable practices that compliment and support their strategies and communicate their efforts on sustainability to the consumers and other stakeholders through claims and labelling in order to remain relevant. Countless terms and phrases are being used to draw attention on environmental and social characteristics of products or their processes. Sustainability claims may be appeared in the forms of texts or images or both combined as distinctive signs or labels that aim to differentiate the products or processes from others which do not have sustainable merits like theirs. However, their credibility and their meanings are often questionable. According to ISEAL Alliance, there are five universal truths of credible sustainability claims: “a claim needs to be clear, accurate, relevant and based on a system that is transparent and robust”.

The growing number of the self-declared ecolabeling schemes has caused widespread confusion and skepticism over the truthfulness of such environmental claims, hence many enterprises decided to choose the independent or third-party entities to certify that their environmental attributes

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<sup>7</sup> Barry Dalal-Clayton and Barry Sadler, ‘Strategic Environment Assessment: Sustainability Appraisal; A Sourcebook and Reference Guide to International Experience’ (2004) at 232.

<sup>8</sup> Frank-Martin Belz and Ken Peattie, ‘Sustainability Marketing: A Global Perspective’ (2<sup>nd</sup> Ed. 2012).

are valid<sup>9</sup>. Indeed, an independent third-party certification can provide a higher level of clarity and credibility to any sustainability claims, but, in the case that businesses are not within a jurisdiction where regulations relating to claims and labelling enforced, they may not feel obliged or are required to make a credible claim or an accurate label since the businesses might consider it as costs, thus, eventually they may simply continue to advertise sustainability value with their self-declaratory labels. In the worst case, a self-declared claim could be only a marketing ploy by just simply advertise misleading or deceptive claims whereas unable to substantiate such claim. Accordingly, a claim and a label must be accurate and credible for its truthfulness. A misleading or deceptive claim is not only detrimental to consumer at times, but also devaluing other sustainable products or processes in the long run. As a result of confusion, lack of accuracy, and, unavailability of contents verification, many commentators and scholars are in favour of public standards<sup>10</sup> in order to emphasise the accuracy and credibility of claims and labels and to maintain a sustainability value of sustainable products.

### **3. Legal Frameworks in Advertising Sustainability Value in Foreign Countries**

#### **3.1 Consumer Protection in the United States of America**

##### **(i) The FTC Act and the Green Guides**

The Federal Trade Commission (FTC) is an independent federal agency responsible for unfair competition and consumer protection. Section 5 of the FTC Act grants authority to the FTC to prevent “unfair or deceptive acts or practices”<sup>11</sup>, it has been interpreted to permit the FTC to regulate “false, deceptive and misleading use of commercial speech or advertising claims.”<sup>12</sup> The FTC defined ‘deceptive’ and as “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment”<sup>13</sup> Thus, the consumer may file a complaint to the FTC for investigation and take enforcement action, and the FTC may bring charges against the actions of persons or companies which the

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<sup>9</sup> Jason J. Czarnezki, ‘Greenwashing and Self-Declared Seafood Ecolabels’, 28 Tul. Envtl. L.J. 37 (2014).

<sup>10</sup> *Id.*

<sup>11</sup> Federal Trade Commission Act of 1938, ch. 40, Pub. L. No. 75-447, 52 Stat. 111, (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

<sup>12</sup> E. Howard Barnett, ‘Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing’, 1 ENVTL.LAW. 491, 495 (1995).

<sup>13</sup> Cliffdale Associates., Inc., 103 F.T.C. 110, 176 app. (1984).

FTC believes said person or company made a deceptive or misleading claim. Subsequently, however, a case-by-case prosecution by the FTC was an inadequate standard to use as a tool for assessment of complex and scientific green marketing claims. Therefore, the private sector such as advertising industry and state attorneys general requested the FTC to adopt uniform green-marketing guidelines that would allow them to differentiate between a legal and illegal green marketing claim<sup>14</sup>.

In 1992, the FTC first released the guidance for the ‘use of environmental marketing claims’, generally known as the ‘Green Guides’<sup>15</sup> as claims and labelling guidelines and updated them periodically. The Green Guides are not federal regulations, hence, they do not have the enforcement and effect of law; however, the FTC issued the Green Guides as an “administrative interpretation of law”<sup>16</sup>. The FTC can take action under the FTC Act when the claims are inconsistent with the Green Guides by proving said claims or practices are unfair or deceptive. The Guides advise advertisers, marketers or producers that they will need a “competent and reliable evidence to adequately substantiate environmental marketing claims” which was later prescribed as “evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.”<sup>17</sup> The details of topics the Guides addressed are: (i) General Environmental Benefit claims, (ii) Carbon Offsets, (iii) Certifications and Seals of Approval, (iv) Compostable, (v) Degradable, (vi) Free-Of claims, (vii) Non-Toxic claims, (viii) Ozone-Safe and Ozone-Friendly claims, (ix) Recyclable, (x) Recycled Content, (xi) Renewable Energy claims, and, (xii) Renewable Materials claims<sup>18</sup>. For example, a claim such as ‘eco-friendly’ sends a message that a product has environmental benefits and also conveys that a product has no negative impact on the environment; which is unlikely that the producer can substantiate the claim, thus, it is deceptive. Another example is a claim such as ‘eco-friendly: made with recycled materials’ would not be considered a deceptive claim because this statement is clear and

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<sup>14</sup> *Supra note 12* at 498.

<sup>15</sup> 16 C.F.R. § 260.

<sup>16</sup> Federal Trade Commission, ‘The Green Guides Statement of Basis and Purpose’.

<sup>17</sup> *Ibid*, § 260.5.

<sup>18</sup> *Supra note 15*.

prominent and the producer may be able to substantiate that the components of product or package is made from recycled material, thus this kind of claim or label is not deceptive.<sup>19</sup> The Guides do not include the areas of ‘organic’ and ‘sustainable’ claims, stated in the provision that “in the case of organic claims, the Commission wants to avoid providing advice that is duplicative or inconsistent with the USDA’s National Organic Program (NOP), which provides a comprehensive regulatory framework governing organic claims outside the NOP’s jurisdiction, and for sustainable claims, the Commission lacks sufficient evidence on which to base general guidance.”<sup>20</sup>

### (ii) State Laws

Every state enacted their own consumer protection laws similar to section 5 of the FTC Act since private actions or commerce within the state is not subject to federal authority, hence, unfair, false or deceptive claims in each state is regulated under state consumer protection law. The state consumer protection act is different from the FTC Act that it often grants private cause of action while the FTC Act does not.<sup>21</sup> And, that private rights of action usually provide recovery of costs and attorney’s fee as well as multiple damages.<sup>22</sup>

While many states had adopted the Green Guides as a guidance for interpretation, some state, such as, California and Minnesota had adopted the FTC Green Guides as its state law which means the Guides, which in a federal level do not have a legal binding status, become an effective regulation and enforceable state laws.<sup>23</sup> Therefore, consumers may bring legal actions through states consumer protection agencies or to the state court; supporting their cases with the definition and the interpretation provided in the Green Guides. It is worth to note that both federal government and states government are similarly focusing on the environmental aspect of the claims or the claims that are able to be proved by the scientific method, thus, claims and labelling in other dimension of sustainability i.e. socially or ethically, have been left to the voluntary schemes standards or certification programmes.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Alan S. Brown & Larry E. Hepler, ‘Comparison of Consumer Fraud Statutes Across the Fifty States’, (2005) at 270.

<sup>22</sup> *Ibid*

<sup>23</sup> MINN.STAT.ANN. § 325E.41.



### 3.2 Consumer Protection in the European Union

#### (i) The Unfair Commercial Practices Directive

The European Union Directive 2005/29/EC 'Unfair Commercial Practices Directive'<sup>24</sup> (UCP Directive) is applying to misleading advertising and other unfair commercial practices in 'business-to-consumers transactions', not only at a stage of advertising but also 'before, during, and after a commercial transaction in relation to a product.'<sup>25</sup> The UCP Directive has a scope with protection of the economic interests of consumers regarding misleading and unfair commercial practice, and, excluding other areas such as health and safety. The Article 5 of the Directive provided that a commercial practice is unfair if "(a) it is contrary to the requirements of professional diligence, and, (b) it materially distorts or likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed...", and in the paragraph 4 providing that the "commercial practices shall be unfair if they are misleading or aggressive." Further, in Article 6 defined 'misleading acts' as "contains false information and is therefore untruthful or in anyway, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct...and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise", thus, businesses must present their claims in a clear specific, accurate and unambiguous manner to ensure that consumers are not being misled. Under Article 7, claims can be misleading if they are based on vague and general statements such as 'environmentally friendly' or 'ecological' or 'sustainable' because these claims are almost impossible to substantiate from its vagueness. For example, claims that electric car is 'ecological' have been found misleading in France because it did not provide information to put the claim into perspective of consumer stating regulator "since it could not be established that the electricity needed to recharge the cars would entirely derive from renewable energy sources, using it would have a negative impact on the environment". In addition, Article 12

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<sup>24</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). OJ L149.

<sup>25</sup> The UCP Directive Article 3

stating that the “Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11: (a) to require the trader to furnish evidence as to the accuracy of factual claims...; and, (b) to consider factual claims as inaccurate of the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority”. Thus, claims should be based on evidence which can be verified by the authorities, since claims must be able to be proved with solid evidence, they must be robust and verifiable which could be either through scientific method or documentation. Accordingly, claims or labelling shall be assessed whether they are misleading or deceptive under the UCP Directive on a case by case basis.

#### **(ii) National Application of the UCP Directive and National Guidelines of the EU Member States**

The EU member states adopt and implemented the UCP Directive to their national legislatures by either incorporated it into existing laws, e.g. Denmark, Germany, France, Sweden etc., or adopted a new law transposing the UCP Directive e.g. the United Kingdom, Ireland, Poland etc. The ‘internal market clause’ in Article 4 of the Directive caused the member states to repeal any provisions which were incompatible with the Directive, as a result, each national laws of every member states have one set of rules and a high level of consumer protection, particularly the set of the Black List practices which prohibited in all circumstances prescribed. Additionally, since the UCP Directive aims to apply to business to consumer transactions, some countries extended the scope of their laws to regulate other type of transaction i.e. business to business transaction too, for example, Austria, Germany and Sweden. Therefore, application of the Directive, under Article 6, national authorities perform a case by case basis assessment of claims and its impact on the average consumer’s purchasing decision. The European Commission (EC) considers that problems of ‘green’ claims could be “addressed by measures related to enforcement and development of best practices rather than by legislative changes to the UCP Directive and it will support appropriate and consistent enforcement e.g. developing guidance on this topic” as announced in the European Consumer Agenda.<sup>26</sup> Subject to the Article 11 of the UCP Directive, the member states are free to choose the enforcement mechanisms

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<sup>26</sup> The European Commission, ‘UCPD Report’ available at <[http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_report\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf)> accessed on 7 January 2017.

which “best suit their legal tradition, as long as they ensure that adequate and effective means exist to prevent unfair commercial practices.” According to Article 13, it is also left to member states to decide what type of penalties should be applied, as long as these are “effective, proportionate and dissuasive”. Consequently, not only businesses have to take national guidances on unfair practices of claims and labelling into account, cross-border unfair commercial practices face a variety of enforcement and different legal procedures, as a result, Regulation (EC) No 2006/2004 on consumer protection cooperation (the CPC Regulation)<sup>27</sup> was adopted to address this issue. The CPC Regulation created a framework to allow national authorities from all countries in the EEA to jointly address breaches of consumer rules; one of them is unfair commercial practices under the UCP Directive, when the trader and the consumer are established in different countries. Therefore, Europe is combating misleading or deceptive claims while maintaining their value in the single market policy through this mechanism. Interestingly, without one-size-fits-all type of standards, the member states may further adopt or maintain stricter provisions or standards than those in the UCP Directive, provided the member states have flexibility when they have to deal with newly developed issues in unfair commercial practices, claims or labelling, through national legislations.

#### **4. Analysis of the Consumer Protection Law in Thailand**

The Consumer Protection Act of Thailand<sup>28</sup> ensures the rights of consumers to be afforded “the right to information including correct and adequate description of the goods or services” in Section 4. Whereas the definition of ‘advertise’ was given as “the act enabling the public to have notice or knowledge of a statement for the purpose of trade”<sup>29</sup>, Section 22 providing that “An advertisement shall not contain any statement which is unfair to consumers...be it a statement as to origins, conditions, qualities or characteristics of goods or services...” and in paragraph two providing that statements are deemed to be unfair to consumers are “(1) a false or exaggerative statement;...”. When the producer in Thailand claiming its product or service is ‘green’ or ‘environmentally-friendly’ without being qualified to any standard or

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<sup>27</sup> Regulation (EC) No 2006/2004 of the European parliament and of the council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) OJ 364.

<sup>28</sup> Consumer Protection Act, B.E. 2522 (1979)

<sup>29</sup> Consumer Protection Act, B.E. 2522 (1979) Section 3

certificate, supposed the resource of the product is renewable materials but the production process including waste disposal is not being attested, while the consumers perceive such product as it is something that sustain the environment throughout of its life-cycle, without the common definition of the terms the producer may insist that it considers the 'green' or 'environmentally-friendly' specifically to resource materials but not to the water or waste management of the production process, it is not certain that said claims are false or exaggerative under Section 22 of the Consumer Protection Act. Moreover, even though Thailand already have voluntary product life-cycle and carbon emissions standards certification program, the producers who do not participate in the voluntary schemes yet claiming their products e.g. 'eco-friendly' or 'protecting environment' could continue the practice of unqualified claims since it can be interpret in several or different way.

Furthermore, the claims relating to social or economic sustainability can be interpreted variously and also can be difficult to prove, for example, the 'fair trade' claim, without associating with standards schemes but self-declared, can be viewed by the consumers that the claim has the same meaning or up to the par of voluntary fair-trade standards association, however the businesses may argue that their trade is considered fair since they acquire the materials or products at the local market price, hence the businesses deemed the claim is correct to their sense and the consumers may not be able to prove it as false or exaggerative statement under the law. Plus, the case of claiming social contribution, if it did not document the practice during the process or before making the claim, it will be very difficult for not only the consumers but also the authority to prove the particular practice at the specific period. Therefore, Section 28 of the Consumer Protection Act, provided "in the case where the Committee on Advertisement has a reasonable cause to suspect that any statement used in an advertisement is false or exaggerative under Section 22 paragraph two (1), the Committee on Advertisement shall have the authority to issue an order demanding the advertiser to make such proof as to vindicate the truth.", may unable to obtain proof if it was not made in documentation during the practices or processes or before making claims since it was not require by law. In addition, claims which have various meanings and can be interpret differently by every stakeholder, even the producers substitute the claims that perceived diversely or unevenly by the consumers, to whose interpretation the authority will deem as a point of reference that it violates Section 22 in the investigation under Section 28 or in the dispute process.

Therefore, the Consumer Protection law of Thailand may be adequate for sustainability claims or labelling that is qualified or certified under existed standards or when it provided comprehensible, straightforward and precise contents of claims to the public since the authority may issue an order demanding the producer or the advertiser to prove whether a claim is false or exaggerative on its agreed comprehensible meaning or its associated standards under Section 22 paragraph two (1) and Section 28 of the Consumer Protection Act. However, if the producer or business making claims or labelling that are vague or unambiguous to the consumers, or claiming that it has contributed to society or ecology without representing to or associating with any certification or standards nor does it providing any further explanation on such claim or label, it is uncertain how the authority will evaluate the said sustainability-related claim as being false or exaggerative under Section 22 paragraph two (1), hence, the Thai law is inadequate to resolve the dispute between the businesses and the consumers resulting from discrepancy of interpretation of vague sustainability claims. Consequently, the consumers are lacking in the right to be informed and to be compensated in this issue.

## **5. Conclusion and Recommendation**

In conclusion, the existing consumer protection law of Thailand is inadequate to interpret sustainability-related claim and label which is not associated with or not certified by standards program or labelling schemes as unfair advertisement to the consumers from the lack of common grounds among the business, the consumers and the authorities. From a study of mechanisms in the United States and the European Union, there are legislations combating the environmental marketing and unfair practices towards the consumers. Thus, the command and control approaches as implemented in foreign countries consumer protection laws relating to sustainability advertisement, either by making statement or labelling the claim, prescribing the general or vague claims are considered deceptive and misleading and discouraging absolute term such as 'eco-friendly', 'good for the environment', 'green', 'sustainable', 'an ethical choice' etc. because the impossibility in substantiation of claims unless otherwise associated with certification program or labelling scheme pertaining to the entire products life-cycle. In addition, environmental benefits advertisement shall be made only when it has scientific evidence that was tested by the expertise of relevant professionals, hence decreasing vague and unqualified sustainability-related advertisement. Moreover, substantiation of sustainability claims and labelling shall be

presented by the results of scientific tests or analyses and documentation of track records or data collection for environmental and ethical aspects of sustainability respectively to provide the public and the authority a resolvable dispute. Furthermore, there should be definitions of specific claims attributing environmental or ethical benefits provided by law in order to ensure the consumers rights to be informed and to fulfill the loophole of unfair advertisement interpretation. Although the cost of compliance may affect the businesses, however advertisement is not mandatory, and it is worth to protect the public from the businesses claiming their sustainability merits hence benefits from the choice of the consumers. Therefore, it is recommended in this thesis that Thailand should adopt the same concept of regulatory framework to be its legal control measure with its own details of topics that need to be addressed in Thailand, which shall be further meticulously explored and studied in the policy making and legislative drafting process, to set out the framework of practice of sustainability claims and labelling and to become a ground of reference among every stakeholders in a legal dispute in Thailand accordingly.

This study proposed that, by virtue of Section 8<sup>30</sup> and Section 22 paragraph two (5), the Ministerial Regulation may be issued to combating the environmental benefits, ethical and social contributions of claims by providing a compliance criteria on sustainability-related advertisements to be a common ground for every stakeholders to resolve a dispute which may be raised and to be a solution for the consumers seeking remedy or compensation. The regulation concerning the practice of sustainability advertisements, which including environmental and ethical claims and labelling, shall prescribing rules and criteria in the following:

- (a) Content of claims; the advertisements on sustainability value shall be made and communicated to the public in a clear and precise manner. Providing that making claims or products labelling should reflect specific and verifiable environmental benefit, ethical contribution or social improvement. In particular, it shall stating which aspect of sustainability the claim targets, whether it referring to the whole product or its entire life-cycle or specific

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<sup>30</sup> Section 8 of the Consumer Protection Act, B.E. 2522 (1979) “The Prime Minister shall have charge and control of the execution of this Act and shall have powers to appoint competent officials and issue Ministerial Regulations for the execution of this Act. Ministerial Regulations shall come into force upon their publication in the government gazette.”

part or element such as packaging or resource efficiency dimension, and the subject of the claim must be stated in an unambiguous manner.

- (b) Accuracy of claims; advertisement concerning sustainability either through making claims or product labelling shall be presented in accurate, clear, specific and unambiguous way to ensure that the public are not misled or misunderstood its intended meaning. The term presenting in claim or label shall be accurate and truthful to the scale of its environmental benefit or social contribution, and shall not overstate anything more than what it had literally achieved.
- (c) Avoidance of ambiguous and vague claims; broad or general claims should be clear and prominent and must limit specific benefits they have contributed. General sustainability claims will likely to be perceived as overall contribution to environment and society, hence almost impossible to substantiate. For general environmental benefits claim, it shall be associated with entire life-cycle assessment labelling schemes which is reputable such as the EU Ecolabel, the German Blue Angle or the Thai Green Label.
- (d) Substantiation of claims; any information appeared on sustainability advertising shall be based on verifiable, robust and recognized relevant evidence which may be scientific or documentation methods. Failure to substantiate the claims in documentation or equivalent shall be considered exaggerative and misleading the consumers. It may be specifically set out that environmental claims shall have scientific evidence to support said claims and shall be ready to provide it comprehensibly to the consumers and the authority when the claim is challenged or requested. For other aspect of sustainability besides environmental benefits claims, either in the dimension of social contribution or encouraging ethical consumption of products or services, it may prescribing requirement of documentation substantiating the claim in order to have a track record of facts when proving the accuracy and truthfulness of claims in a dispute.
- (e) Criteria of evidence; the evidence substantiating the claim shall be clear and robust by using appropriate methods. In environmental benefits claims, evidence must be made by relevant scientific testing or analysing method made by the expertise of professionals,

hence the businesses shall refrain from making claims of environmental benefits unless it can obtain and provide competent scientific evidence on claims. In other aspects, evidence shall be documentation substantiating the claims. For example, claiming that the product has contributed to local community workforce and encouraging the consumers to engage in social contribution related claim, unless the track records were kept in documentation it will be very difficult and almost impossible to prove which and whom of claim addressed. Thus, the law should require the businesses to make or obtain reliable documentation or equivalent, e.g. electronic data of records that can substantiate the claims before or at the time of advertising and such evidence should be retained by the businesses throughout the time of advertisement.

- (f) Defining the concerned sustainability terms; it should be studied which terms relating to environmental benefits and ethical or social contributions used in marketing or advertisement that needed to have specific definition. For example, the United States using consumer perception survey in the policy making process, thus providing the term 'degradable' to be qualified to the product or package that have reliable scientific evidence that the entire item will completely breakdown and decompose into the elements in nature or completely decompose after customary disposal into waste stream within one year. In Thailand, the terms such as 'degradable' or 'recyclable' shall be defined by regulation, with the expertise of professionals, as a common ground for every stakeholders in making claims in order to encourage the correct practice of environmental benefits in the society.
- (g) Best practice; the sustainability advertisement in any aspects should be made for communicating about its achievements of either sustaining the environment or contributing the society, not its aspirations of performance in the future because it is not eligible for substantiation by evidence. For communicating efforts on sustainability and avoiding the accusation of false, exaggerative or misleading claims, the claim must associate the established plan with clear targets and timescales of commitment, including the auditing or monitoring for substantiation of sustainability advertisement



## References

### Books

Barnett, E. Howard. *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL.LAW., 1995.

Barry Dalal-Clayton and Barry Sadler, 'Strategic Environment Assessment: Sustainability Appraisal; A Sourcebook and Reference Guide to International Experience' (2004).

Frank-Martin Belz and Ken Peattie. *Sustainability Marketing: A Global Perspective*. (2nd Ed.) 2012.

McKenzie, Stephen *Social Sustainability: Towards Some Definitions*, 2004.

### Articles

Alan S. Brown & Larry E. Hepler, "Comparison of Consumer Fraud Statutes Across the Fifty States", 2005 p 270. available at

<<http://www.thefederation.org/documents/Vol55No3.pdf>>

European Commission, the, "UCPD Report" available at

<[http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_report\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf)>

accessed 7 January 2017.

Jason J. Czarnezki, "Greenwashing and Self-Declared Seafood Ecolabels", 28 Tul. Envtl. L J 37 2014. available online at

<<http://digitalcommons.pace.edu/lawfaculty987/>>.

John Morelli "Environmental Sustainability: A Definition for Environmental Professionals" (2011) Vol 1 Issue 1 Art 2. available at

<<http://scholarworks.rit.edu/jes/vol1/iss1/2/>>.

Joop de Boer, "Sustainability labelling schemes: The logic of their claims and their functions for stakeholders" *Business and the Environment*, July 2003.

published online in Wiley InterScience, DOI: 10.1002/bse.326.

### Electronic Media

Consumer International, "The role of consumer protection in meeting the SDGs" available for download at

<[http://www.consumersinternational.org/media/1488820/the-role-of-consumer-protection-in-meeting-the-sdgs\\_updated-jan15.pdf](http://www.consumersinternational.org/media/1488820/the-role-of-consumer-protection-in-meeting-the-sdgs_updated-jan15.pdf)>.

Report from the Multi-Stakeholder Dialogue, the European Commission, 'Environmental Claims' available at

<<https://www.luminpdf.com/viewer/NNW8SdgpHj8fiTw2i>> accessed on 7 January 2017.

UNEP, "SCP Global Outlook" at 40, available for download at

<<http://www.unep.org/resourceefficiency/Default.aspx?tabid=78405>>.

World Business Council for Sustainable Development (WBCSD), 'Sustainable Consumption Facts and Trends: The Role of the Consumer' at 15, available for download at <<http://www.wbcd.org/contentwbc/download/479/518>>

## CLASS ACTION IN COMPETITION LAW: THE PROBLEMS OF COUNSELS FOR PLAINTIFF\*

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### **Abstract**

It is widely known that the concept of class action in competition law was later on promoted in various legal systems of different countries including the United States of America and European countries where ‘class action’ has been most commonly practiced. One of the most well-known and significant class actions was the lawsuit against Microsoft which not only resulted in recoveries for all parties including the plaintiffs, the defendant and other involved persons but also contributed great benefits to the economy of the country.

A trade competition case in the form of a class action in Thailand is practicable since Thai law on class action is part of the amendment of the Civil Procedure Code of Thailand B.E.2558. Nevertheless, it still lacks specific proceedings to effectively regulate the legal measures in class action in competition law, and there has been few cases based on class action law. The class action law introduced new legal proceedings and an innovative way to litigate competition cases in Thailand. The drawback to this new law is its lack of precedent and unclear application of laws.

The significant problem is the person representing the plaintiff because they play a crucial role in the commencement of class action proceedings. According to Section 222/1 of the Civil Procedure Code, only “injured persons” are entitled to file a class action lawsuit against the defendant. Thus, it is not clear whether the Consumer Protection Board and public prosecutors shall be regarded as “Class” or “Plaintiff’s Lawyer” pursuant to Section 222/12(5) since they are not the injured person. Consequently, the compensation for Consumer Protection Board and public prosecutors can also raise conflict of interest issue because Section 222/37 of the Civil Procedure Code allows the plaintiff’s

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\* This article is summarized and arranged from the thesis “Class action in Competition Law: the Problems of Counsels for the Plaintiff” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2016.

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lawyer to receive up to 30 percent of the total award received by the plaintiff and its members. However, the governmental officers cannot receive extra compensation other than their salary.

Additionally, the author is also concerned whether Thai legal culture would be able to cope with the influence of the American legal culture of the class action because class action proceedings work best when the individuals involved in the lawsuit are well-equipped with the knowledge and resources necessary for initiating a class action in competition law.

This article will focus on the issues of legal standing of the Consumer Protection Board, the legal standing of Public Prosecutors, and Representation of the Plaintiff by Private Lawyer; and the proposal for solution for those problems to deliver its utmost benefit.

**Keywords:** Competition law, Class action, group litigation, Counsel for the plaintiff, Plaintiff's lawyer

**บทคัดย่อ**

เป็นที่รู้กันโดยทั่วไปว่า แนวความคิดการดำเนินคดีกลุ่มในกฎหมายแข่งขันทางการค้าได้มีการแพร่หลายในระบบกฎหมายหลายประเทศ รวมทั้งประเทศสหรัฐอเมริกาและประเทศในกลุ่มประเทศอียู ซึ่งประเทศดังกล่าวมีการใช้วิธีการดำเนินคดีกลุ่มเสมือนวิธีการดำเนินคดีทั่วไป คดีที่เป็นที่รู้จักและเป็นคดีตัวอย่างสำคัญของการดำเนินคดีกลุ่มในการคดีแข่งขันทางการค้านี้ คือ คดีพิพาทระหว่างบริษัทไมโครซอฟท์กับผู้เสียหาย ผลของคดีนี้ไม่เพียงแต่ขยายความเสียหายต่างๆแก่ผู้เสียหาย, โจทก์ และจำเลยในคดี รวมทั้งผู้เสียหายอื่นๆที่ไม่ได้เข้ามาเป็นคู่ความแต่แรก แต่ยังมีส่วนสนับสนุนให้ผลประโยชน์มหาศาลที่ได้รับในคดีมีผลต่อระบบเศรษฐกิจของประเทศด้วย

ในประเทศไทยนั้น วิธีการดำเนินคดีในคดีกลุ่มในกฎหมายแข่งขันทางการค้ามีผลในทางปฏิบัติตั้งแต่เมื่อมีการแก้ไขเพิ่มเติมประมวลกฎหมายวิธีพิจารณาความแพ่งในปี พ.ศ.2558 แต่อย่างไรก็ตาม บทกฎหมายเกี่ยวกับการดำเนินคดีแบบกลุ่มนี้ยังขาดกระบวนการเฉพาะเพื่อให้มีการบังคับใช้มาตรการทางกฎหมายในการดำเนินคดีให้มีประสิทธิภาพ นอกจากนั้นการฟ้องร้องคดีโดยวิธีการดำเนินคดีแบบกลุ่มนี้ยังไม่เป็นที่แพร่หลาย เห็นได้จากตั้งแต่มีการบังคับใช้กฎหมายดังกล่าวมีเพียงไม่กี่คดีที่ใช้การดำเนินคดีแบบกลุ่ม เพราะวิธีการดำเนินคดีแบบกลุ่มนี้เป็นการวินิจฉัยดำเนินคดีแบบใหม่ที่เกิดขึ้นในประเทศไทย เนื่องหลักการต่างจากวิธีดำเนินคดีแบบปกติและยังมีสาเหตุอื่น ได้แก่ ตัวบทกฎหมายที่บัญญัติรวมทั้งยังไม่มียุทธศาสตร์มาก่อนหน้าประเด็นสำคัญของปัญหาดังกล่าว คือ บุคคลที่ทำหน้าที่เป็นโจทก์ในคดี เพราะบุคคลเหล่านั้นเป็นผู้มีบทบาทอย่างมากในการเริ่มต้นวิธีการดำเนินคดีแบบกลุ่มแทนผู้เสียหายอื่นๆ เนื่องจากตามกฎหมายวิธีพิจารณาความแพ่ง มาตรา 222/1 และมาตรา 222/12(15) กำหนดให้เฉพาะผู้เสียหายเท่านั้นที่มีสิทธิ์ฟ้องคดีต่อศาลเพื่อขอให้ศาลอนุญาตให้การดำเนินคดีกลุ่ม ดังนั้น บทกฎหมายดังกล่าวจึงก่อให้เกิดปัญหาหาองค์กรของรัฐหรือเจ้าหน้าที่ของรัฐ เช่น ในกฎหมายแข่งขันทางการค้านั้น ได้แก่ คณะกรรมการคุ้มครองผู้บริโภค หรือ พนักงานอัยการซึ่งมิใช่ผู้เสียหาย โดยตรงในคดีมีสิทธิ์เริ่มต้นดำเนินคดีแบบกลุ่มแทนผู้เสียหายได้หรือไม่ นอกจากนั้นหากอนุญาตให้คณะกรรมการคุ้มครองผู้บริโภค หรือ พนักงานอัยการเริ่มต้นการดำเนินคดีแบบกลุ่มแล้ว คำร้องว่าทนายความในคดีที่ศาลต้องสั่งให้แก้ทนาย โจทก์นั้นจะก่อให้เกิดความไม่เหมาะสมหรือการขัดกันแห่งผลประโยชน์หรือไม่ เนื่องจากว่าองค์กรของรัฐหรือเจ้าหน้าที่ของรัฐไม่ควรได้รับเงินชดเชยอื่นนอกจากเงินเดือนของตนเองตามหน้าที่

นอกจากนี้ ผู้เขียนยังมีความเห็นต่อไปว่า วิธีการดำเนินคดีแบบกลุ่มในประเทศไทยนั้นได้รับแนวคิดมาจากวัฒนธรรมของกฎหมายประเทศสหรัฐอเมริกา เมื่อนำมาใช้กับวัฒนธรรมกฎหมายของประเทศไทยย่อมทำให้เกิดความเปลี่ยนแปลงทางวัฒนธรรมกฎหมาย ดังนั้นบุคคลที่เกี่ยวข้องกับวิธีการดำเนินคดีแบบกลุ่มนี้จำเป็นต้องมีความรู้และความรู้เท่าทันเพียงพอที่จะเริ่มการดำเนินคดีแบบกลุ่ม โดยเฉพาะกฎหมายแข่งขันทางการค้าที่เกี่ยวข้องกับผลประโยชน์ทางเศรษฐกิจของประเทศ

บทความนี้จะวิเคราะห์ถึงประเด็นของบทบาทของคณะกรรมการคุ้มครองผู้บริโภค, บทบาทของพนักงานอัยการ และ บทบาทของทนายเอกชน ในฐานะทนายของฝ่ายโจทก์ในการเริ่มต้นการดำเนินคดีแบบกลุ่มแทนผู้เสียหายในคดี รวมทั้งข้อเสนอแนะของปัญหาเพื่อที่จะอำนวยความสะดวกสูงสุดเพื่อให้การดำเนินคดีกลุ่มนั้นเกิดประสิทธิผลมากที่สุด

**คำสำคัญ:** กฎหมายแข่งขันทางการค้า, การดำเนินคดีกลุ่ม, ทนายโจทก์

## 1. BACKGROUND OF CLASS ACTION IN COMPETITION LAW

With respect to the characteristics of a competition law case, wrongful actions in the cases often result in several injured parties at issue. In addition, disputes in competition law share the same grounds and evidence from the same wrongful cause of action by the same person. Hence, a class action is available for competition law cases in many countries. A class action is used as a procedural alternative to ensure efficient, rapid and fair proceedings to all persons involved.<sup>1</sup>

In Thailand, the law on class action is a part of an amendment in the Civil Procedure Code of Thailand B.E.2558, Section 222/1-222/49. These provisions provide for new proceedings which allow an individual to file a lawsuit to protect his rights as well as those of others in the case where their claims are based on the same facts and the same provision of law, with no requirement of the power of attorney or prior consent from all plaintiffs. The specific provision which permits class action for competition law case is Section 222/8 of the Civil Procedure Code. The most influential element to class action regulation in Thailand can be found in the fundamental principles of class action litigation in the United States which are prescribed in the Federal Rule of Civil Procedure (Fed. R. Civ. P. 23) Rule 23 which governs civil procedure in United States district (federal) courts<sup>2</sup>.

In comparison, in ordinary litigation each injured party is required to bring a claim before the Courts separately. The traditional proceedings consume a lot of time and resources because the courts must hear witnesses, facts and concerned parties for each case separately. Moreover, if there are any inconsistencies in the judgment between cases involving the same common interests, such inconsistencies can distort the standard of the whole justice system.<sup>3</sup>

However, there has only been a few class action lawsuits based on this class action law due to the lack of specific proceedings to regulate the competition class action lawsuit effectively. The existing proceedings, either from the language of the provisions or in practice, are ambiguous for the injured persons or associations to avail themselves to such proceedings because

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<sup>1</sup> Judge Vichai Ariyanuntaka. 'The analysis on class action in Thailand purposed to Thai Council of state' p.42

<sup>2</sup> Judge Eearn Kunkaew, Class action and Writ of certiorari (Winyuchon, 2016) p. 6

<sup>3</sup> Namtae Meeboonsalang, 'Class action in environment cases' (Master degree, Chulalongkorn University 2004) p.72

the nature of the class action is to allow only private attorney to act as the lead plaintiff in the lawsuits.

## **2. LEGAL PROBLEMS CONCERNING COUNSELS FOR THE PLAINTIFF**

Counsels of the plaintiff, the person representing the plaintiff, plays a crucial role in the commencement of class action proceedings because they are the one gathering evidence, arguing before the court and ensuring that the plaintiffs' rights are protected throughout the entire litigation and after the judgement.<sup>4</sup>

Under the amended Civil Procedure Code, a group of individuals injured by an unfair trade practice is entitled to set up a class action. Pursuant to Section 222/1 and Section 222/8, this group of individuals is regarded as a 'class representative' who has the rights and is authorized to initiate a class action. The roles of these class representatives are very important because they must protect the benefit of all class members. Therefore, it is important to study and understand their roles. In Thailand's class action in competition law case, representation could potentially be done by the Consumer Protection Board, public prosecutors or private attorneys.

Before the amendment of the Civil Procedure Code, the laws allowed the injured person to initiate an action against the defendant for compensation, but it was not efficient. Furthermore, the scope of duties of the Consumer Protection Board and Public Prosecutor were not clearly prescribed. It was unclear whether the Commission and Public Prosecutor were eligible to bring an action against the defendant on behalf of other parties who are injured but have not assigned their authority for any legal proceedings.

The other issue for consideration is whether Thai private attorneys are equipped with the knowledge, skills and experience to handle class action lawsuits which are typically cases with profound implications to various groups of persons. Since the prospect of class action litigation will lead to an out-of-court settlement, this form of litigation is also deemed to be a way to evolve our law system to be more 'American-style-mass-tort litigation'.<sup>5</sup> Thereby, it may still be difficult to find a sufficiently qualified and experienced lawyer to take class action cases because this type of proceeding is relatively

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<sup>4</sup> Ardawat Ingkaranuwat, 'The role of lead counsel for the plaintiff in class action' (Master degree, Durakij Bundit University 2006) p.66

<sup>5</sup> Judge Vichai Ariyanuntaka(n1) p.41

new to most Thai lawyers. Despite the contingent fees incentive of up to 30% of the awarded compensation provided for by the Civil Procedure Code, it is still not able to solve this problem.

Besides, the lawyer's fee awards under Section 222/37 of the Civil Procedure Code, which can be as high as 30% of the award, is intended to incentivize private lawyers to litigate class action lawsuits for a large number of plaintiffs. Therefore, collusion possible and conflict of interest may arise.

### **3. FOREIGN LAWS CONCERNING CLASS ACTION LITIGATION AND LAWSUITS**

The concept of class action in competition law is widely promoted in various legal systems in different countries, including the United States of America and Germany where class action is a common practice.

For the common law countries, the author chooses to do a comparative study of the US law and Thai law because the concept of class action in Thailand is influenced by the Federal Rules of the United State Rule 23. Furthermore, the United States of America is considered a model for many other countries in extensively enacting a law for class action.<sup>6</sup> The United States of America successfully exercises the law on class action, since there are numerous cases that created an economic value in the country and built an approach to lawsuits made by the private sector which is extremely beneficial to many victims at once.

There were well-known and significant class action lawsuits against Microsoft which not only resulted in recoveries for all parties including the plaintiff, the defendant and other involved persons but also contributed great benefits to the economy of the country.

In *United States v. Microsoft Corporation* (2001), the plaintiff accused Microsoft of abusing its monopoly powers on operating system and web browser sales of Intel-based personal computers. The company was accused of disallowing competition in the web browsers' market as it used the technique of combining its web browser (Internet Explorer) with its software which was installed in all of Windows products.<sup>7</sup> Microsoft was found to violate Sections

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<sup>6</sup> Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* (Second Edition, Legal Text Series, Times Mirror Boaks 2004) p.110

<sup>7</sup> 'U.S V.S Microsoft : the overview; U.S. judges says Microsoft violated antitrust laws with predatory behavior' ( The New York time, 4 April 2000) <



1 and 2 of the Sherman Antitrust Act. This was followed by the ‘remedy’ through the court ordering a breakup of Microsoft into two separate units – one to produce the operating system and another for producing software components. According to the settlement, Microsoft had to distribute \$1.1 billion in the coupon to eligible consumers and businesses in which they could redeem after purchasing computers (or similar types of electronics) made by any manufacturer.<sup>8</sup> Since then, class action lawsuits have been litigated in competition law. Three Floridian men filed a class action case against Microsoft claiming that it had “coerced” them into “unintentional” upgrades to Windows 10 and that this update damaged their PCs resulting in loss of time and money which violated laws regarding unsolicited electronic advertisements as well as Federal Trade Commission prohibitions on deceptive and unfair practices.

For the civil law countries, the author had studied German class action law. Germany does not have any general law that allows for class action; i.e. class action can only be litigated under certain specific law.<sup>9</sup> However, Germany is notable for having a legal measure that can protect several persons whose rights have been infringed from the same set of facts or laws. Consequently, civil class action lawsuits can be initiated by an organization for the public interest, such as the Chamber of Industry, trade associations, consumer associations, etc. These organizations can initiate the class action lawsuit on behalf of the injured individual, which will be considered as class action lawsuits made by state agencies.

For example, the case between European Commission (2004) and (2007) vs Microsoft Corp., the Commission found that Microsoft refusing to supply competitors in the work group server operating system market interface information necessary for their product. Also, Microsoft harmed competitors by making Windows Media Player and Windows PC operating system inseparable. For this matter, Microsoft distributed €497 million for violating its market power in the European countries.<sup>10</sup>

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<http://www.nytimes.com/2000/04/04/business/us-vs-microsoft-overview-us-judge-says-microsoft-violated-antitrust-laws-with.html> > accessed 21 October 2016

<sup>8</sup> Ibid

<sup>9</sup> Harald Koch, Group and Representative Action in West German Civil Procedure (Erik Jayme, Ed 1990) p.232

<sup>10</sup> European Commission, Legal service document (2007)  
<[http://ec.europa.eu/dgs/legal\\_service/arrets/04t201\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/04t201_en.pdf)>

#### **4. ANALYSIS ON THE PROBLEMS OF CLASS ACTION IN COMPETITION LAW IN THAILAND**

The nature of the competition law's class action is that a single wrongful act can affect a large number of people and cause economic and social damage. The use of a class action in competition law cases in other jurisdictions tends to lead to changes in several aspects. A concrete analysis of the use of class action proceedings in competition law would greatly benefit Thailand. Since there is no clear provision empowering the public agencies to initiate a class action, the question is whether it is appropriate for public agencies to be involved and represent the plaintiff in class actions.<sup>11</sup> The person representing the plaintiff plays a crucial role in the commencement of class action proceedings. In Thailand's case, representation for class action in competition law could potentially be done by the Consumer Protection Board, public prosecutors or private lawyers.

##### **4.1 Legal standing of the Consumer Protection Board**

The Consumer Protection Board or associations responsible for public enforcement in this area of law is under Section 40 paragraph 2 of Trade Competition Act B.E. 2542, this gives them legal standing to bring a claim on behalf of a consumer or member of such associations.<sup>12</sup>

However, class action is a process whereby one representative of a group of individuals, who claims and shares the same set of facts and points of law, brings a case before the court. Insofar as competition law cases may be proceeded by class action proceedings, there is still ambiguity as to who can be a representative in class action in competition law cases as the Competition Act grants legal standing to both private persons and public bodies such as the Consumer Protection Board and associations.

In cases brought under EU competition law, class actions may be brought by the European Commission, which is a public body. The idea of allowing one individual to become a representative in civil law proceedings for a dispute which affects the general public or a large number of people and which concerns the public interests, is not native to the civil law tradition where it is viewed that it is more suitable for the state to handle such cases than

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<sup>11</sup> Ardawat Ingkaranuwat(n4) p.130

<sup>12</sup> Section 40 paragraph2 of Trade Competition Act B.E. 2542, In bringing an action for damages pursuant to paragraph one, the Consumer Protection Board or associations recognised under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations, as the case may be.

private individuals, usually by establishing a body whose objective is to act for the benefit of the public. Accordingly, the Consumer Protection Board is empowered by European regulations to act as the representative to bring cases on behalf of consumers or its associated members.<sup>13</sup>

Nevertheless, there are aspects of Thai class action proceedings which differ from the class action under EU law as follows.

(1) The Origin of Thai class action proceedings

Thai class action proceedings are based on the class action proceedings under the Federal Rule of Civil Procedure of the US, the jurisdiction which is acknowledged by countries of both civil and common law traditions as the model for private enforcement in class action litigation and the main influence for Thai class action law.<sup>14</sup>

(2) The definition of 'class' in the Civil Procedure Code

Section 222/1 defines 'classes as persons who have the same rights on the basis of the same facts and points of law. The lead plaintiff or class representative is the class member in whose name the case is brought before the court and who represents all members of the class in a class action.'<sup>15</sup>

(3) No clear provision empowering the Consumer Protection Board or associations to initiate a class action

The class action provisions in the Civil Procedure Code do not mention the Consumer Protection Board or associations under consumer protection law, which are bodies, granted standing to bring an action on behalf of a consumer or member of association pursuant to section 40 of the Competition Act B.E.2542.<sup>16</sup>

For this issue, the author views that the Consumer Protection Board should be allowed to act as the lead plaintiff in class actions in competition law matters because the wrongful act in disputes in this area of law tends to directly affect the rights of a large number of injured persons and have impact on consumers generally and the country as a whole<sup>17</sup>. Such a state agency as the Consumer Protection Board should be able to participate in these actions in

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<sup>13</sup> Christian Ahlborn\* David S. Evans 'The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe' (2004) <[http://ist-socrates.berkeley.edu/~scotch/DigitalAntitrust/Ahlborn\\_Evans.pdf](http://ist-socrates.berkeley.edu/~scotch/DigitalAntitrust/Ahlborn_Evans.pdf)>

<sup>14</sup> Rachata Boonsinsuk, 'The class action in civil law and common law system' (Master degree, Chulalongkorn university 2002) p.37

<sup>15</sup> Korravee Sungvoravongsa, 'Class action for Initial Public Offering of Securities' (Master degree, Durakij Bundit University 1999) p.88

<sup>16</sup> Judge Vichai Ariyanuntaka(n.1) p.73

<sup>17</sup> Korravee Sungvoravongsa(n15) p.47

competition law, because their functions include powers to act in competition lawsuits under Section 40 of the Competition Act B.E. 2542, even though the involvement of the state in class actions may not be compatible with the purpose of class actions.

In addition, the Consumer Protection Board should get involved and support class action lawsuits from the beginning since the practice is still relatively new to Thailand and its concept and procedures are different from procedures for other cases. Public and private sectors with the capability, strength and knowledge should contribute to the society and economy. Therefore, the Board and associations should be able to pursue actions without requiring power of attorney from all injured persons of the class.

Class action lawsuits prosecuted by the Consumer Protection Board is time-consuming and expensive. Therefore, it should be appropriate for the court to determine the lawyers' fee awards by taking into account the duty of the organization, as well as the cost spent in prosecuting the case in order to return the appropriate amount to the government by amending the Civil Procedure Code or issuing the Supreme Court's regulation of the class action. For example, "In case the plaintiff or the plaintiff's lawyer is a state agency, in determining the award of the lawyer fees, the court shall take into account the role of such state agencies or state officials and the cost of the proceeding, in which the government has to pay. Then order reimbursement to the government for such appropriate amount"

#### **4.2 Legal standing of Public Prosecutors**

The main influence for class action proceedings in Thailand comes from the United States class action. In the United States, representation is done by private lawyers in accordance with the Federal Rules of Civil Procedure (FRCP). These private lawyers receive a huge sum of remuneration from the class members. The question is whether it is appropriate for public prosecutors who are public officials to be involved and represent the plaintiff in class actions.

There are two opposing views on this issue. The first view considers that public prosecutors should not be permitted to sue on behalf of the plaintiff in class action cases as it would not be consistent with the purpose of class action proceedings and the role of public prosecutors, taking into account the lucrative remuneration of up to 30% of the compensation paid to the class members for plaintiff's attorneys. The rationale for high fees in class action

cases is based on the idea that it would provide an incentive for private attorneys to take the case.<sup>18</sup>

To support this opinion, according to *United States v. Microsoft Corporation*, the counsel of plaintiff who is a private attorney makes an investment to bring civil action to the Court. The expenses also includes witness and court fee incentives to class action litigations that are attorney's fee and the alarming expense of class action damages which would be worth 'investing' for the plaintiff.

On the other hand, the second view holds that public prosecutors should be permitted to the class action. Thai public prosecutors' role is to provide assistance to citizens and recent developments in their role include involvement in civil proceedings, either as the plaintiff on behalf of the state or on behalf of the injured private citizens.<sup>19</sup>

Especially since Thai public prosecutors now have legal standing to bring a case before the court in the areas of consumer protection, environmental law and competition law. In the area of consumer protection law, public prosecutors are consumer protection officials pursuant under Public Prosecution Organization and Public Prosecutors Act and the Consumer Protection Act B.E. 2522; accordingly, private attorneys are not required to be appointed in these proceedings<sup>20</sup>

The class actions against Trump University are recent United States examples which lend support to this view. In those cases, the attorney general was appointed to represent the plaintiffs and this differed from the typical class action case where the plaintiffs are represented by private attorneys. There are reasons to support the participation of public prosecutors in class actions as the main objective of their functions is to protect the public interest. As regards the issue of contingency fees, it is possible for public prosecutors to waive their fees in class action cases. In Trump University cases, the defendant, Donald

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<sup>18</sup> Ardawat Ingkaranuwat(n4)p.132

<sup>19</sup> Watcharee Sutarai. Public 'prosecutor in the capacity of lead counsel for the plaintiff in class action : a study in consumer protection law and environmental law', ( Master degree, Durakij Bundit University, 2009) p.133

<sup>20</sup> Nisakorn nisitteeraard, 'New approach of case management regarding environmental issues : class action' (Master degree, Thammasat University 2010) p.57

Trump, agreed to settle the three class action suits, one in New York and two in California, with \$25 million compensation for the plaintiffs.<sup>21</sup>

For this argument, the author views that Thai legal culture and class action litigation are different from the proceedings of the normal litigation. For the same reason, Thai public prosecutors can act in consumer protection cases to protect the public interests. The participation of public prosecutor does not necessarily entail any amendment to the Competition Act B.E. 2542 or insertion of the definition of Plaintiff's Attorney including the public prosecutor who performs the duty in the provisions on class action proceedings in the Civil Procedure Code because the existing wording in the latter refers to which would be sufficient.<sup>22</sup>

However, the issue of contingent fee prosecution by public prosecutors should be specified in the legislation as the attorney's fees since it is inappropriate for public prosecutors to profit from this reward as it is their duty to protect the public's interest. For this reason, the Public Prosecution Organization and Public Prosecutors Act B.E. 2553 should provide public prosecutors with specific powers and duties in relation to class action proceedings and should require them to waive any contingency fees.

Additionally, although the prosecution of class action lawsuits by prosecutor aids and protects the public interest, the cost of such prosecution is very high, thus costing the lawyer's money and time. To combat this problem, the Civil Procedure Code should be amended, or the Supreme Court's regulation should be enacted to clearly state as follow:

“In case the plaintiff or the plaintiff's lawyer is a state agency, in determining the award of the lawyer fees, the court shall take into account the role of such state agencies or state officials and the cost of the proceeding, in which the government has to pay. Then order reimbursement to the government for such appropriate amount”.

This amendment of the Civil Procedure Code or issuance of the Supreme Court's regulation will create fairness to both public prosecutors and other state agencies, who must represent the plaintiff in the class action, which affects the public sector.

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<sup>21</sup> Trump settles Trump university lawsuits for \$25M' ( BBC news, 19 Nov 2016) <<http://www.bbc.com/news/world-us-canada-38021820>> accessd 1 December 2016

<sup>22</sup> Watcharee Sutarai(n19)p.152

### 4.3 Representation of the Plaintiff by Private Lawyer

The lawyer's fee awards under Section 222/37 of the Civil Procedure Code, which can be as high as 30% of the award, is intended to incentivize private lawyers to litigate class action lawsuits for a large number of plaintiffs.<sup>23</sup> It is shown that class action lawsuits require plaintiff's lawyers that are more skillful than regular lawyers. Also, class action lawsuit incurs many expenses from pre-class action in gathering of evidence, which requires high expertise and perseverance of the plaintiff's lawyers.<sup>24</sup>

This may raise issues of lawyers' collusion and lawyers trying to get benefit from the lawsuit. The collusion in class action lawsuit is more complicated than the regular cases as there are many key parties involved. For example, group representative, group members' lawyers, unnamed group members, the defendant, defendants' lawyers, persons who refuse to compromise and the court. In this case, the group members' lawyers and defendants' lawyers may agree not to compromise for the utmost benefits of the group members because the defendant wants to pay the compensation as less as possible and the plaintiff lawyers want to receive the highest lawyers' fee.<sup>25</sup> Consequently, the group members will only receive a small amount of money from the settlement agreement.

In the United States, when the court concerns about the collusion issue, the court settles the case through "coupon settlement" system instead of a monetary settlement. This is regardless whether the court rules that the lawyers

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<sup>23</sup> Section 223/37 of the Civil Procedure Code, The Court is to set the amount of money awarded by the defendant to the lawyer for plaintiff in case where the Court's judgement orders defendant to act, omit to act or transfer property. In order to determine the appropriate amount, the Court must take in to account the difficulty of the case, the amount of time taken and work ethics of the lawyer for plaintiff, as well as the cost of class action proceeding. This is not inclusive of the fee that the plaintiff's lawyer has expended. For this purpose, an account of the aforementioned expenses must be submitted to the Court and a copy of it to the defendant at the end of the Court proceedings.

If the Court judgement is for defendant to pay monetary compensation, the Court must consider the criteria as well as calculate the amount that the plaintiff and members of the class action proceeding are entitled to receive in percentage of the monetary compensation amount but the amount of money awarded to the lawyer of plaintiff must not exceed 30% of that amount.

<sup>24</sup> Prof. Phiroj Wayuphap, *The explanation on civil procedure (Class action)*, (Siam publishing, 2016) p.74

<sup>25</sup> Judge Vichai Ariyanuntaka(n1) p.114

conduct is unethical or not. When the court does not have sufficient information about the group, and cannot efficiently verify the collusion or unethical conduct of the lawyers, the court will not allow monetary settlement. According to the settlement of *United States v. Microsoft Corporation (2001)*, the suffered consumers and businesses will be given coupons worth \$1.1billion in total by Microsoft to redeem for cash when buying computers, peripheral computer hardware or computer software produced by any company.<sup>26</sup>

In order to prevent collusion between the plaintiffs' lawyers and the defendant or the defendant's lawyers, one of the most effective methods is to allow the court to examine the settlement between the plaintiff's lawyers and the defendant to ensure equality and fairness to both parties. This includes the content, method and the defendant's payment method regarding the substance, procedure, and payment by the defendant. The court will exercise its power as a representative of the government, which means the court shall have a supervising function from the beginning of the case until post-judgment. For example the court has a discretion whether to certify the class or not, and when the judgment has been made, the court must ensure that the parties perform their duties in accordance with the settlement agreement by issuing notifications at every important step of the process pursuant to Section 222/1 to Section 222/49 of the Civil Procedure Code regarding class action lawsuits empowers the court with supervising authority as if the court is exercising its power in place of the government.<sup>27</sup>

Apart from the above issues, the author views that to develop legal profession such as lawyers, Judges, Public prosecutors, State agencies and persons is crucial because the introduction of the class action proceedings in the Civil Procedure Code presents Thailand with an opportunity to reshape the legal environment for competition cases, the economy and society as a whole. By providing support and training to private lawyers who will be the key actor in this area, the state would benefit greatly from the potential success of class action cases following a prompt and effective adoption of the new procedure by the concerned parties.

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<sup>26</sup> Paul H. Alvarado, 'Coordination Proceedings Special Title Rule', [2004] Cal. 1550b Super. Lexis 262

<sup>27</sup> Judge Eearn Kunkaew(n2) p. 58



## 5. CONCLUSION AND RECOMMENDATIONS

Class action in competition law litigation will help increase the efficiency of the justice system for the people because it could protect a large number of victims in one single lawsuit. This is beneficial especially for those victims who cannot file a lawsuit to seek remedies for themselves or for those victims who suffer from minor injuries. Thus, class actions create opportunities in the society, including cases that have tremendous economic value. Additionally, class actions saves time and cost, avoid repetition of cases, prevent conflicts of judgments and effectively reduce the number of cases in the court.

The role of plaintiff's lawyer is crucial for the success of class action lawsuits. However, there is a controversial issue in term of who can initiate the class action lawsuit. For instance, whether or not a class action can be utilized by state agencies or state officials' class action lawsuits since the concept of class action in Thailand is influenced by the Federal Rules of the United State Rule 23. The private sector in the United States is strong and can bring class action lawsuit to the court. In Thailand, organizations or state officials are the ones assisting the public. There are not many private lawyers who have represented a large number of injured persons. Thus, there are problems in applying the American legal concept to the Thai law.

The prospect of class action litigation will lead to an out-of-court settlement. This form of litigation is also deemed to be a way to evolve our legal system to be more American-style-mass-tort litigation. Counsel for the plaintiff who will take this role should have a better understanding of both American and Thai cultures, which can conflict with each other.

The understanding of legal professions' role is the solution for competition laws' class action issues. Especially if the plaintiffs' counsel or the persons representing the plaintiff plays a crucial role in the commencement of class action proceedings. Under Thai legal system, it would be wise to allow the Consumer Protection Board or the public prosecutor to initiate a competition class action and be the lead counsel for the plaintiff. This approach would allow the class action to be an effective measure for the protection of stakeholders' rights. Nevertheless, an amendment to the existing law or issuance of additional rules is also essential for the development of competition class action in Thailand.

The Competition Commission, the Consumer Protection Board or Government Associations is entitled to initiate the case on behalf of consumers or members of the association pursuant to Section 40 of the Competition Act. Therefore, the power of Consumer Protection Board to initiate a competition class action should also be expressly written in the law.

Public prosecutors can be a part of the class action in competition law since public prosecutors should participate in the prosecution that relates to the state's interests and affect a large number of individuals. There should be no limitation to the public prosecutors' power in this matter.

The lead plaintiff's lawyer is substantially vital since he or she is the person who gathers information for the case based on the same facts and provisions of laws as well as gathering evidence and carrying out the entire litigation process.

In addition to the authority of public agencies or public officials, which should be expressly provided in the law, the waiver of lawyer's fee awards according to the Civil Procedure Code is also a critical issue which must be expressly specified in the law as well. This is because such high awards are intended to attract private lawyers to represent the groups. As such, the state agencies or state officials whose duties are to protect the benefit of the public sector shall not need to be incentivized by this high lawyer's fee award. It is unreasonable and not transparent if the waiver of this particular fee is not expressly provided in the law and state agencies received this award. The Consumer Protection Board and public prosecutors must also waive the lawyers' fee awards before joining competition class action lawsuits.

However, In filing the class action lawsuit, state agencies ie. Consumer Protection Commission and Public prosecutor must collect evidence, gather members, send notice to the members, implement and enforce the judgment of the court. Therefore, it should propose ideas about monetary award for lawyers and costs for State Organization that is involved with the class action proceeding by amending the Civil Procedure Code or issuing the Supreme Court's regulation of the class action.

To prevent the problems collusion and out-of-court settlement, class action proceeding should be inspected by the court. According to Section 222/1 to Section 222/49 of the Civil Procedure Code regarding class action, the court considers whether the request of the plaintiff is in accordance with the conditions in order for the court to issue an order to proceed with class action and must send notices and make an announcement to individuals in the group

as members of the group immediately. When the final judgment has been made, the process of issuing the notification of the judgment is crucial. The court shall notify the judgment to group members by the same method specified in the notification of the allowance of class action lawsuit made to such group members. Including, announcing such judgment in daily newspaper ubiquitously for three consecutive days. Thus, the authority of the court to govern is as if the court is exercising its power in place of the government.

Other recommendations to deliver class action to its utmost benefit relates to the state continuously improving knowledge, qualifications, professionalism and experience in class action cases to Thai legal profession. This can be done through the methods of promoting courses like complex litigation and class action in law school; imposing the basic qualifications and suitability of a potential lawyer for initiation class action lawsuits; and providing training or raising awareness and understanding of law users and ordinary individuals about class action lawsuits is also encouraged and shall be supported.

## References

### Books

Ardhawatt Ingkaranuwat. "The role of lead counsel for the plaintiff in class action." Master's thesis, Faculty of law Durakij Bundit University, 2006.

Judge Eearn Kunkaew. "Class action and Writ of certiorari." Winyuchon, 2016

Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure*.

Second Edition. Legal Text Series. Times Mirror Books. 2004.

Harald Koch, *Group and Representative Action in West German Civil Procedure*.

Erik Jayme. Ed 1990.

Korravee Sonvoravongsa. "Class action for Initial Public Offering of Securities." Master's thesis, Durakij Bundit University, 1999.

Namtai Meeboonsalang. "Class action in environment cases" Master's thesis, Faculty of law Chulalongkorn University, 2004

Prof. Phiroj Wayuphap. "The explanation on civil procedure (Class action)." Siam publishing, 2016.)

Wancharee Sutarai. "Public prosecutor in the capacity of lead counsel for the plaintiff in class action: a study in consumer protection law and environmental law." Master's thesis, Durakij Bundit University, 2009.

### Articles

Edward H. Cooper. "Class action advice in the form of question" (2006)

Duke Journal of Comparative & International Law, vol.2

Judge Vichai Ariyanuntaka, the analysis on Class action litigation purposed to Thai council state

### Other Materials

European Commission, Legal service document (2007)

<[http://ec.europa.eu/dgs/legal\\_service/arrets/04t201\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/04t201_en.pdf)>

Paul H. Alvarado, "Coordination Proceedings Special Title Rule", (2004) Cal. 1550b

Super. LEXIS 262

<<http://advance.lexis.com/document/?pdmfid=1000516&crd=12c1ee9b-4c51-4389-9c9705f451adc4c8&pddoc=%2F>>, accessed 12 November 2017>

Trump settles Trump University lawsuits for \$25M (BBC News, 19 Nov 2016)

<<http://www.bbc.com/news/world-us-canada-38021820>> accessed 1 December 2016 >