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AIM AND SCOPE

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EDITOR'S NOTE

In the previous volume, I paid my concern on the 'publish or perish' and questioned why the Thai regulation requires any master's degree students to publish their thesis in a journal.¹ One may claim that more publications correlate to high university ranking. However, I will not argue on this point because I firmly believe that regulators pay more attention to the quality of a graduate than ranking.

With this argument on ranking in mind, thereafter, I checked graduation criteria of top 10 law schools ranked by the QS World University Rankings by Subject in 2019.² Among these law schools, six are in the United States, three are in the United Kingdom, and one is in Australia. In the United States, Harvard University, ranked first by the QS, does not require any LL.M. student to write a thesis.³ Thus, there is no requirement for publishing master's degree student's work into a scholarly article. Neither Yale University nor Stanford University obliges their LL.M. candidates with the publication requirement.⁴ While the University of California, Berkeley, Columbia University, and New York University have a so-called thesis option for LL.M. candidates, none of them further binds a

¹ Lalin Kovudhikulrungsri, 'Editor's Note' (2018) 8 *Thammasat Business Law Journal* <<https://www.tci-thaijo.org/index.php/TBLJ/issue/view/9516/Thammasat%20Business%20Law%20Journal%20Vol.8%2018%20Editor%E2%80%99s%20Note>> accessed 29 November 2019.

² Sabrina Collier, 'Top Law Schools in 2019' (*Top Universities*, 27 February 2019) <<https://www.topuniversities.com/university-rankings-articles/university-subject-rankings/top-law-schools-2019>> accessed 29 November 2019.

³ Harvard Law School Graduate Program, 'HLS Graduate Program Handbook 2019-2020' (*Harvard Law School*) <<https://hls.harvard.edu/content/uploads/2019/08/HLS-Graduate-Program-Handbook-2019-2020.pdf>> accessed 29 November 2019.

⁴ Yale Law School, 'Yale Law School 2019-2020' (*Yale Law School*, 10 August 2019) <<https://bulletin.yale.edu/sites/default/files/yale-law-school-2019-2020.pdf>> accessed 29 November 2019; Stanford Law School, 'Student Handbook 2018-2019' (*Stanford Law School*) <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/11/StudentHandbook_v05-2018-19.pdf> accessed 29 November 2019.

publication of a thesis as a condition to graduate.⁵ Traveling across the Atlantic to the United Kingdom, there is no requirement to publish a dissertation on any journal, let alone an indexed or non-indexed one.⁶ For the Melbourne Law School, there is a minor thesis option. Similar to their counterparts in the United States and the United Kingdom, the Melbourne Law School does not force their LL.M. candidates to publish any piece in a learned legal journal.⁷ This comes to my conclusion that top law schools do not command their LL.M. candidates to publish their writing in any journal.

I must admit the limitation of my mini-research that I did not check other disciplines because of my capacity as a law lecturer and the editor to *Thammasat Business Law Journal*. I aim to focus on the graduation criteria in legal study. If a publication is considered necessary in other sciences, I do not mind that requirement. However, what I try to demonstrate is that in a master's degree study in law, publication in an indexed journal is not a primary requirement. Therefore, a one-size rule does not fit all.

This volume is again published on time, and I am able to spare time to search for an answer mentioned in the previous paragraphs. These could not

⁵ UC Berkeley School of Law, 'LL.M. Thesis Track, Courses' (*Berkeley Law, University of California*) <<https://www.law.berkeley.edu/academics/lm/ll-m-thesis-track/courses/>> accessed 29 November 2019; Columbia Law School, 'Supervised Research, the LL.M. Essay, and Assistantship Credits' (*Columbia Law School*) <<https://www.law.columbia.edu/students/graduate-legal-studies/llm-degree-requirements/supervised-research-and-llm-essay>> accessed 29 November 2019; Columbia Law School, 'LL.M. Writing Project Requirement' (*Columbia Law School*) <<https://www.law.columbia.edu/students/graduate-legal-studies/llm-degree-requirements/llm-writing-project-requirement>> accessed 29 November 2019; NYU School of Law Graduate Division, 'LL.M Student Handbook 2019-20' (*NYU School of Law*) <<https://www.law.nyu.edu/sites/default/files/llm-handbook.pdf>> accessed 29 November 2019.

⁶ The Cambridge LLM, 'LLM Programme, Teaching and Assessment' (*Faculty of Law, University of Cambridge*) <<https://www.llm.law.cam.ac.uk/about-the-cambridge-llm-programme/teaching-and-assessment.html>> accessed 29 November 2019; University of Oxford, 'Magister Juris' (*University of Oxford*, 7 October 2019) <<https://www.ox.ac.uk/admissions/graduate/courses/magister-juris?wssl=1;> <<http://www.lse.ac.uk/law/Assets/Documents/llm/LLM-Student-Handbook-2018-19.pdf>> accessed 29 November 2019.

⁷ Melbourne Law School, 'Minor Thesis option' (*The University of Melbourne*) <<https://law.unimelb.edu.au/students/masters/studies/minor-thesis-option>> accessed 29 November 2019.

happen without the support of scholars, the Advisory Board, the Editorial Board, the Manager, and the Managerial Staff. I, as the editor, would like to thank all of them for their unconditional contribution and their continuous works.

Lalin Kovudhikulrungsri

Editor-in-Chief

Thammasat University

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THE IMPACT OF ACCESSION TO THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS ON THAI LAW AND PRACTICE^{*}

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Abstract

The Hague Convention on Choice of Court Agreements aims at promoting the validity of exclusive jurisdiction clauses in international civil and commercial contracts as well as facilitating the recognition and enforcement of judgments rendered by the chosen court in all Contracting States to the Convention. To date, Thailand has not yet signed this Convention, and it still applies its domestic law and judicial practice to examine the validity of choice of court agreements as well as recognise and enforce foreign judgments; nonetheless, comparing to the Convention, Thailand's existing legal regime does not set out specific rules governing the relevant issues, which gives rise to the legal uncertainty to foreign enterprises whether their choice of court forum agreement and the judgment pursuant to such an agreement would be recognized by the Thai court.

Because of the aforesaid problem, this article explores whether Thailand should become a Contracting Party to the Convention and whether such an accession will have any impact on Thailand's current law

^{*} This article is summarised and rearranged from the research "The Impact of Accession to the Hague Convention on Choice of Court Agreements on Thai Law and Practice", Faculty of Law, Fudan University, 2018.

and practice. This article finds that although Thailand's current legal regime is somewhat incompatible with some provisions of the Convention, it should still accede to the Convention by making declarations accordingly so that it will not be bound by those provisions of the Convention, which will enable the Thai court to apply a uniform and internationalized rule without conflicting with its current law and practice.

Keywords: Accession, the Hague Convention on Choice of Court Agreements, the Validity of Choice of Court Agreements, Recognition and Enforcement of Foreign Judgments, Thailand

1. Introduction

The Hague Convention of 30 June 2005 on Choice of Court Agreements (“the Convention”) aims to promote parties’ choice of court in international civil and commercial contracts, which ensures that the forum selection clause designating an exclusive court to adjudicate the dispute between parties is recognised in the chosen court and in any unchosen court of a Contracting State to the Convention. Furthermore, the Convention also provides legal certainty to affirm that judgments obtained pursuant to the choice of court agreements become enforceable in other Contracting States.¹ To date, there are 35 Contracting Parties to the Convention.

Currently, Thailand has not yet become a Contracting Party to the Convention.² In this light, Thailand still applies its domestic law and judicial practice to examine the validity of the choice of court clauses as well as recognise and enforce judgments rendered by foreign courts, which gives rise to concerns whether the current legal framework of Thailand provides explicit rules for dealing with the examination of the validity of jurisdiction clauses entered into by the parties in international commercial contracts and the recognition and enforcement of judgments rendered by the chosen court in accordance with parties’ choice.

In consideration of the aforesaid issues, it gives rise to a concern whether the current regulatory framework of Thailand is in support of its ‘Thailand 4.0 policy’,³ and the ‘Eastern Economic Corridor (“EEC”)’ project⁴

¹ William J. JR Woodward, ‘Saving The Hague Choice of Court Convention’ (2014) Penn Law: Legal Scholarship Repository 664-665 <<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1170&context=jil>> accessed 25 October 2018

² Hague Convention on Private International Law, ‘Status Table of the Hague Convention of 30 June 2005 on Choice of Court Agreements’ <www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 25 October 2018

³ BOI of North America’s Blog, ‘Government of Thailand Announces New 4.0 Investment Attraction Policies’ <<http://thinkasiainvestthailand.com/boiblog/index>>

aiming to attract more foreign investments into the country. However, in order to attract more foreign investments under those schemes, Thailand's current regulatory framework should be conducive to promoting those international commercial activities, and that being said, Thailand should consider to become a Contracting State to the Convention in order to promote its legal regime to become more internationalized and create a business-friendly regulatory environment for foreign investors.

Consequently, this paper will mainly analyse the legal impact of the Convention on Thailand's existing legal regime in the event that Thailand decides to accede to the Convention. The analysis will focus on whether the provisions of the Convention are consistent or conflict with the existing law and practice of Thailand. For any inconsistency between the provisions of the Convention and Thailand's current legal regime, this paper will propose Thailand to make declarations accordingly so that the application of the Convention will be compatible with its current legal regime.

2. Thailand's Current Legal Regime Governing the Validity of Choice of Court Agreements and Recognition and Enforcement of Foreign judgments

2.1 The Validity of Choice of Court Agreements

In regard to the examining the validity of choice of court agreement under Thailand's current legal regime, the current Civil Procedure Code of Thailand ("Thai CPC")⁵ does not lay down specific rules governing this issue. However, when the original version of Thai CPC came into effect on 1 October 1935, its Section 7 (4) expressly granted the parties to choose a

php/40-government-of-thailand-announces-new-4-0-investment-attraction-policies>
accessed 25 October 2018

⁴ Easter Economic Corridor Office, 'Investing in the EEC' <<https://www.eeco.or.th/en/content/investing-eec>> accessed 25 October 2018

⁵ Civil Procedure Code B.E. 2477 (1934)

court jurisdiction to adjudicate their disputes.⁶ Nonetheless, upon the 1934 version of Thai CPC was amended in 1991, the content of Section 7 (4) was entirely removed from the 1991 version,⁷ and such amendment has resulted in the current version of Thai CPC to be silent on what elements are required in order for a jurisdiction clause to be valid under Thai law.

At present, there are three different Thai laws containing inconclusive provisions related to governing the validity of choice of court agreement including Civil and Commercial Code (“Thai CCC”),⁸ Conflict of Laws Act,⁹ and Unfair Contract Terms Act.¹⁰ According to the general principle of Thai CCC, it stipulates that an act is void if its purpose is explicitly prohibited by law or is contrary to public order or good morals.¹¹ This principle was referred by the Thai Supreme Court (“the Court”) in the case no. 951/2539 (1996 A.D.). Upon the Court in this case examined the validity of a choice of court agreement involving an international commercial case, it decided that the forum selection agreement as stated in the bill of lading by choosing a UK court to adjudicate disputes arising from the international carriage service was invalid since none of parties to the contract had domicile in the UK. Furthermore, the Court ruled that the choice of court clause was deemed to be contrary to Section 4 (1) of Thai CPC, which merely allowed the parties to file a claim to the court where the defendant had domicile or where the cause of action arose, and when

⁶ Kanokluck Amornworawit, Panha Thangkotmai Waduai Khotoklonglueaksan Nai Sanyathurakit Kankharahwangprathet [Legal Problems Concerning Choice of Court Agreement in International Business Contract] (Masters of Law Degree Thesis, Thammasat University 2009) (กนกลักษณ์ อมรรววิทย์, ปัญหาทางกฎหมายว่าด้วยข้อตกลงเลือกศาลในสัญญาธุรกิจการค้าระหว่างประเทศ) (วิทยานิพนธ์ปริญญามหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2552)

⁷ *ibid*

⁸ Civil and Commercial Code B.E. 2468 (1925)

⁹ Conflict of Laws Act B.E. 2481 (1938)

¹⁰ Unfair Contract Terms Act B.E. 2540 (1997)

¹¹ Civil and Commercial Code B.E. 2468 (1925), s 150

parties entered into a choice of court agreement that conflicts with Section 4 (1) of Thai CPC, such an act was considered to violate public order; hence, the forum selection agreement was void.¹² In consideration of the Court's ruling in this case, it can be deemed that when a Thai court examines the validity of a choice of court agreement, one of principles to be applied is that a legal act or agreement of the parties must not violate law or contradict public order or morals.

In addition, Thailand's Conflict of Laws Act sets forth that if there is no any other Thai law applicable to matters involving the conflict of law issues, the private international law shall apply.¹³ However, it is unclear whether this provision has been applied by the Thai court in practice. In regard to the Thai Supreme Court's decision in case no. 3537/2546 (2003 A.D.), the Court in this case did refer that the parties' choice of court agreement designating a court of Singapore to assert jurisdiction over their disputes was valid in accordance with the 'principle of private international law'. Nevertheless, the Court did not expressly state whether its decision was based on the section 3 of Conflict of Laws Act. In addition, the Court in this case further ruled that since the choice of court clause did not expressly designate the court of Singapore as an exclusive jurisdiction; thus, it could be deemed that the parties in this case were still entitled to file their claim to the Thai court as another competent jurisdiction.¹⁴

In regard to the aforementioned case, it can be implied that if parties in international commercial contracts select a foreign court to adjudicate their dispute without specifying such a court as an exclusive jurisdiction, the Thai court is unlikely to dismiss the claim submitted to its jurisdiction. In this light, unlike the practice of the countries with common law systems, the Thai court still exercises its jurisdiction over the dispute

¹² The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) <<https://deka.in.th/view-3853.html>> accessed 26 October 2018

¹³ Conflict of Laws Act B.E. 2481 (1938), s 3

¹⁴ The Decision of the Thai Supreme Court no. 3537/2546 (2003 A.D.) <<https://deka.in.th/view-50331.html>> accessed 26 October 2018

although parties' claim may fall under the basic principles of private international law including a case has already been submitted to another jurisdiction pursuant to 'lis alibi pendens' principle, or a case should be heard by another appropriate forum according to 'forum non conveniens' principle. Additionally, in comparison to the Court's decision no. 951/2539 (1996 A.D.), it can be observed from the Court's ruling in this case that the Court did not consider the forum selection clause had violated public order, but rather recognised the parties' choice pursuant to the party autonomy doctrine.

Nevertheless, in regard to the ruling of this Court, an interesting point to be raised here is the question whether a Thai court will still exercise its jurisdiction over the dispute provided that parties' choice explicitly designates a certain foreign jurisdiction as 'an exclusive court' whereas a Thai court is also deemed as a competent court based on the place where either party has domicile or where the cause of action arises. In regard to this question, the author views that considering the inconsistent decisions of the Thai Supreme Court in the aforesaid two cases,¹⁵ it can be concluded that two different approaches could be applied to this issue. First, a Thai court may consider such a choice of court agreement to be valid in accordance with the party autonomy doctrine as applied by the Court's decision no. 3537/2546 (2003 A.D.). Secondly, a Thai court may not give effect to such a choice of court agreement due to violating public order according to the decision of the Court no. 951/2539 (1996 A.D.).

In regard to the international civil and commercial contracts entered into between the consumer and the business or professional operator where the terms and conditions are prepared by the parties of unequal bargaining power. In this light, the provision of forum selection in such a contract can be considered as unfair contract terms under Unfair Contract Terms Act.¹⁶ According to section 4 of Unfair Contract Terms Act, the terms

¹⁵ The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) and no. 3537/2546 (2003 A.D.)

¹⁶ Unfair Contract Terms Act B.E. 2540 (1997), s 4

in a contract between the consumer and the business operator are considered unfair if such terms cause an imbalance in the parties' rights and obligations and creates more burden to the consumer than what could have been anticipated by a reasonable person. In this regard, a Thai court can examine and order such unfair contract terms to be only effective and enforceable as they are appropriate and fair depending on the facts of the case.¹⁷

Aside from considering whether the terms of contract render any advantage to the business operator over the consumer, a Thai court also needs to examine other circumstances, such as the good faith of the parties, bargaining power, economic status knowledge, anticipation, time and place of making the contract, and any potential negative effects on the consumer.¹⁸ Nevertheless, to date, the Thai Supreme Court has not yet made a ruling on the validity of choice of court agreement in an international commercial contract involving one party to the contract as a consumer. However, considering the decision of the Thai Supreme Court no. 3368/2552 (2009 A.D.), the Court gave effect to the arbitration clause in the international carriage contract entered by the parties who were both Thai nationals and domiciled in Thailand. The parties agreed to designate the Singapore International Arbitration Center to arbitrate their disputes. The Court in this case ruled that the arbitration clause was not prepared by one side only, but it was mutually agreed by both parties, so such a clause did not render any advantage or disadvantage to neither party; thus, it was not deemed as unfair contract terms.¹⁹

In reference to the aforesaid decision, the author views that if the holding in this case was applied to the choice of court clause in an

¹⁷ Nantika Tipayamontri, 'Consumer Protection Laws in Thailand' Thai-American Business Journal (May-June 2004) 19 <www.amchamthailand.com/asp/view_doc.asp?DocCID=1055> accessed 26 October 2018

¹⁸ Unfair Contract Terms Act B.E. 2540 (1997), s 10

¹⁹ The Decision of the Thai Supreme Court no. 3368/2552 (2009 A.D.) <<https://deka.in.th/view-502744.html>> accessed 26 October 2018

international commercial contract, whether a jurisdiction clause in a such international commercial contract would be deemed as unfair contract terms depends on whether the chosen forum would create any significant disadvantage to one of parties particularly the consumer. Furthermore, in reference to the ruling in this case, it can also be implied that if the chosen jurisdiction was a court of a third country; in other words, the chosen court was located neither at consumer's domicile nor at the business operator's domicile, it may not be deemed to cause significant imbalance between the parties. However, if the court based on the business operator's own domicile was chosen as the exclusive jurisdiction, an interesting question to be raised here is whether such a jurisdictional clause was considered to be fair to the consumer although the main purpose of such a clause could be chosen in a good faith and to protect the business from unreasonable commercial risks rather than hinder the consumer's rights from taking legal action.

Furthermore, another concern which should be noted here is whether a Thai court will still give effect to a jurisdiction clause that the parties mutually choose a third country's court to decide their dispute in order to avoid unfair contract term situation. In this regard, the Thai Supreme Court in case no. 3882/2549 (2006 A.D.) decided that a jurisdiction clause designating a court in Hong Kong to adjudicate the dispute arising from the international carriage from Thailand to Spain was invalid since the Hong Kong court did not have any connection with the parties or their dispute as none of parties had domiciled in Hong Kong. In addition, since the cause of action arose in Thailand rather than Hong Kong, and most of evidence related to the dispute was located in Thailand, Thailand's Intellectual Property and International Trade Court should be the proper venue to hear the dispute.²⁰ In reference to this ruling, it should be noted that in an international commercial contract although a business operator and a consumer select a court of a third country to hear their dispute, such

²⁰ The Decision of the Thai Supreme Court no. 3882/2549 (2006 A.D.) <<http://www.deka.in.th/view-267755.html>> accessed 26 October 2018

a jurisdiction clause may not be upheld by a Thai court due to the lack of connection between the chosen jurisdiction and the parties or disputes involved.

2.2 Recognition and Enforcement of Foreign Judgments

With regard to the issue of recognition and enforcement of foreign judgment in Thailand, currently Thailand does not have any specific law governing the recognition and enforcement foreign judgments. Up to now, Thailand has not yet acceded to the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.²¹ However, this issue was earlier addressed by the judicial practice in the decision of the Thai Supreme Court no. 585/2461 (1918 A.D).²² Although the decision in this case was rendered in the early 20th century, its ruling has become a substantial precedent for a Thai court to apply when dealing with the issue regarding the recognition and enforcement of foreign judgments.²³

In reference to the facts of the aforementioned case, it was related to the breach of a sale contract concluded by both Vietnamese parties in Saigon, Vietnam, and the plaintiff brought a claim against the defendant for failing to deliver goods to him with the Saigon Civil Court, and the Saigon Civil Court rendered the judgment in favor of the Plaintiff. The plaintiff then sought enforcement of Saigon Court's judgment with the Thai court where

²¹ Hague Convention on Private International Law, 'Status Table of Contracting Parties of The Hague Convention on the Recognition and Enforcement of Foreign Judgments' <www.hcch.net/en/instruments/conventions/status-table/?cid=78> accessed 27 October 2018

²² The Decision of the Thai Supreme Court no. 585/2461 (1918 A.D.)

²³ Panthip Kanjanajitra Saisoonthorn, Panhangueankhai Kanrapong Khamphiphaksa Khongsantangprathet [Problems on Conditions for Recognition of Foreign Judgments] (Law Journal Thammasat University, 22 (2)) 205 (พันธุ์ทิพย์ กาญจนะจิตรา สายสุนทร, ปัญหาเงื่อนไขการรับรองคำพิพากษาของศาลต่างประเทศ (วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ปีที่ 22 ฉบับที่ 2) 205)

the defendant was domiciled, and this case was eventually appealed to the Thai Supreme Court. The Court held that the principle of recognition and enforcement of foreign judgments was one of mutual respect among nations; thus, the Thai court shall recognise and enforce judgment rendered by a foreign court under two principles including i) the judgment was given by the court of competent jurisdiction; ii) that such a judgment was final and conclusive on the merits of the case. However, since the judgment of this case was given in default due to the failure of defendant to make an appearance in the court, the plaintiff had a burden to prove to the Thai court that such a judgment was final, and the defendant would not be able to pursue this matter further; nevertheless, the plaintiff failed to submit any proof supporting this issue; therefore, the Court in this case eventually denied to recognise and enforce the judgment rendered by the Saigon Civil Court.

Consequently, the decision of the Thai Supreme Court in this case lays down two significant principles for the recognition and enforcement of foreign judgments in Thailand. First, the foreign court adjudicating the case must be a competent jurisdiction. Secondly, the foreign judgment must be final and conclusive, which means that the parties in the suit are barred from challenging the decision made by the foreign court as per the doctrine of *res judicata*.²⁴ Furthermore, the ruling in this case also provides that in the event that a Thai court refuses to recognise and enforce a foreign judgment, a new trial based on the merits can be initiated in Thailand, and such a foreign judgment and documentary evidence generated during the litigation procedure in a foreign court can be used as evidence at a new trial.²⁵

With respect to the above analysis, it can be concluded that Thailand's current domestic law and judicial practice governing the validity of a choice of court clause in international civil and commercial contracts

²⁴ *ibid*

²⁵ *ibid*

are somewhat unpredictable and unspecific; particularly several issues as discussed above are not covered by the current legal regime of Thailand. Additionally, in regard to the issue of recognition and enforcement of foreign judgments, although the Thai Supreme Court no. 585/2461 (1918 A.D) laid down certain principles for dealing with this matter, in comparison to the uniform substantive rules, those principles established by the judicial practice are still considered to be unsettled, which cannot assure what other circumstances should also be taken into consideration to affirm that a foreign judgment is fully recognised and enforceable by the Thai court.

3. An Analysis of Legal Impact of The Convention on Thai Law and Practice

In reference to the legal framework of the Convention, the fundamental concepts of the Convention are primarily set forth based on the ‘three basic rules’ including i) the court of a Contracting State designated by an exclusive choice of court agreement must exercise its jurisdiction; ii) a non-chosen court of a Contracting State must not assert its jurisdiction over the dispute between the parties that have been designated by the parties to have an exclusive court exercise its jurisdiction, and iii) a judgment rendered by the chosen court must be recognised and enforced by the courts of other Contracting States. Although the Convention lays out these uniform rules to ensure that choice of court agreements and judgments rendered pursuant to such agreements will be honoured by Contracting States, it provides a number of exceptions to these basic rules so that the application of the Convention can be compatible with the domestic law of Contracting States. Nonetheless, in comparison to the Convention, the current legal framework of Thailand does not lay down explicit rules governing the examination of jurisdictional clause and the recognition and enforcement of foreign judgments. Thus, an analysis of legal impacts of the Convention on Thailand’s current legal framework will significantly point out whether the accession of Thailand to the Convention

will give rise to any discrepancy between the Convention and Thailand's current legal regime.

3.1 Scope of the Application of the Convention

The scope of application of the Convention only covers agreements involving the international civil and commercial matter.²⁶ However, certain international civil and commercial agreements, such as consumer contracts, employment contracts, family matters, carriage of passengers and goods, and certain intellectual property matters do not fall under the scope of the Convention.²⁷ In regard to Thailand's current legal regime, it does not expressly lay down what matter is allowed or disallowed for parties involved in international commercial contracts to set forth a forum selection clause. Nevertheless, at present, Unfair Contract Terms Act of Thailand sets forth a specific rule governing the issue on the validity of choice of court agreements made between business operators and consumers. In case that the jurisdiction clause in such an agreement creates any significant disadvantage to one party, in particular a consumer, who is considered to be a vulnerable party, such a forum selection clause shall be voided.²⁸ Nonetheless, since the scope of the Convention is exclusive of the consumer contract, in the event that Thailand accedes to the Convention, a Thai court can still exercise its jurisdiction to examine the validity of a forum selection clause in consumer contracts pursuant to its Unfair Contract Terms Act without conflicting with the scope of application of the Convention.

In addition, in the event that a Thai government is acting in its commercial capacity, although the Convention does not exclude the proceedings involved in the Thai government or its agency as a party,²⁹ the application of the Convention in such a case will not affect the privileges

²⁶ The Hague Convention on Choice of Court Agreements, art 1 (1)

²⁷ *ibid.*, art 2 (1) (2)

²⁸ Unfair Contract Terms Act B.E. 2540 (1997), s 4 and s 10

²⁹ The Hague Convention on Choice of Court Agreements, art 2 (5)

and immunities of States,³⁰ and in this light, when Thailand accedes to the Convention, the principle of sovereign immunities and the law on privileges of States will still be applicable to the choice of court clause made between the Thai government and the other party in international civil and commercial contracts. Nonetheless, if Thailand considers that there are certain matters under the scope of application of the Convention that should not be allowed for parties to choose other jurisdictions rather than a Thai court to hear their disputes, Thailand is permitted to make declarations for exemption from applying the Convention to such matters,³¹ and in relation to all other Contracting States, Thailand will be considered as a non-Contracting State with regard to that matter.³²

3.2 Exclusive choice of Court Agreement

The exclusive choice of court clause is a core issue to determine whether the parties' choice merely allows a chosen court to exercise its jurisdiction over other competent courts. With regard to the formation of choice of court agreement in international commercial contracts, in general, designating a court to adjudicate disputes arising from the contracts can be classified into two types of jurisdiction clauses including an exclusive jurisdiction clause and a non-exclusive jurisdiction clause.³³ In regard to the Convention, it was founded on the concept of an exclusive choice of court agreement,³⁴ which lays out that the court of a Contracting State chosen by the parties' choice must hear the case,³⁵ whereas the courts of other

³⁰ *ibid.*, art 2 (6)

³¹ The Hague Convention on Choice of Court Agreements, art 21 (1)

³² *ibid.*, art 21 (2) (a) (b)

³³ Stephen G. A. Pitel and Jonathan de Vries, 'The Standard of Proof for Jurisdiction Clauses' (2008) 46 *Canadian Business Law Journal* 66 (2) < <https://ssrn.com/abstract=2378308> > accessed 28 October 2018

³⁴ The Hague Convention on Choice of Court Agreements, art 1 (1)

³⁵ *ibid.*, art 5 (1)

Contracting States must refuse to exercise their jurisdiction provided that they are not designated as the chosen forums.³⁶

However, under Thailand's current legal regime, although the existing law of Thailand does not explicitly address this issue, it can be considered that both exclusive choice clause and non-exclusive choice clause are upheld by its judicial practice, which can be observed from the decision of the Thai Supreme Court no. 3537/2546 (2003 A.D.). The Court in this case ruled that since the parties' jurisdiction clause did not expressly specify the court of Singapore as an exclusive court, it should be deemed that such a jurisdiction clause did not prevent neither party from filing their petition to the Thai court as another competent court. What can be implied from the Court's ruling in this case is that if the parties had expressly specified that a court of Singapore was chosen as the exclusive court in their agreement, such an exclusive choice would have been upheld by the Thai Supreme Court. Nonetheless, since the parties failed to expressly state their choice, the Thai Supreme Court in this case decided that the concept of a non-exclusive court choice should be applied. Thus, it can be deemed that the parties' agreement did not exclude a Thai court as another competent court to assert its jurisdiction over their dispute.

With regard to the aforesaid analysis, providing that Thailand accedes to the Convention, the author views that Thailand's judicial practice on the affirmation of an exclusive choice of court issue will not create any conflict with the Convention since the Thai Supreme Court's holding in the aforesaid case clearly stipulated that the parties' exclusive choice of court would have upheld by the Court if such a choice had been clearly stated in the agreement. Nevertheless, although the main concept of the Convention is to promote an exclusive choice of court agreement, in the situation where the parties' choice of court agreement simultaneously designates both exclusive jurisdiction and non-exclusive jurisdiction to hear their disputes, article 22 of the Convention permits Contracting States to make a

³⁶ *ibid.*, art 6

reciprocity declaration in order to recognise and enforce the judgment rendered pursuant to such a non-exclusive clause. Hence, in the event that Thailand accedes to the Convention, such a reciprocity declaration shall be made accordingly in order that a judgment rendered by a Thai court based on a non-exclusive choice of court agreement will be recognised by other courts of other Contracting States that have also made the same declaration.

3.3 Obligations of the Chosen Court

As the exclusive choice of court clause is a core concept under the Convention, the effectiveness of the Convention depends on whether the chosen court can exercise its jurisdiction as designated in the choice of court agreement. In this light, the Convention imposes certain obligations for the chosen court of a Contracting State to apply including i) the chosen court shall hear the dispute unless such a jurisdiction clause is null and void under the law of that Contracting State;³⁷ ii) the chosen court must not reject its jurisdiction on the ground that another court is more suitable to hear the disputes according to the *forum non conveniens* principle.³⁸ In contrast, this issue is silent under Thailand's current legal regime; however, it can be observed from several rulings of the Thai Supreme Court as discussed previously that a Thai court could exercise its jurisdiction to hear the disputes between the parties on the ground of a competent court regardless whether it was designated as a chosen court or not.³⁹

Thus, in consideration of the holdings of the Thai Supreme Court in the aforementioned cases, it can be inferred that if a Thai court is chosen by parties' choice to hear their dispute, such a court can exercise its jurisdiction so long as it is a competent court as set forth under Thai CPC. According to Thai CPC section 4 (1), it sets forth the scope of a Thai court's

³⁷ The Hague Convention on Choice of Court Agreements, art 5 (1)

³⁸ *ibid.*, art 5 (2)

³⁹ The Decisions of the Thai Supreme Court (n 12), (n 14), and (n 20)

jurisdiction to hear a case based on two primary concepts including the place where the defendant has domicile and the place where the cause of action arises.⁴⁰ Additionally, aside from these two basic jurisdictional rules, Thai CPC also sets forth several conditions as the extension of the Thai court's jurisdiction.⁴¹ In this light, if a Thai court is chosen as an exclusive jurisdiction, and it appears to be a competent court under the provisions of Thai CPC, the author views that there will not be an issue for Thai court to deny the validity of jurisdiction clause.

However, an interesting question to be raised here is whether a Thai court as a chosen court will refuse to hear parties' claim if it is not a competent court according to the jurisdictional rules under Thai CPC. Although the current Thai law and practice are silent on this issue, the author views that if Thailand accedes to the Convention and decides not to adjudicate parties' claim due to the lack of authority pursuant to the provisions of Thai CPC, it will be contrary to the obligation of the chosen court under article 5 of the Convention. In order to avoid this contradiction, it is suggested that Thailand may make a declaration according to article 19 of the Convention, which grants a Contracting State to exempt from exercising its jurisdiction as a chosen court pursuant to parties' exclusive choice clause provided that its court does not have any connection with the dispute or the parties. In this light, the author views that upon making such a declaration, a Thai court, as a chosen court, will not only be able to limitedly exercise its jurisdiction within the scope of jurisdictional rules under its Thai CPC, but it will also avoid creating any conflict with the Convention.

3.4 Obligations of the Non-Chosen Court

In addition to the obligations of the chosen court, the Convention also imposes certain obligations to the court of other Contracting States that

⁴⁰ Civil Procedure Code B.E. 2477 (1934), s 4 (1)

⁴¹ *ibid.*, s 3, s 4 bis, and s 4 ter

is not designated by the choice of court agreement, which is deemed to be a non-chosen court under the Convention. The main obligation of the non-chosen court under the Convention is not to perform litigation proceedings if the parties have agreed to designate the other court to hear their disputes.⁴² Although the Convention does not permit a non-chosen court to assert its jurisdiction over the dispute between the parties, several exceptions are set forth under the Convention, which allows the non-chosen court to exercise its jurisdiction in lieu of the chosen-court under the certain circumstances including i) the jurisdiction clause is null and void under the law of the chosen court,⁴³ and in this light a non-chosen court is entitled to decide the validity of a choice of court agreement by applying the law of the state of the chosen court.⁴⁴

Additionally, a non-chosen court is allowed to apply its own law to determine whether the parties are capable to conclude the choice of court agreement⁴⁵ and whether giving effect to a jurisdiction clause would provide manifest injustice or may be contrary to public policy of its country.⁴⁶ The Convention further grants the non-chosen court to apply its own rules in the event that an exclusive choice of court agreement cannot be reasonably performed,⁴⁷ and as for the last exception, a non-chosen court is entitled to hear the case provided that the chosen court has decided not to hear such a dispute.⁴⁸

In comparison to the Convention, Thailand's judicial practice has principally recognised parties' choice on designating a foreign court to hear their dispute;⁴⁹ however, it is further required that the chosen court had to

⁴² The Hague Convention on Choice of Court Agreements, art 6 para 1

⁴³ *ibid.*, art 6 (a)

⁴⁴ *ibid.*, art 6 (a)

⁴⁵ *ibid.*, art 6 (b)

⁴⁶ *ibid.*, art 6 (c)

⁴⁷ The Hague Convention on Choice of Court Agreements, art 6 (d)

⁴⁸ *ibid.*, art 6 (e)

⁴⁹ The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) (n 12)

have some connections with the parties or disputes.⁵⁰ In this light, the author views that such a requirement enables a Thai court acting as a non-chosen court's role to decide whether to uphold or deny parties' jurisdiction clause, which is considered to conflict with the obligation of the non-chosen court as imposed by article 6 of the Convention. Nevertheless, although the Thai Supreme Court in this case does not expressly state the reasons for requesting a connection between the chosen court and the parties or disputes, it can be assumed that there are two possible reasons behind for such a requirement. First, a Thai court as a competent court would be more suitable to hear the case than the chosen court under the circumstances that the parties or evidence related to the case are located in Thailand. Secondly, when a Thai court exercises its jurisdiction in lieu of the chosen court, it could assure that such a dispute would be decided in accordance with its domestic law and its public policy.

In consideration of the above concerns, the author views that these issues can be properly settled under article 6 of the Convention, which provides several exceptional rules enabling a non - chosen court to fully examine the validity of choice of court agreement. In this light, a Thai court as a non-chosen court is permitted to inspect the validity of jurisdiction clause by applying not only a chosen court's law but also Thai law to decide whether a jurisdiction clause designating a foreign court to hear the dispute will give rise to manifest injustice or will be contrary to Thailand's public policy.⁵¹ Furthermore, the Convention also allows a Thai court to assert its jurisdiction over the dispute in the event that the jurisdiction clause is null and void.⁵² Thus, the author views that the Convention provides more room for the Thai court to be able to censor the validity of the choice of court agreement and assert its jurisdiction although its role is deemed as the non-chosen court under the Convention.

⁵⁰ *ibid*

⁵¹ The Hague Convention on Choice of Court Agreements, art 6 (c)

⁵² *ibid.*, art 6 (a)

Considering the above analysis, it is suggested that when Thailand is acting as a non-chosen court, it should not apply the requirement of the connection between the chosen court and parties or the dispute to determine the validity of the choice of court clause. This will not only correspond with the obligation of the non-chosen court as imposed by article 6 of the Convention, but it will also enhance the party autonomy doctrine under the private international law to be fully recognised by the Thai court, and this could mean that pursuing an international commercial lawsuit in Thailand will be more predictable and less complicated to some extent. More importantly, it will also boost the confidence of foreign investors in doing their businesses in Thailand as they are able to access to more efficient and more transparent legal framework upon dealing with their disputes in the Thai court.

3.5 Recognition and Enforcement of the Judgments of the Chosen Court

One of the fundamental concepts of the Convention is to ensure that the ultimate judgment rendered by the chosen court pursuant to the choice of court agreement is recognised and enforced by the court of other Contracting States. Hence, the Convention imposes general obligations on the non-chosen court that when it is requested to recognise and enforce a judgment rendered by the chosen court, it shall recognise and enforce such a judgment and may not review the merits of the judgment unless the decision of the chosen court was given by default.⁵³ However, the Convention sets out several exceptional grounds allowing a requested court to exempt from such obligations under the following circumstances including i) the choice of court agreement was null and void under the law of the chosen court;⁵⁴ ii) the parties are incapacity under the law of the

⁵³ The Hague Convention on Choice of Court Agreements, art 8

⁵⁴ *ibid.*, art 9 (a)

requested court;⁵⁵ iii) the judgment was involved the defective service of process,⁵⁶ fraud,⁵⁷ or incompatible with public policy of the requested court;⁵⁸ iv) the judgment is inconsistent with a judgment given in the requested court to the same parties;⁵⁹ and v) the judgment rendered by the chosen court involving the same parties and the same cause of action decided by the earlier judgment of another foreign court is inconsistent, which the earlier judgment has fulfilled the specified conditions of recognition in the requested state.⁶⁰

Nevertheless, in regard to Thailand's current legal regime, there are no specific rules for a Thai court to apply when dealing with the recognition and enforcement of foreign judgments. However, in reference to the decision of the Thai Supreme Court no. 585/2461 (1918 A.D.), the recognition and enforcement of foreign judgments in Thailand can be based on the two principles. First, the judgment must be given by the court of competent jurisdiction. Secondly, the judgment must also be final and conclusive on the merits of the case.

In comparison to Thailand's current legal regime on the recognition and enforcement of foreign judgments, article 9 of the Convention not only covers the two principles in accordance with the decision of the Thai Supreme Court no. 585/2461 (1918 A.D.) but also provides several exceptional rules for a requested court to apply prior to giving effect to a judgment rendered by a chosen court. As a result, the author views that in the event that Thailand accedes to the Convention, the provision of the Convention is compatible with Thai court's practice. More importantly, article 9 of the Convention also provides several exceptions enabling the Thai court to deny the recognition and enforcement of the judgment of the

⁵⁵ *ibid.*, art 9 (b)

⁵⁶ *ibid.*, art 9 (c)

⁵⁷ *ibid.*, art 9 (d)

⁵⁸ *ibid.*, art 9 (e)

⁵⁹ *ibid.*, art 9 (f)

⁶⁰ *ibid.*, art 9 (g)

chosen court. Consequently, the author views that the accession of Thailand to the Convention will not only enhance Thailand's current legal regime to be more predictable and consistent, but it will also promote the reliability role of the Thai court when it comes to making a decision on the recognition and enforcement of the foreign judgments in relation to the international commercial matters.

4. Conclusions and Recommendations

In consideration of the aforesaid analysis, even though the current legal regime of Thailand principally upholds the choice of court agreement, the rules governing the validity of the jurisdiction clause still remain uncertain and unpredictable. In addition, as for the recognition and enforcement of the foreign judgments, Thailand neither has specific rules nor has concluded any international treaty pertaining to this matter. Thus, at present, the practice of the Thai court in dealing with the recognition and enforcement of foreign judgments is also unpredictable. Conversely, the provisions of the Convention concerning the choice of court agreement and the recognition and enforcement of a judgment rendered by the chosen court in relation to disputes arising from the international commercial matters are more definite and more uniform.

In reference to the analysis conducted by this article, it finds that the three fundamental rules imposed by the Convention somewhat contradict to the current legal regime of Thailand; however, these three basic rules are not absolute but rather provide several exceptions that will enable Thailand to make relevant declarations for exemption from applying certain provisions under the Convention in order to complement its current law and practice. As a result, in consideration of the disuniformity and uncertainty of Thailand's current legal regime in dealing with the issues involving the validity of jurisdiction clauses and recognition and enforcement of foreign judgments, the author views that it is high time for Thailand to become a Contracting State to the Hague Convention on the

Choice of Court Agreements by proposing necessary declarations as permitted by the Convention in order that a Thai court will be able to apply a uniform rule that will be compatible with Thai law and practice.

More importantly, the accession of Thailand to the Convention is one of significant steps to promote Thailand's legal regime governing the international commercial transactions to become more internationalized and standardized; particularly such an accession will significantly promote Thailand 4.0 scheme and the EEC project since the application of the Convention in Thailand will boost foreign investors' confidence that their international commercial litigations involving the determination of validity of jurisdiction clause will be governed by the same standard rules as applied in other Contracting States. Significantly, a judgment rendered by a chosen court will primarily recognised and enforceable in Thailand, and by the same token, the judgment rendered by a Thai court will also be recognised and enforceable in other Contracting States to the Convention.

Bibliography

Dissertations

Amornworawit K, Panha Thangkotmai Waduai Khotoklonglueaksan Nai Sanyathurakit Kankharahwangprathet [Legal Problems Concerning Choice of Court Agreement in International Business Contract] (Masters of Law Degree Thesis, Thammasat University 2009) (กนกลักษณ์ อมรรวิทย์, ปัญหาทางกฎหมายว่าด้วยข้อตกลงเลือกศาลในสัญญาธุรกิจการค้าระหว่างประเทศ) (วิทยานิพนธ์ปริญญา มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2552)

Journals

Kanjanajitra Saisoonthorn P, Panhanguankhai Kanraprong Khamphiphaksa Khongsantangprathet [Problems on Conditions for Recognition of Foreign Judgments] (Law Journal Thammasat University, 22 (2)) (พันธุ์ทิพย์ กาญจนะจิตรา สายสุนทร, ปัญหาเงื่อนไขการรับรองคำพิพากษาของศาลต่างประเทศ (วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ปีที่ 22 ฉบับที่ 2))

Pitel S, and Vries J, 'The Standard of Proof for Jurisdiction Clauses' (2008) 46 Canadian Business Law Journal 66 < <https://ssrn.com/abstract=2378308> > accessed 28 October 2018

Tipayamontri N, 'Consumer Protection Laws in Thailand' Thai American Business Journal (May-June 2004) <www.amchamthailand.com/asp/view_doc.asp?DocCID=1055> accessed 26 October 2018

Woodward W, 'Saving The Hague Choice of Court Convention' (2014) Penn Law: Legal Scholarship Repository <<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1170&context=jil>> accessed 25 October 2018

Websites

BOI of North America's Blog, 'Government of Thailand Announces New 4.0 Investment Attraction Policies' <<http://thinkasiainvestthailand.com/boiblog/index.php/40-government-of-thailand-announces-new-4-0-investment-attraction-policies>> accessed 25 October 2018

Easter Economic Corridor Office, 'Investing in the EEC' <<https://www.eeco.or.th/en/content/investing-eec>> accessed 25 October 2018

Hague Convention on Private International Law, 'Status Table of Contracting Parties of The Hague Convention on the Recognition and Enforcement of Foreign Judgments' <www.hcch.net/en/instruments/conventions/status-table/?cid=78> accessed 27 October 2018

Hague Convention on Private International Law, 'Status Table of Contracting Parties of the Hague Convention of 30 June 2005 on Choice of Court Agreements' <www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 25 October 2018

Legislations

Civil and Commercial Code B.E. 2468 (1925)

Civil Procedure Code B.E. 2477 (1934)

Conflict of Laws Act B.E. 2481 (1938)

Unfair Contract Terms Act B.E. 2540 (1997)

Court Decisions

The Decision of the Thai Supreme Court no. 585/2461 (1918 A.D.)

The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.)

The Decision of the Thai Supreme Court no. 6565/2544 (2001 A.D.)

The Decision of the Thai Supreme Court no. 3537/2546 (2003 A.D.)

The Decision of the Thai Supreme Court no. 3882/2549 (2006 A.D.)

The Decision of the Thai Supreme Court no. 3368/2552 (2009 A.D.)

**THE DEVELOPMENT OF NOTARIES IN REAL ESTATE
REGISTRATION IN THAILAND^{*}**

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Abstract

Real estate disputes are one of the most common types of disputes in Thailand for decades and this is because the real estate administration of Thailand is inefficiency. In particular, there is a failure in Thai real estate registration and land titling, so the title deeds are unreliable and cause insecurity in the real estate business. Therefore, this thesis looks into the causes and the consequences of the current real estate registration process in Thailand. Then, the thesis examines on the intermediary that the four foreign countries, namely France, Germany, the United Kingdom (England and Wales) and the United States of America, used in their real estate registration for preventing real estate disputes. The intermediary used in the civil-law countries and the common-law countries are quite distinct, so the thesis will compare the intermediary - the civil law notaries - in civil-law countries and other kind of real estate professionals in common-law countries in order to suggest the best solutions for solving the real estate situation in Thailand.

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Keywords: Land, Real Estate, Immovable Property, Realty, Notaries, Conveyancers

1. Introduction

Real estate properties, all over the world, are always seen as valuable assets that everyone would like to possess, so people often compete for land. Thus, real properties in most countries are usually managed by the State. Each State has its own rules and procedure on how to allocate and keep track on the immovable properties in order to prevent arguments about the ownership, and similar to other countries, real estate properties in Thailand are also managed by the State. There are several Codes and Acts that stipulate particular practices for the certain kinds of real estate activities in order prevent real estate arguments. Importantly, in short, anyone who own land must register and earn the title in order to prove his right to it.¹ Furthermore, every transaction involving immovable properties must be made in writing and registered with a competent official otherwise it will be void.² Some kind of transactions, like a mortgage transaction or hire of real estate property, are only required to be in writing for it to be enforceable.³ Nevertheless, despite such formalities, real estate litigation is one of the common arguments in Thailand. There are still numerous news reporting incidents of land grabbing and land invasion in various places in Thailand, and this is because the Thai real estate administration is inefficient. The certificate of land and land registration are unreliable and unstable. Even though an owner of land holds a title deed, which gives complete rights over land and is regarded as the most reliable certificate of ownership, it is still possible that he might lose possession over his property. There are various tricks to seize the land of the others in these modern times. These tricks are used based

¹ Thai Land Act B.E. 2497 s 5 – s 7

² Thai Civil and Commercial Code s 456

³ Thai Civil and Commercial Code s 538 and s 714

on loopholes in the legal system or the shortcoming of land management. Some trick may be screened out by a scrupulous investigation during the registration. Yet, the investigation during the registration may be insufficiently effective, since there are still many dispute over real estate properties.

In some foreign countries, there are professionals that act as the intermediaries in the real estate transactions who conduct the title search to make certain of the correctness of the title and the status of the property prior the registration. However, the intermediaries in different countries may be different profession and have distinct roles and characteristics. In some European countries, namely France and Germany, civil-law notaries are important intermediaries in real estate transactions. They are very trustworthiness professionals. In real estate transaction, notaries will verify and certify the title, the status of the realty, and the contractual parties. With their statuses and formal practices, notarial authentication or notarial acts are very credible, so their authentications are the requirement for the registration. On the other hand, in common-law countries, notaries are not powerful as civil-law notaries, so there are other kind of professionals who function in the real estate transactions i.e. solicitors and licenses conveyancers in the United Kingdom and real estate agents, brokers and realtors in the United States. Though these professions are not the requirement in the real estate transactions in these two countries, they do the verification and work similarly to notaries. Therefore, the study examines the intermediaries in different four countries of two different law systems in order to provide recommendations to solve the unstable and unreliable real estate registration and titling system in Thailand. This article will discuss the following issues: 1) the problems in Thai real estate registration; 2) the intermediaries used in four foreign

countries; 3) the flaw in Thai real estate registration; and 4) the recommendations to solve the real estate registration situation in Thailand.

2. The Problem of Real Estate Registration in Thailand

Even though in this modern time the real estate registration in Thailand seems to work in a systematic procedure and governed by concrete rules set, land management is still extremely problematic and there are many arguments over land possession in Thailand, some of which have been problematic for decades such as forest invasion and land expropriation. Although the State has improved the land administration in various ways and introduced technology to manage the land registry and directory, arguments over land are still one of the top issues in Thailand. There has not only been an increase in the number of land disputes in the modern age, but they have also developed in to diverse forms. However, there are three common types of land disputes: 1) Problems caused by uncertain real estate information; 2) problem caused by land transfer without ownership; and 3) problems caused by the use of a nominee in real estate transactions.

2.1 Problems of Uncertain Real Estate Information

The uncertain real estate information is the consequence of too many public agencies being responsible for managing land, while there is no proper connection between them and the lack of sufficient verification before procession conveyancing transactions. As a result, these diversified organizations overlap in terms of territorial claims, which is one of problematic issue in Thailand that has been broadcast on the news for more than 30 years. This problem is the result of poor land administration in Thailand because nine Agencies from five

Ministries are responsible for different area of land. There may be two or more agencies governing one area. Since each agency has its own mission and uses different laws, there are many different laws and various mission within one area. Consequently, these regulations and missions sometimes collide and make it difficult to determine who is entitle to the land. Wang Nam Khieo-Nakornratchasrima⁴, Khao Kor-Phetchaboon⁵, and Bang Kanoon forest-Phuket⁶ are examples of those area where there are more than one Agency has authority over the land, and two types of certificates of ownership are issued to the local. Both certificate are issue legitimately, but issued under different law. The owners has earned the rights according to the certificate they hold, but may wrongfully act under another law.

2.2 Problems of Land Transfer without Ownership

Transfer of land without ownership is the most common argument over land in Thailand. This is the situation in which the transferor is not the owner of the land and has no right to pass the

⁴ Het Wang Nam Khiaw Khaipit Khaithok [A Cause 'Wang Nam Khiaw Who is Right, Who is Wrong] (Faculty Of Environment and Resource Studies, 2011) <http://www.en.mahidol.ac.th/thai/news/envi_news_fullv2.php?id=1163> accessed 5 May 2017 (เหตุ ว่างน้ำเขียว ใครผิด ใครถูก) (คณะสิ่งแวดล้อมและทรัพยากรศาสตร์, 2554) เข้าถึง 5 พฤษภาคม 2560

⁵ Naithun Khonmisi Hupthidin "Khao Ko" Ropthit [Investors-Colored People Grab Every Direction Of "Khao-Ko"] (ASTV Manager Online, 2013) <<http://www.manager.co.th/local/viewnews.aspx?NewsID=9560000143651>> accessed 5 May 2017 นายทุน-คนมีสี ฮุบที่ดิน"เขาค้อ"รอบทิศ (ASTV ผู้จัดการออนไลน์, 2556) เข้าถึง 5 พฤษภาคม 2560

⁶ Khonsuanplam Yangpara 45 Rai Bukrukpasanguan Bangkhanun Phuket [Invaded Bang Kanoon Preserved Forest, Phuket to Demolish 45-Rai Of Palm-And-Rubber-Tree Farm] (Komchadluek, 2016) <<http://www.komchadluek.net/news/regional/233768>> accessed 5 May 2017 โคนสวนปาล์ม-ยางพารา45ไร่บุกรุกป่าสงวนบางขุนภูเก็ต (คมชัดลึก, 2559) เข้าถึง 5 พฤษภาคม 2562

ownership to another person. The transferor seizes or embezzles the land from person who has the legitimate right to it and then defrauds the transferee by claiming that he has the right to make a legal transaction on behalf of the true owner. This involves deception at the real estate registration, and if the registrar believes that the transferor has the right to process the transaction, he will complete it and enter it in the public record. Hence, the fraudulent transaction will be valid and be able to claim against a third party. The transaction will not only damage the real owner, but it will also cause a problem for the transferee and a third party as well. Based on the crop of lawsuits, there are diverse tricks to transfer the land belonging to another person to oneself or to others, for example: the land owner empowered someone with a blank power of attorney and such person use the power of attorney to transfer the land to someone else⁷; or individuals, who is not the real owner of the land, falsely report to the land official that they have lost their certificate of ownership and request to issue a new document for his own use.⁸

2.3 Problems of the Use of a Nominee in Real Estate Transactions

There are various laws under the Thai jurisdiction that limit foreigners' capability to own some kinds of immovable property, especially Land.⁹ Therefore, many foreigners search for loopholes in the Thai law to acquire land and one of the most popular way to do is to appoint a local called a nominee to hold the land for them by engaging in some kind of legal relationship which will allow the foreigner to entrust the nominee to hold his property instead of him. This legal

⁷ Thai Supreme Court Judgements: No.7906/2544, No.8929/2542, No.4708/2533

⁸ Thai Supreme Court Judgements: No.2071/2532, No.2803/2535, No.2093/2542, No.8018/2544, No.7223/2556, No.6239/2555

⁹ Thai Land Act s 86 – s 96ter

relationship conceals their real intention, which is to make a real estate transaction. The three popular kinds of legal relationships that foreigners commonly use are: 1) marriage, 2) setting up a company and 3) hiring a nominee directly. As a result, there are many reports and news about foreigners owning land in many commercial areas and tourism resorts. One of the significant official reports is the report in the conference of the Standing Committee of Commerce, Industry and Labor the National Legislative Assembly in 2555 mentioned that about 100 million Rai or about one third of all land in Thailand is possessed by foreigners and they have obtained it via a loophole in Thai law.¹⁰

3. The Intermediary in Real Estate Transaction in Foreign Countries

The intermediary in real estate transactions of four countries: two civil-law countries namely France, Germany, and; two common-law countries namely the United Kingdom (England and Wales) and the United States of America in order to study the characteristics and the roles of the intermediary in each country and how they are used as an intervention in real estate transactions for preventing land disputes.

Since France and Germany are the regions where the Roman prevailed in the past, they adopted the Roman notaries and has developed them into their unique systems. The civil-law notaries in these two countries have the similar characteristics and functions, but

¹⁰ Industry and Labour the Standing Committee on Commerce, the National Legislative Assembly, Sarup Raingan Sammana Rueang “Nitikam Amprang” [The Summary of The Conference Title: Hidden Transactions: Foreigners and Land Possession] (The Secretariat of the Senate, 2012)) <<http://www.senate.go.th/w3c/senate/pictures/comm/68/2555/sammana/2555/sam.report.nitikamaompangTeedin12.03.55.pdf>> accessed 17 December 2017 คณะกรรมาธิการเศรษฐกิจ การพาณิชย์และอุตสาหกรรมวุฒิสภา และการแรงงาน สภานิติบัญญัติแห่งชาติ, สรุปรายงานสัมมนา เรื่อง นิติกรรม อำพราง: ต่างชาติกับการถือครองที่ดิน (สำนักงานเลขาธิการวุฒิสภา - สภานิติบัญญัติแห่งชาติ, 2555) เข้าถึง 17 ธันวาคม 2560

they are not entirely the same. Notwithstanding, the French notaries and the German notaries in this modern times are very solid and systematic profession. As notaries' works involve with some legal works, legal knowledge is one of the requirements to become a notary in France and Germany. They are not only required to have basic legal knowledge, but they must also have high legal education and specialized trainings in this profession. Therefore, notaries in these countries are one kind of legal professions. Although some notaries are also advocates, they usually have higher status than general advocates. They have special functions and vital roles in certain businesses including real estate transactions. In both countries, notaries are mandatory to be part of the real estate transaction and notaries' authentication is the vital condition for real estate registration. Without notaries' participation, real estate transactions cannot be registered and consequently, are not enforceable against third parties. The law requires notarial acts as a requirement because before notaries notarize the transaction they must conduct a title search to verify the ownership and other important information of the realty first. Their notarial act guarantee their work and guarantee that there will be no dispute after the notarization. If there is any land disputes after the authentication, French notaries and Germany notaries are subject to liabilities for malpractice and mistake. As notarial act is high reliable, they are considered as public acts and are used as the intervention in the real estate transactions.

On the other hand, this thesis does not discuss a lot about the common-law notaries in England and Wales and in America because they do not have a significant role in real estate transactions like the notaries in France and Germany, so this thesis focus on the other

professions that have notable roles in the real estate transactions instead.

Even though English notaries can also work in real estate transactions, they are not commonly hired to work in real estate transactions. In England, real estate conveyancing works are actually dominated by solicitors and licensed conveyancers. The roles and duties of solicitors and licensed conveyancers in real estate transactions are similar to civil-law notaries' functions. Yet, they are not required to be part of the real estate transaction or for real estate registration by laws. Solicitors and licensed conveyancers are hired to provide convenient and security to their clients. By being the real estate professionals, they provide information and help the clients to make a better decision. However, solicitors and licensed conveyancers are not wholly the same though they have the same roles and authority when conducting the real estate transactions. Licensed conveyancers are legal practitioners who are specialists in real estate areas whereas solicitors offer boarder functions than licensed conveyancers. They can conduct litigations or legal actions such as clearing encumbrance, eviction etc., as well, so the majority of the real estate works are indeed conducted by solicitors.

For the U.S., American notaries do not have any roles in real estate transactions, because they do not have any legal education nor specialized in any area, so they only perform the basic functions of common-law notaries. The two notable professionals in real estate transactions in the U.S. actually are real estate salespersons and title insurance agents. Real estate salespersons are simply the third party who are the facilitators of the real estate transactions on behalf their clients until the transaction is completed whereas tile insurance agents are those who authorized to sell title insurance guaranteeing the

correctness of the title. They are not the persons who insure against the defects in title, but they usually conduct a title search to verify that the information on the title is correct before they sell title insurance. Thus, the functions of the two profession are similar to the functions of civil-law notaries. These functions, especially the function of title insurance agents, can provide security in the real estate transactions, but as they are not mandatory by law, some people do not hire real estate agents nor title insurance agents, or both, in order to save some cost. Yet, when the property is bought via mortgage, the mortgage lenders usually request a title insurance before issuing the loan.

All in all, in these four countries, there are independent real estate professionals that provide convenient and security in the real estate transactions. In the Roman prevailed countries, civil-law notaries and their authentic acts are mandatory for real estate registration. Since their performances are empowered by the States, it is not easy to become a notary in this region, so once they are qualified and appointed as a notary, they must upheld their professional code of conducts strictly. Otherwise, they are subject to number of liabilities. As a result, notarial acts and the real estate transactions are very reliable. With their authentic act, the public can fell secure that there will be no dispute afterwards. Unlike the civil-law notaries, the other real estate professionals in the United Kingdom and the United State are voluntary option because their participations are not a required condition for the registration. Therefore, they may also provide security to the transactions like the civil-law notaries, but the history of the title may not be very reliable since they are not necessary to be part of every real estate transaction. Not only this, the acts of real estate professionals in the United Kingdom and in the United State are merely

the acts of commercial agents, so their credibility cannot be compared to the conducts of civil-law notaries.

4. The Flaws in Real Estate Registration System in Thailand

From the study of real estate registration in Thailand and the study of intermediaries of four other countries (France, Germany, the UK and the U.S.), it can be understood that the real estate problems in Thailand are the result of the absence of an intermediary. The intermediary would normally assist and control the registration stage, in order to ascertain and ensure that the contractual parties have the rights and capabilities over a property and that the property is free for transactions. The flaws caused by the absence of an intermediary in Thailand's real estate businesses can be summarized in the following five points:

4.1 The Lack of Verification on Parties' Identity

In Thailand, there are no independent real estate professionals who assist the contractual parties in any kind of real estate transactions, like in the four foreign countries discussed earlier, so the owner of a property, or the buyer, must verify the status or the identity of the opposite party themselves. Thus, when the contractual parties do not have any, or have very little, experience in real estate transactions, their verification may not be effective enough to prevent disputes, since it is possible that they may miss some vital information which may cause problems afterwards. In some cases, the contractual parties may hire a lawyer to take care of the legal aspects of a sale, and have them do the verification of the other party's identity, since lawyers have legal knowledge and connection to check, which may have an effect on the validity and/or enforceability of the real estate

transactions. The lawyer is then entrusted to verify the opposite party's identity on behalf of their clients. However, Thai lawyers are not real estate specialists. They do not have specialist knowledge or training in real estate transactions, so they are not comparable to real estate professional, such as civil law notaries. When lawyers do not have a lot of experience in real estate transactions, it is possible that their verification may not be efficient enough, which could cause disputes over the land in the future, similar to the case where in which the contractual parties do it themselves. However, lawyers are not always hired to be part of real estate transactions because they are costly and may be considered an unnecessary expense for a real estate transaction, since their involvement is not mandatory by law.

Notwithstanding this, the land registrar may also verify the parties' identities before they process a registration, but their verification may also not be thorough enough. This can lead to a lot of real estate disputes, which arise from incorrect identity of buyers or sellers. Cases such as transfers of real estate without ownership, or uses of nominees in real estate conveyancing, are examples of cases where efficient verification of identity did not occur. If the registrar checked these carefully, there should not be any incidents arising from incorrect identity checks. However, as already discussed about real estate registration in Thailand, the registrar usually examines the names of the contractual parties and the name of the person who owns the land on the title deed, and asks a few questions to see that the parties have the capability to create the transactions within a few hours - usually 1-2 hours. As a result, they do not carry out deep or thorough verification to ascertain the parties' rights and capabilities, as civil law notaries would do. This might be because the land registrar has quite a lot of work, so it would be difficult for them to verify all of the details in every real estate transaction in a short period of time.

Hence, it seems like in Thailand that there is not enough verification done on the identity of parties, and this incorrect

identification process is one of the main reasons that causes land disputes in Thailand.

4.2 The Lack of Verification and Certification of Titles

In the other four countries considered, there are independent real estate professionals who can conduct a title search on the public record in order to verify and certify the correctness of the title and the status of the property. The results of title search can ensure that the information on the title is correct and represents true information about the property, so when there is a problem arising from any incorrect information yielded from the title search, the injured parties can claim for compensation from the notary. On contrary, In Thailand there is no independent profession that has the authority to verify and certify title deeds, unlike these other four countries. Only land officials have the authority to conduct title searches of the public record, so when parties want to verify the status and the ownership of some land, they must go to the local land office and file a requisition to get information about the real estate. The Land registrars merely verify information about the land, then provide information about the requested real estate and indicate whether the title is real or fake. They do not certify the title, nor do they provide any guarantee for the title and the result of the title search like civil law notaries would do. Hence, if there was an intermediary who held the duty to conduct a title search with liability over the results, the intermediary would conduct a careful verification on the history of the title and the status of the property, avoiding any problems that might emerge after the certification.

4.3 The Lack of Certification of Transactions

In countries where there are civil-law notaries, the two parties are required to sign the contract in front of notaries, and notary will

sign and stamp his seal to certify the transaction. This practice called notary act. As notaries hold a neutral position in the transaction, they will make sure that all parties know and understand all the terms and situations, and that the parties accept such agreement unanimously. Yet, Thai law does not see that certification of real estate transactions as crucial, as a notarial act is not a requirement for real estate registration. In fact, notarial act or any kind of authentication does not exist in real estate transactions in Thailand. Real estate agreements are complete and can be enforceable between the contractual parties simply when the consent of the two parties is reached, and then the transactions can be claimed against a third party when they are registered in the public record by a competent officer. The only similar practice to notarial certifications is when the registrar examines the consent of parties by asking them to confirm their consent and signing their names before the registrar records the transactions. The registrars normally ask this question to see that the parties agree to the transfer and receive the rights and obligations over the property. The registrar will not examine deeply to see whether such agreement is made with true consent of the parties or made under fair terms or not. In Thailand, there are quite a lot of cases where one party takes advantage over another with unfair terms, misleading facts, coercion etc. Thus, in Thailand, the certification by a registrar is not as credible nor equivalent to the acts of a civil law notary. Having an intermediary like civil law notaries would protect the contractual parties from unfair, fraudulent or subrogated agreements, as well as improving the reliability and stability of the real estate businesses.

4.4 The Absence of a Central Information Centre

There is no central information centre that gathers information about all of the real estate properties in Thailand, and Land is under the control of various organizations, and each organization has their own record of land which is under their authority. Sometimes the areas that each organization holds overlap, so when two organizations issue different policies which are not compatible or collide over the same piece of land, it can cause problems. These problems demonstrate that the current land management is inefficient because the boundaries for each authority are unclear and overlapping, and there is no central information centre where information about land ownership can be checked. The absence of a central information centre shows that real estate information in Thailand, and Thai real estate registration, is uncertain and unreliable. This is because even though people may acquire the realty for value, obtain possession in good faith, register their acquisition, and obtain a title deed, they may still lose their ownership over the property if the title deeds were issued wrongfully, leading to title deed revocation. If there was a central information centre that could check the status of land easily for every authority, these kinds of problems would not happen.

4.5 The Inefficiency of the Present Notaries in Real Estate Transactions in Thailand

Nowadays, there are notaries in Thailand, but they are like those notaries in common law countries, particularly American notaries. Thai notaries do not have a broad working scope like civil law notaries do, so they do not play any significant role in particular transactions like marriage or other family transactions, business transactions, or real estate transactions, apart from certifying associated documents in cases in, which such certification is required. In addition, Thai notaries are

also lawyers. These two professions have completely different nature: Notaries is a neutral position in the transaction while lawyers are representing only one party- the clients.

5. The Solution to Real Estate Problem in Thailand

After discussing the reasons that cause real estate problems in Thailand, this thesis proposes two solutions in this section: 1) the establishment of a Central Information Centre; and 2) the development of a civil law notary profession for real estate registration in Thailand.

5.1 The Establishment of Central information Centre

In Thailand, information about real estate properties is scattered around in various organizations. This is because there is no central information centre which gathers information about real estate properties. The absence of a connecting or central point to obtain real estate information causes confusion and conflict in the real estate business, so it is necessary to develop a central information centre, which stores information about all kinds of real estate properties in Thailand. It would have information about all organizations in one place, so that everyone can obtain real estate information easily and accurately. The information centre will gather information about every kind of real estate property in Thailand into a single place, no matter whether they are public or private properties. There should be general information about the real estate, such as its location, size, boundaries, and the nature of the land and so on. Furthermore, real estate information should be classified into different types, so that it can be easily found when searching for the property. There should also be information relating to present policies, the history of the land and restrictions issued over the land, as well as within the local area, which would help anyone who wished to acquire the land to make a decision.

Nonetheless, there should be some limitation to this access, since some information should be kept for public security reasons and privacy reasons. Private individuals should not have the authority to register their real estate transactions on their own, nor conduct title searches, as these two functions should be reserved for real estate professionals, namely the land registrar or notaries, in order to avoid fraudulent activities or mistakes.

5.2 An independent intermediary in the Real Estate transaction

In every real estate transaction, there should be a professional intermediary who can process or give advice to the parties in order to prevent mistakes or fraud. This is because lay people usually do not have much knowledge or experience in real estate transactions, so they cannot conduct an efficient verification like professionals since each real estate transaction has many stages and many important details, and missing some information or having mistaken in a transaction may result in an incomplete transaction or a transactions being revoked. Currently, the only two profession who have notable roles in real estate transactions are the land officials and lawyers in Thailand. However, the performance of these two professions are still not effective enough, so there still many real estate disputes in the country. Therefore, it is necessary to have a special intermediary in real estate transactions, who can make sure that all related information is true and correct. Notaries are property specialists, so they are required to have a good understanding of the law as well as real estate transactions. Notaries, must have a neutral position, and are concerned about the benefit for both sides before they certify a transaction, and since they are not a part of public sector or attached to any profession, they are able to work in the real estate business without interference or pressure from other authorities.

6. Conclusion

In Thailand, there are a lot of disputes over land possession because Thai land registration system is failing. The consequences of the weaknesses of the Thai land registration system can be summarized as three major problems: 1) uncertain real estate information; 2) transfer of land without ownership; and 3) use of a nominee in the real estate transaction. This study has found that these three problems occur because verification during real estate registrations is inefficient, or in other words, there is a lack of verification on the parties' identities and the real estate information, lack of certification on titles, as well as the transactions themselves. This is because in Thailand there is no intermediary in real estate transactions who checks all information before registration, additionally there is no central information center, so it is difficult to check information about land because the information needed is scattered around and sometimes the information that each organization holds does not match. As a result, the thesis would like to propose to develop civil law notaries for real estate registration in Thailand, as well as set up a central information center for solving real estate problems in Thailand.

Bibliography

Electronic Media

Het Wang Nam Khiaw Khaipit Khaithok [A Cause ‘Wang Nam Khiaw Who is Right, Who is Wrong] (Faculty Of Environment and Resource Studies, 2011)<http://www.en.mahidol.ac.th/thai/news/envi_news_fullv2.php?id=1163> accessed 5 May 2017 (เหตุ วังน้ำเขียว ใครผิด ใครถูก) (คณะสิ่งแวดล้อมและทรัพยากรศาสตร์, 2554) เข้าถึง 5 พฤษภาคม 2560

Industry and Labour the Standing Committee on Commerce, the National Legislative Assembly, Sarup Raingan Sammana Rueang “Nitikam Amprang” [The Summary of The Conference Title: Hidden Transactions: Foreigners and Land Possession] (The Secretariat of the Senate, 2012)) <http://www.senate.go.th/w3_c/senate/pictures/comm/6_8_2555/sammana/2555/sam.report.nitikamaompangTeedin12.03.55.pdf> accessed 17 December 2017 คณะกรรมาธิการเศรษฐกิจ การพาณิชย์และอุตสาหกรรมวุฒิสภา และการแรงงาน สภานิติบัญญัติแห่งชาติ, สรุปรายงานสัมมนา เรื่อง นิติกรรม อำพราง: ต่างชาติกับการถือครองที่ดิน(สำนักงานเลขาธิการวุฒิสภา - สภานิติบัญญัติแห่งชาติ, 2555) เข้าถึง 17 ธันวาคม 2560

Khonsuanplam Yangpara 45 Rai Bukrukpasanguan Bangkhanun Phuket [Invaded Bang Kanoon Preserved Forest, Phuket to Demolish 45-Rai Of Palm-And-Rubber-Tree Farm] (Komchadluek, 2016) <<http://www.komchadluek.net/news/regional/233768>> accessed 5 May 2017 โคนสวนปาล์ม-ยางพารา45ไร่บุกรุกป่าสงวนบางขุนภูเก็ต (คมชัดลึก, 2559) เข้าถึง 5 พฤษภาคม 2562

Naithun Khonmisi Hupthidin “Khao Ko” Ropthit [Investors-Colored People Grab Every Direction Of “Khao-Ko”] (ASTV Manager Online, 2013) <<http://www.manager.co.th/local/viewnews.aspx?NewsID=9560000143651>> accessed 5 May 2017 นายทุน-คนมีสี ฮุบที่ดิน“เขาค้อ”รอบทิศ (ASTV ผู้จัดการออนไลน์, 2556) เข้าถึง 5 พฤษภาคม 2560

LIQUIDATED DAMAGES IN AIRLINE BUSINESS EMPLOYMENT CONTRACTS^{*}

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Abstract

Penalty is one part that employers write in employment contract to protect their benefits such as to control the employee not to resign before the limit time stipulated by the employer. This can be advantages to the employer to receive the penalty excessively. However, when it reaches the court consideration in Section 14/1 under the Labor Protection Act B.E. 2541, it mainly focuses on the employee's benefits which are not easy to award the excessive amount to the employer

Thus, it is foremost to study and analyze Thai laws, especially Thai Labor Protection Act B.E. 2541, whether they are sufficient to find a solution to award the excessive amount, with legitimate interest and being reasonable to the cases. Moreover, foreign laws concerning about liquidated damages and penalty laws should be studied and adapted to be used with interpretation of the laws in Thailand.

Keywords: Liquidated Damages, Penalty, Excessive Amount.

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1. Introduction

Employment contracts are the contract made between employers and employees to have an agreement related to its work. Generally, it seems easy to make an employment contract, but when there is a terms and conditions given as an extra conditions to both parties, it creates a complication, leading to a dispute that needs a good resolutions to a problem that occurs. Employment contracts are very interesting because two parties have different status in which both engage to have an agreement to work together. For example, an employer needs an employee to work for the company, so the employer will stipulate all the terms and conditions in the contracts where the employee who needs to work and earn salary would apply for a job and must agree to those terms and conditions stated in the contract. In most cases, employers will be the one who stipulates the terms and conditions in the contract which the employee will have no chance to negotiate and change any details in the contract. Employees will only choose to accept those terms and conditions and get employed or deny the offer and get unemployed.

Besides, labor law is the law that controls both parties' benefits and has the purpose to protect the employee's benefits from the employer taking advantages as well. However, it is an interesting point to study why the current law still cannot solve the dispute when the dispute between both parties occurs.

One of the good examples of employment contracts is airlines employment contract, which is different from those of other businesses in some specific parts. For example, there will be a training cost that the airline will pay for the employee to be trained to become a pilot or a flight attendant.¹ The training includes a training program abroad in which the company covers the cost for air transportation, accommodation and training equipment, but the air fare will not be the same rate offered to usual

¹ Annex 1

customers who buy the ticket from the airline services. When the employer claims in the contract of penalty for the amount of cost, it should reflect the actual losses. Also, the details stated in the contract will have an extra condition requiring that flight attendant must work for a certain period of time. Otherwise, it will be a penalty for resigning or being expelled.

Nonetheless, this kind of contract is similar to other businesses as well such as hotel business that there are employment contracts to hire employee to work in their business. For example, once an employee is hired to work for the company such as in the position of Creative Officer, who designs all kinds of creative work, there will be a contract where it stipulates the penalty if the employee is in default. However, in this paper, only airline employment contract will be focused as a case study. The details will be discussed later.

Airline business consists of many kinds of contracts, for example, purchasing, hire of work, hire of services, and sales. In order to run an airlines business, one type of contract that cannot be avoided is employment contract, which is the contract that plays important role to hire employees to work for the company to move the business forward. Employment contracts in airlines business will be mainly discussed in this paper with a focus on flight attendant employment contract as a case study of employment contract.

Flight attendant employment contract is one of the contracts that are very interesting to study because it contains a training contract and an employment contract, which could be separated or combined together. In the contract of hiring a flight attendant, one important part is penalty, which is effective when the hired personnel breach the contract. This paper will focus on this part of the contract as a major discussion in relation with others related terms and law. In the contract of hiring a flight attendant, there will be a penalty written in the contract to control flight attendant not to breach the contract. Penalty that is written comes with a time condition that the penalty will be effective. For example, a flight attendant

has to work for airlines at the minimum of 2 years. If a flight attendant resigns or is expelled before the minimum period, then there will be a penalty of 120,000 baht.²

In Thailand, the contract made between employers and employees will be related with the labor law and the Thai Civil and Commercial Code (TCCC). The TCCC plays a role as the main law that is used in hire of services with regard to Sections 575 – 586. In addition to the hire of services, there are the law that can be put in the contract as an extra condition in order to enforce the employee not to breach the contract, which is penalty. Penalty in the TCCC is generally used in the contract in order to control the performance as agreed in the contract so that the party will not breach the contract. Otherwise there will be a consequence.

The other law related to the employment contract is the labor law. Labor law is applied accordingly with the TCCC. Labor law is a law that protects employee and also helps employer and employee to know the duty and the benefit that both parties will receive from the hire of services and also consist of the protection on the benefit of both parties.

Airlines employment contract with the condition of penalty is a contract that the airlines stipulate the penalty in sum amount of money to avoid the breach of contract from the employee because it can affect their business.³ For example, a contract regulates if employees terminate the contract before completing 2 years of working, they are liable for a compensation of 120,000 baht as a penalty for airlines.⁴ Mostly, this kind of contract will be used accordingly with the company expenses paid for employees on certain benefits such as employee training to become a flight attendant. These training expenses could be a lot such as training equipment, flight simulation, and air ticket and accommodation, if training

² Annex 1

³ Jonathan Morgan, *Great Debates in Laws*, (2nd edn, Palgrave Macmillan 2015) 234.

⁴ Annex 1

abroad. In the view of the company, it is the company's expense to train employees to work for the company. Once the employees resign before the time specified in the contracts, it is the loss to company because the company expects high-quality employees as a result of the paid training. In other words, the training is invested in employees with the expected work quality for the company in return, not to work for other companies when they resign.

On the other hand, the employee may question where the amount of 120,000 baht comes from. Does this amount reflect the actual cost that the company loses? If the company stipulates the damages in the contract to clarify the loss of company when a breach of contract happens in the future, it will be fair to the parties. This can be called liquidated damages that simply mean damages designated during the formation of a contract for the injured party to collect as compensation upon a specific breach. However, the problem is that there are different opinions about penalty and liquidated damages in Thai law. There are lawyers who interpret the penalty as liquidated damages while some interpret it differently as penalty which is an amount that can be claimed excessively.

Moreover, airline employment contracts do not have a form of the contract. In other words, it means that the contract can be made as in general rule as freedom of contract. However, the Unfair Contract Terms Act Section 3 has given a definition of "standard form contract" as written contract in which the essence of contract has prescribed in advance, regardless being executed in any form and used either contracting parties in the businesses. Then, airline employment contract needs to be made based on the Unfair Contract Terms Act as well.⁵ There is Section 4 that controls terms in the contract to prohibit unfair terms and the terms that allow one party take advantages over the other party. In order to consider which term

⁵ Unfair Contract Terms Act 2540, s 3

is fair and reasonable, Section 10 will be applied as it is used accordingly with Section 4.

Furthermore, the dispute may occur when the employee breach the contract, the employer will definitely file a lawsuit against the employee to claim such damages. If the case is pursued to the court, the employer has to clarify how much the employees really damage the employer's company.⁶ This is because it needs to show the evidence to the court in order to consider the case. In this case, it wastes time for both parties to find a lawyer and attend all the court appointments until the dispute is settled down.

Also, the court can decrease the penalty as it is stated in Section 14/1 under the Labor Protection Act B.E. 2541 – if a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the court. In determination of reasonableness, every legitimate interest of the creditor, not merely his/her property interest, shall be taken into consideration. After payment of the penalty, the claim for reduction is barred.⁷ In fact, Section 14/1 is a law that allows the court to consider reducing the amount of the penalty. It is not easy to use this section immediately when the court considers the case because it must fall into the condition under Section 14/1 that might not be in consideration in the view of business area. Also, the intention of making a contract under the rules of the TCCC is an important factor that the court will consider and may grant penalty to employers according to their requested amount that represents real lost and damages when the court perceives it fair and appropriate. Thus, this process takes time to both parties and may not be resolved even in a one-year period. However, the standard of the excessive amount is hardly found and currently Thai law has different opinion whether the

⁶ Thai Civil Procedure Code, s 84/1

⁷ Labor Protection Act B.E. 2541, s 14/1

penalty can be claimed excessively or it should be the amount that reflects the actual losses only.

Another problem with Section 14/1 is that it can lead to different judgment by different judges because the court may consider through different point of view and standard as the Section 14/1 is open to the court considerations. Besides, the Unfair Contract Terms Act is another law that the court will need to consider if the contract stipulates penalty prohibited by laws or not and if it is fair to both parties. This is to prevent unfair contract between the employer and employee when the employer claims for a penalty that is not an actual loss and gains profit from that penalty. However, the problem is that this has to be decided by the court to consider whether it void or not. As the Unfair Contract Terms Act does not state the consequences of breaking the law, the court will use the power in Section 14/1 to consider the cases and also it can lead to a question how much the penalty should be considered as excessive amount that is not appropriate to the case in which different judge can decide differently.⁸ For example, if A claims for a penalty from B for 800,000 baht but A actually loses only 100,000 baht or A stipulates the condition in the contract that B cannot work again in the area of creative. This is not a fair condition to put it in the contract. A as an employer takes advantages over B as an employee. When it reaches to the court, the court will consider if the amount is excessive or not. In Thai law, it is still unclear whether the penalty can be excessive.

Penalty and liquidated damages in other legal systems are important to study in order to understand the concepts and the intentions of the law of penalty and liquidated damages as well as their practice. The court's decisions and explanations of the judicial reasoning help understand how the court considers cases related to the penalty and liquidated damages. This will help to see how important to propose the other point of view on

⁸ *Supreme Court Case No. 690/2552*

penalty in the Thai law and to see the problem of using penalty and liquidated damages in other legal systems. Thai law can apply the good point of penalty and liquidated damages from other legal systems in order to interpret and close all the loopholes to make the law fair to all parties with justice. On the other hand, the stipulated amount in both penalty and liquidated damages has to be considered whether it is excessive or not by the court in which currently there is a question whether penalty and liquidated damages can be claimed excessive.

Then, the questions are raised in Thai law – Can the penalty be claimed excessively? Can it be interpreted as liquidated damages to claim for an excessive amount in the contract under Thai law? Is this possible? How can employees be protected from paying a disproportionately forfeited penalty to employers? Are penalty and Section 14/1 sufficient to find a good dispute resolution under the Thai law? Is there any provision in the Unfair Contract Terms Act that prohibits an unfair agreement? What are the consequences? This paper attempts to provide answers to these questions.

2. Penalty Issues

The law that describes about penalty with an interesting point of view to be further studied is Italian law. In Italian law, there are three groups of people who have different opinion on penalty. The first group thinks that penalty is in duty to compensate; the second group thinks that penalty is both compensation and punishment; and the third group thinks that penalty is both compensation and punishment with one obligation to compensate the losing party and punish the breach party.⁹ Penalty is a tool to prevent the breach of contract to ensure that the obligations will be performed as agreed in the contract.

⁹ Sanunkorn Sotthibandhu, Kham Athibai Nitikam Sanya [Juristic Act-Contract] (18th edn, Winyuchon 2014) 409 (ศนันท์กรณ โสทธิพันธุ์, คำอธิบายนิติกรรมสัญญา (พิมพ์ครั้งที่ 18, วิญญูชน 2557) 409)

However, the intention of penalty should be acceptable only if it uses in a proper way rather than to take advantages from the other party by gaining benefit from a penalty. There will be a chance that the employer will stipulate excessive amount of penalty. Thus, the employer should be limited for the stipulated amount not to be excessive but reflects the actual losses in which this will prevent the employer from gaining profit from such a stipulated excessive amount.

The reason for this proposal idea is that the law only permits the courts to reduce the excessive amount if it is not appropriate, but there is no law that awards the excessive amount if it is appropriate, especially in penalty law. So, this means that if the employer pre-estimates the losses which lawyers have two opinions that it is liquidated damages and pre-estimates it is not liquidated damages. The author agrees with the second opinion that it is not a liquidated damages. Once there is a default, the court will not be permitted to award the losses that are higher than the stipulated amount in the contract. Also, there will be a chance that the court will believe that the stipulated sum amount is appropriate and the employer will lose what they deserve to get. This will not have a conflict of the freedom of contract and with good faith.

Penalty has been used to protect the employer for the loss that comes from employee resigning or being expelled. It is used to claim for what company believes as their losses. In airlines employment contract, the penalty is stipulated in the contract with a sum amount that is randomly stipulated without knowing where it comes from and what is the calculation of those amounts.¹⁰ It can be advantages that the employer takes over the employee. Employer status in the contract is higher than the employee who cannot really negotiate and ask about the penalty. The options are limited – to sign the contract to get a job or not to sign the contract and get no job. There are no other choices for employee to do anything about it.

¹⁰ Annex 1

Once signing the contract, in the future, if there is a dispute in which penalty is one of the tools that employer uses to claim for the losses, employees face the limited choices again, either to pay it or to go to court. In reality, employee would prefer to pay penalty rather than go to the court, and this will be advantages for employer. At the first place, employer knows that if the employee cannot negotiate anything, then it is easy to stipulate the penalty at a high amount to make benefit to the company. Moreover, if the penalty is stipulated at 2 years minimum of working period, those who work more than 2 years can resign or are expelled without paying penalty. But for those who work under 2 years, they should not pay the penalty at the same amount at 120,000 baht when the working period is varied. Those who resign at 5th month will not have to pay the same penalty amount as those who resign at 2nd month. The penalty is still 120,000 baht and has not been reduced. This is not fair and reasonable to employee who is in a lower status, making it impossible to negotiate at the time of signing contract. There is no choice at all for the employee and the law that can protect this at the first place should be the Unfair Contract Terms Act because under the TCCC has no law to control the employer to make a fair stipulated penalty.

3. Liquidated Damages with Section 14/1

Section 383 of the TCCC is not sufficient to solve the problem of excessive amount as the court cannot decide the case without the law that empowers the court to make decision or the law that does not state what both parties can do. In this case, penalty law does not state that the employer can claim for an excessive amount and also for what the party does not request the court to decide the case. For example, if the employer pre-estimates the cost at 150,000 baht, but, at the breach of contract from employee, the losses is at 200,000 baht, the amount that is excessively higher than 150,000 baht. The court may not be allowed to award at the amount of 200,000, which can be seen excessive to the court.

Section 383 cannot solve this problem because it only allows the court to reduce the amount, but not to award the excessive amount.

The main idea of liquidated damages is to make the amount reflect actual losses. Nowadays the trend of using liquidated damages has changed to allow the court to award the excessive amount.¹¹ Liquidated damages in Common law country is a good example to compare the way it awards the excessive amount. There are some cases in the Common Law country that the courts are starting to consider the liquidated damages that can be claimed in excessive amount with the appropriate reason. The court considered the validity of the penalty.¹² However, with the above example, it cannot reflect actual losses if the court does not award the amount in 200,000 baht. Basically, Thai law does not really have the law that is the same as the concept of liquidated damages.

Therefore, it should not be interpreted that liquidated damages have existing in Thai law. The author proposes that with the adaptation of liquidated damages, it can be used under the Thai law for the court to consider on giving an excessive amount with the concern of legitimate interest. Also, it can be a concept that is adapted with the labor law and the TCCC as it can be consistent. Although the concept of liquidated damages does not currently exist in Thai law, with the study of liquidated damages, it is the concept that will bring to use with the court's consideration by using the guideline that the author proposes later in the recommendation. Changing the law is difficult, and to make it a written law will not be easy. So, the suggested way is to use them with the court's consideration as said in Section 14/1 to yield the results with the same standard for all the judge decisions to avoid the problem of different judge having different opinion on the cases.

¹¹ *Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67, UKSC 2013/028*

¹² *ibid* 11

To make it functional, it must be interpreted and understood very well. Liquidated damages can make a fair system to both parties agreeing to the stipulated sum. It is a good faith concept that protects one party from being taken advantages by the other party. It can be used to reduce the stipulated sum of money with the time that the employee has completed the work for airlines or it can be used to in excessive. Liquidated damages is not only fair during the court process but it is also fair throughout the process, starting from the contract signing process. In other words, liquidated damages will make the whole system fair to every party. Even when the parties are having a dispute with the contract such as in the case that employee does not pay liquidated damages as agreed, there will be a lawsuit that leads the court to use Section 14/1 under the Labor Protection Act B.E. 2541 to rule on the stipulated sum amount agreed by both parties. It will not be difficult for the court to consider the dispute of liquidated damages. The court can rule based on the contract stipulated sum of money that both parties agree if the court sees that it is not a fraud or any misleads. Section 14/1 under the Labor Protection Act B.E. 2541 is used to consider the fairness and appropriateness to the case that the court has power to decide. If the court does not consider liquidated damages at all, there might be a chance that one party will gain advantages over the other party. Liquidated damages can be applied consistently with Section 14/1 so that it will result in fairness to every party. Also, it can affect the practice of the employer. The author proposes that using court proceeding will be at the last resource to find the solution to the case. The result of Section 14/1 and liquidated damages together will be appropriate and fair to every party in the way that makes consideration on the stipulated amount easier and less complicated.

On the other hand, the interpretation of Section 14/1 is an issue whether it can award the excessive amount or not. In the author's opinion, the interpretation of Section 14/1 can be interpreted to award the stipulated amount in an excessive amount if it is appropriate to the case

and reasonable. As mentioned previously in the Topic 3 about liquidated damages with Section 14/1, liquidated damages are now changing in some cases that the court can award an excessive amount. So, it is a good point that Thai law can be improved by considering award excessive amount as long as it is appropriate in all angles. This is not because that the Common Law country like UK is changing and Thai law has to be changed. It is an example of the trend that the courts are now changing. The reason that the author proposes that Section 14/1 should be interpreted to award the excessive amount is because of the different status of both parties that employer and employee are not equal. If the court considers with a concern whether employer or employee gains more interest than the other, there will not be a fair result. As mentioned earlier, Thai courts consider not only the assets but also in terms of law to bringing justice to all people. If there is an only part to reduce the excessive amount but not award the excessive amount when it is appropriate, then it would not be fair at all. Sometime employer's losses can be excessive from the stipulated sum of amount. If it cannot be claimed, then the employer has to take responsibility for the losses that they should be compensated.

Section 14/1 does not only protect the employer's benefit, but it also protects the employee's benefit as well. The labor law has original intention to protect the employee's benefits, especially the section 14/1. Under the section 14/1, the court can consider the fairness to both parties, not only the employer's losses, which means the section 14/1 will be appropriate to the case for both parties.

4. Recommendations

The author proposes that with the adaptation of liquidated damages, it can be used under the Thai law for the court to consider on giving an excessive amount with the concern of legitimate interest. Also, it can be a concept that is adapted with the labor law and the TCCC as it can

be consistent. The author suggests that Thai law needs to consider the concept of liquidated damages in the TCCC and the Labor Protection Act. The concept of liquidated damages focuses on the actual loss that is a stipulated sum of amount agreed by both parties and is now improving to award an excessive amount in some cases as mentioned earlier. The author proposes the recommendation with a belief that Thai law has a loophole on penalty that causes the employer to use it to take advantages with a claim for an extravagant amount that is not appropriate to the case. Stipulated sum of money will help make it fair for that both parties can clarify the actual damages and acknowledge them in order to protect the default. If a default occurs, the party that causes damages has to be responsible as agreed on the stipulated sum amount. This is to avoid the lawsuit and unfair penalty to the party. However, if there are circumstances where the employer has extra losses or at the time of default the losses are costing more, the employer can call for such losses. If the employee does not agree, there will be a case brought up to the court and let the court decide the amount in which the author proposes that the court uses Section 14/1 to the case as it can be interpreted to award the excessive amount, if it is appropriate to the cases.

Moreover, the author recommends that, in Thai law, especially in the TCCC and the Labor Protection Act B.E. 2541, judges should interpret that the amount of penalty that has been stipulated in the contracts can be claimed excessive if it is appropriate to the case. Amendment the law is never easy. Therefore, as mentioned that changing the law is difficult, using liquidated damages as a written law will barely happen. However, using liquidated damages with Section 14/1 will help create the fairness and appropriateness as intention of the law will not end up with judgment subjective to different judges. Rather, it will bring the same standard with every case. The results will reflect back to the beginning of the contract signing process that both parties will stipulate amount based on the actual losses that will be reduced by the time of completed working period. This

can be accomplished without changing the law. In practice, if it goes to the court consideration, the liquidated damages will be used in consideration at the end as the court already uses the consideration to consider the case as said in Section 14/1 under the Labor Protection Act B.E. 2541. Therefore, the use of Section 14/1 to the case will help the court find good solution to all parties with appropriate results.

Nevertheless, this might not be effective perfectly because it is an idea of the Common Law, but the author proposes to see the good law and the concept that can be adapted to interpret Section 14/1 under the Labor Protect Act. Moreover, this will be consistent with the Unfair Contract Terms Act that it will make the law to be used at the beginning of the contract signing process. Also, it can be consistent to other laws so that it can be used and considered at the same time. As mentioned earlier, the idea of using Section 14/1 under the Labor Protection Act B.E. 2541 should be considered as an exceptional rule of Section 142 under the Civil Procedure Code. The author would consider a lawsuit to be the last choice and last resource to solve penalty issues because the author believes that lawsuit should take part only when it is necessary and there are no other options. With liquidated damages, issues on penalty can be solved before using the court process and it can reduce the number of court cases as well. However, the concept of liquidated damages should be just an option to consider in court. Interpretation of Section 14/1 should be the main focus that the court should interpret to award an excessive amount.

Bibliography

Books

Labor Protection Act B.E. 2541

Morgan J, *Great Debates in Laws*, (2nd edn, Palgrave Macmillan 2015)

Sotthibandhu S, Kham Athibai Nitikam Sanya [Juristic Act-Contract] (18th edn, Winyuchon 2014) (ศนันท์กรณ์ โสทธิพันธุ์, คำอธิบายนิติกรรมสัญญา (พิมพ์ครั้งที่ 18, วิญญูชน 2557))

Thai Civil and Commercial Code 2560

Unfair Contract Terms Act 2540

Cases

Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67, UKSC 2013/028

Supreme Court Case No. 690/2552

Annex 1

To be read and construed as an integral part of this Agreement.

SECTOR	PARTICULARS	
1	Name	
2	ID Card No.	
3	Employee Code	
4	Address	
5	Position	Flight Attendant
6	Training Course Title	FLIGHT ATTENDANT TRAINING
7	Duration of Course	Two (2) months.
8	Number of years	Two (2) years Commencing November 17, 2014
9	Agreed Liquidated Damages	<u>Resign/Dismissed</u> Within 2 nd Year : 120,000 baht

SECURITIZATION OF INTELLECTUAL PROPERTY ASSETS IN THAILAND ^{*}

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Abstract

This article presents new challenge of the securitization of intellectual property, as well as, examines how the securitization of intellectual property rights has developed in the U.S. and Japan. Generally, it is perceived that intellectual property could be used for securitization. However, the evolution of securitization in Thailand is in a slow phase. The precedents of use of intellectual property rights as an asset-backed for securitization are limited and a statute supporting intellectual property securitization is also unclear. Analysis of the strong and weak points of intellectual property securitization will help furnish a different approach to develop Thailand's future securitization. Even though the use of intellectual property securitization is currently on the low side, its potential is enormous and intellectual property securitized is a lucrative way for many companies. Enactment of any act should be done on an awareness of the possible barrier toward securitization of the intellectual property.

Keywords: Securitization, Intellectual Property, Royalty fee, IPRs.

^{*} This article is summarized and rearranged from the thesis "Securitization of Intellectual Property Assets in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

1. Introduction

There are many emerging trends that rely on intellectual property, since it can be securitized to create greater opportunities for commercializing new products and developing the business of intellectual property's owners¹ and firms can use their intellectual property to get accessed to many alternative markets.² Using intellectual property as collateral is not a new concept, as Section 8(5)³ of the Business Collateral Act B.E. 2558 (2015) brings in the new method of collateralization and currently recognized intellectual property as collateral. On the other hand, using the intellectual property assets for securitization is a new financing tool, and it helps driving organizations to access more sources of fund.

In general, securitization refers to the pooling of various financial assets⁴ and then issues new debt securities backed by such assets to support such financial products. Underlying assets for securitization can be any assets which have predictable cash flow.⁵ Thus, future royalty fees of intellectual property can be used as assets for securitization.⁶

In Thailand, traditional securitization normally uses commercial mortgages, residential mortgages, auto loans or credit card receivable

¹ J. Paul Forrester, 'Securitization of Project Finance Loans' NYU Journal <<http://people.stern.nyu.edu/igiddy/ABS/projectloans.htm>> accessed 15 September 2018

² Bruce Berman, *From Ideas to Assets: Investing Wisely in Intellectual Property* (John Wiley & Sons, Inc., New York, John Wiley & Sons, Inc 2002)

³ Business Collateral Act B.E. 2558 (2015), Section 8(5) (For the purpose of this Act, property includes: Intellectual property.)

⁴ Forrester (n 1).

⁵ 'The Securitization of Intellectual Property Assets - A New Trend' <https://wipo.int/sme/en/ip_business/finance/securitization.htm> accessed 15 September 2018

⁶ *ibid*

obligations⁷, which all of these can generate receivables to back securities. However, intellectual property rights are not defined as the underlying assets used in securitization process under Section 3⁸ of current Emergency Decree on Special Purpose Juristic Persons for Securitization B.E. 2540 (1997), since the intellectual property rights are not rights of claim. Nevertheless, they are, in some cases, necessary to be transferred to the special purpose vehicle.

2. Securitization of intellectual property in foreign countries

In developed countries, a value of intellectual property is much higher than the intellectual property created in Thailand because technology in such countries is far more evolved.⁹ The laws concerning intellectual property securitization in the high-valued-intellectual-property countries are expected to be models for emerging countries, i.e. Thailand. Considering the efficiency of securitization of intellectual property in foreign countries, the writer particularly pays attention to the securitization laws in the U.S., because the U.S. has large intellectual property markets and reliable experiences in the relevant laws governing the intellectual property securitization for many years. With regard to the study of Japanese law, given its legal system is similar to Thai law, the development in the field of modern securitization is comparable to Thai law, and it can ultimately

⁷ Stephen Bennett, 'Securitisations in Thailand'

<http://www.globalsecuritisation.com/08_GBP/GBP_GSSF08_127_134_Thailand.pdf>
accessed 23 May 2019

⁸ Emergency Decree on Special Purpose Juristic Persons for Securitisation B.E. 2540 (1997), Section 3 ("assets" means (1) rights of claim which generate a flow of receipts in the future; or (2) rights of claim coming into existence in the future which determine debt repayment in cash and generate a flow of receipts in accordance with the rules specified by the SEC)

⁹ Philip Elmer-Dewitt, 'Apple's brand value rises to No. 2 in the world, after Google' (2011) Fortune Media IP Limited. <<http://fortune.com/2011/09/15/apples-brand-value-rises-to-no-2-in-the-world-after-google/>> accessed 28 April 2019

indicate the facts whether Thai law is ready for intellectual property securitization or whether something is still missing and needed to be improved.

2.1 Securitization of intellectual property in the United States

Although the U.S. government did not enact the act specifically governing the securitization, the existing laws regarding securities and trust indenture can be applicable and sufficient to regulate every framework of securitization.¹⁰ Section 3(79) of the Securities Exchange Act of 1934 gives the definition for the “Asset-Backed Security” which does not explicitly determine what is eligible to be securitized. However, the assets must have character of (1) a fixed-income or (2) any type of self-liquidating financial asset. Thus, any assets which can generate adequate incomes to return to lenders can fall within the term¹¹ “self-liquidating financial asset.”

2.2 Securitization of intellectual property in Japan

Act on Securitization of Assets of 1998 gives the broad definition for assets that are capable of being securitized. The asset shall be acquired by the SPC and have value as it can be used to issue the asset-backed securities or shall be able to be administrated and dispositioned in order to generate incomes. Although there is no court case regarding the intellectual property securitization found in a Japanese court, there is some evidence

¹⁰ Patrick D Dolan and others, ‘Structured Finance & Securitisation’ (Getting the deal through, 1 March 2018)

<<https://gettingthedealthrough.com/area/74/jurisdiction/23/structured-finance-securitisation-2018-united-states/>> accessed 14 October 2018

¹¹ Michael Urschel and others, ‘Risk Retention Update: Spring 2018’ (2018) King & Spalding

<<https://kslaw.com/attachments/000/005/731/original/ca032618.pdf?1522090057>> accessed 14 October 2018

indicating that companies have used intellectual property securitization for fundraising purpose.¹²

There are some other factors that make intellectual property securitization in Japan become unpopular. For example, the development of technology is rapidly dynamic. The use of the cassette tape was very popular in the past, and it is obsolete now. This gives adverse influence on the value of the intellectual property and devalues the royalty incomes generated from cassette tape. Furthermore, the litigation risks on the validity of the ownership, transfer, and license agreement of the intellectual property may not attract conservative investors to purchase the intellectual property backed securities. Lastly, the absence of a secondary market for asset-backed securities results in the lack of liquidity. Thus, the investors seldom sell the securities to other investors during the securitization period. The investors are more likely satisfied with interest gain and capital money at the end of securitization project.¹³

3. Problems concerning securitization of intellectual property in Thailand

In Thailand, the securitization of intellectual property still lacks experiences since it is a new financing mechanism for intellectual property industries. Plus, the markets for asset-backed securities are small because of the limitation of buyers and sellers in the capital market. These problems should be recognized as well as the uncertainties of the relevant law. In the writer's view, the current Emergency Decree on Special Purpose Juristic Persons for Securitization B.E. 2540 is still not practicable to comply with an intellectual property securitization. Therefore, it should at least have the

¹² Dr. Mark Fagan, 'Facilitating Securitization in Japan' (2009)

<<http://derecho.uba.ar/institucional/pacem/japan-mark-fagan.pdf>> accessed 20 November, 2018

¹³ Takahiro Kobayashi, 'IP Securitization', (2004) IFLR

<<https://iflr.com/Article/2026741/IP-securitization.html?ArticleId=2026741>> accessed 20 April 2019

provision that makes a transfer of royalty streams from intellectual property at the same time with intellectual property rights of copyrights, trademarks, or patents to a special purpose vehicle become possible.

3.1 The definition of “assets”

The Emergency Decree on Special Purpose Juristic Persons for Securitization B.E. 2540 limits the assets for securitization, only the rights of claim. Therefore, the definition of assets does not cover some rights such as intellectual property rights of copyrights, trademarks, or patents, namely, ownership or exclusive rights. Nonetheless, considering the potential of the intellectual property rights which have a value in the global market and an ability to be exploited.¹⁴ The intellectual property rights of copyrights, trademarks, or patents can be sold, licensed, used for collateral, or transformed into securities. Like other valuable assets, the intellectual property rights can be recognized as financial assets because the intellectual property owners can manage the intellectual property rights to earn future cash flow streams.

3.2 Difficulty in predicting future cash flow

There is a difficulty in predicting future cash flow due to the intellectual property's specific factors and a complexity to assess the value of intangible assets.¹⁵ Various kinds of intellectual property risks and the valuation of the royalty streams from intellectual property still remains in a developing area, and there are various arguments over methodology and fact of the method used. The technical and precise valuation of intellectual property rights is necessary for the development of securitization.

¹⁴ Shigeki Kamiyama and others, 'Valuation and Exploitation of Intellectual Property' (2006) OECD Science, Technology and Industry Working Papers 2006/05
<https://www.researchgate.net/publication/5206043_Valuation_and_Exploitation_of_Intellectual_Property> accessed 18 November 2018

¹⁵ Kenan P. Jarboe and others, 'Intangible Asset Monetization' (2008) Athena Alliance
<<https://www.issuelab.org/resources/2875/2875.pdf>> accessed 22 November 2018

3.3 Characteristics of intellectual property

Characteristics of the assets to be securitized is one of the obstacles in the securitization process since the assets targeted for securitization are the intellectual property royalties which have unexpected risks all the time. To successfully securitize the assets, it is necessary to identify whether the intellectual property rights are appropriate to be securitized. Thus, a finance analyst must, from the first place, verify the ownership of intellectual property by tracking the record of the past performance of their intellectual property for estimating future revenue generate from intellectual property rights.¹⁶

3.4 Balance of disclosure

The intellectual property owner faces the problems of disclosing financial status and adequate information to support the investment decision because some confidential technical information related to the intellectual property must be hidden during the issue of the debt securities. Since the offering securities backed by royalty streams from intellectual property and/or intellectual property rights will be subject to the requirement of disclosure according to Notification of the Capital Market Supervisory Board, sometimes, it causes difficulty to the intellectual property owner to balance what should be disclosed and what should not.

4. Conclusion

The World Intellectual Property Organization described the securitization of intellectual property as “a new trend”¹⁷ since it becomes more acceptable by financial markets as a financing tool to convert fewer

¹⁶ Nora Wouters, ‘IP SECURITIZATION – THE CASE FOR BELGIUM’ (2011) IPEG, <<https://www.ipeg.com/ip-securitization-the-case-for-belgium/>> accessed 25 April 2019

¹⁷ ‘The Securitization of Intellectual Property Assets - A New Trend’ <https://wipo.int/sme/en/ip_business/finance/securitization.htm> accessed 15 September 2018

liquid assets into bonds that can be sold in a capital market to investors. Nevertheless, securitization of only royalty streams from intellectual property can occasionally constitute various difficulties. The problem will occur when rights of claim derived from intellectual property license agreement are transferred without the intellectual property rights of copyrights, trademarks and patents because an originator still possesses the exclusive rights. The originator, therefore, can still exercise the exclusive rights by reproducing, adapting, assigning, and granting licenses to others which may lead to unintended outcomes to investors who purchased the securities backed by intellectual property rights.

The market relating to the securities backed by intellectual property is not popular. The reasons are probably that several factors which are needed to be deterred are still in progress and the intellectual property securitization is not an effortless process so that it needs professionals in various areas to deal and participation from many stakeholders, better regulations as well as interdisciplinary study and laws comprising intellectual property law, laws and finances regarding corporate and other aspects. With regard to the risks of the securitization of intellectual property rights of copyrights, trademarks, and patents, the law needs to provide regulation with efficient procedures including the criteria for assessment of the value of intellectual property rights. Problem-solving by amending the definition in the Emergency Decree on Special Purpose Juristic Persons for Securitization B.E. 2540 as stated above will make securitization more efficient and will promote the development of a bond market which is part of the capital market. It also promotes the development of intellectual property, helping entrepreneurs to have more funding options and making investors to have more diversified financial instruments.

Bibliography

Book

Berman B, *From Ideas to Assets: Investing Wisely in Intellectual Property* (John Wiley & Sons, Inc., New York, John Wiley & Sons, Inc 2002)

Journals

Forrester P, 'Securitization of Project Finance Loans' NYU Journal
Kenan P. Jarboe and others, 'Intangible Asset Monetization' [2008] Athena Alliance

Electronic Sources

'The Securitization of Intellectual Property Assets - A New Trend'
<https://wipo.int/sme/en/ip_business/finance/securitization.htm> accessed 15 September 2018

Stephen Bennett, 'Securitisations in Thailand'
<http://www.globalsecuritisation.com/08_GBP/GBP_GSSF08_127_134_Thailand.pdf> accessed 23 May 2019

Patrick D Dolan and others, 'Structured Finance & Securitisation' (Getting the deal through, 1 March 2018)
<<https://gettingthedealthrough.com/area/74/jurisdiction/23/structured-finance-securitisation-2018-united-states/>> accessed 14 October 2018

M Urschel and others, 'Risk Retention Update: Spring 2018' (2018) King & Spalding
<<https://kslaw.com/attachments/000/005/731/original/ca032618.pdf?1522090057>> accessed 14 October 2018

Kobayashi T, 'IP Securitization', (2004) IFLR
<<https://iflr.com/Article/2026741/IP-securitization.html?ArticleId=2026741>> accessed 20 April 2019

Kamiyama S and others, 'Valuation and Exploitation of Intellectual Property' (2006) OECD Science, Technology and Industry Working Papers 2006/05 <https://researchgate.net/publication/5206043_Valuation_and_Exploitation_of_Intellectual_Property> accessed 18 November 2018

Fagan M, 'Facilitating Securitization in Japan' (2009) <<http://derecho.uba.ar/institucional/pacem/japan-mark-fagan.pdf>> accessed 20 November, 2018

Wouters N, 'IP SECURITIZATION – THE CASE FOR BELGIUM' (2011) IPEG, <<https://www.ipeg.com/ip-securitization-the-case-for-belgium/>> accessed 25 April 2019

Dewitt P, 'Apple's brand value rises to No. 2 in the world, after Google' (2011) Fortune Media IP Limited. <<http://fortune.com/2011/09/15/apples-brand-value-rises-to-no-2-in-the-world-after-google/>> accessed 28 April 2019

'The Securitization of Intellectual Property Assets - A New Trend' <https://wipo.int/sme/en/ip_business/finance/securitization.htm> accessed 15 September 2018

THE ROLE OF TRADE UNIONS IN PROTECTING RIGHTS OF LABOURERS
IN THE READYMADE GARMENTS (RMG) SECTOR OF BANGLADESH:
A COMPARATIVE ANALYSIS OF BANGLADESH, CHINESE AND
INDIAN LAWS*

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Abstract

With the 6.5% share of Readymade Garments (RMG) in the global market, the RMG industry is not only the second-largest industry in the world but is also the leading revenue-earning industry of Bangladesh. In the Fiscal Year 2017-2018, this sector generated the income totaling US\$ 30.614 billion, which accounted for 83.49% of the total export value of Bangladesh. Unfortunately, the number of trade unions in the RMG industry in Bangladesh remains far from satisfaction. The reason behind this poor presence of trade unions in this business principally lies in the deficiency of the Bangladesh labour law regarding the establishment and activities of trade unions.

In effect, following its ratification of the relevant Conventions of the International Labour Organization (ILO), Bangladesh is obligated to put forth in its labour law a level of protection in conformity with the requirements of

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the ILO Conventions. However, the required level of protection has not been envisioned as far as the legal recognition of trade unions is concerned.

This paper points out inadequacy and shortcomings of Bangladesh labour law in relation to trade unionism in comparison to legal requirements in the ILO conventions concerned as well as in the Chinese and Indian legal frameworks in this sphere. Through such comparative study, this paper recommends practical solutions to legal deficiencies in Bangladesh labour law, with a view to bringing Bangladesh labour law in line with internationally recognized standards as at the very least contemplated by the ILO conventions and thereby affording labourers with reasonable protection in their voluntary and independent establishment of and participation in trade unions.

Keywords: Trade Union, Readymade Garments, Bangladesh Labour Act, International Labour Organization Conventions.

1. Introduction

1.1 General Concept of Trade Union

Conflict between employers and labourers is a very common phenomenon in every industry. To solve this, a trade union is considered a platform to hear the voices of the labourers affected, and collective bargaining is a method of negotiation between two parties. Trade unions are a legal association made up of a group of labourers or owners to mutually establish corporate objectives. The core role of the trade union of labourers is to ensure better rights and wages, working conditions, working hours, workplace safety and other benefits for the workers through negotiations. In this regard, collective bargaining is the most preferable method for these types of negotiations. Usually, trade unions have their own set of rules to help it function and discuss lawfully. In general, trade unions deal with three relationships. The first is between labourers and labourers. The second is between labourers and employers, and the last is between employers and employers.¹ The concept of trade unionism first arose in the United Kingdom in the 18th century when the industrial revolution took place. At first, the unskilled and semi-skilled labourers were forced to work for long hours with low wages. As a result, several disputes arose, where labourers came together to resolve the conflicts between the laborers and the owners. Consequently, the labourers started to benefit from the trade unionism activities through collective bargaining actions. In the 1900th century, the concept of trade unions has spread all over the world.²

¹ Abu Hena, Mostofa Kamal, Hassan Faruk Al Imran, *Labour Law in Bangladesh: Doctrine, Theory and Practice* (Muhit Publications, February 2018) 273

² Trades Union Congress, 'A Short History of British Trade Unionism' (T.U.C. London, 1947)

<http://collections.mun.ca/PDFs/radical/AShortHistoryofBritishTradeUnionism.pdf>

accessed 11 September 2018

1.2 Trade Unions in RMG of Bangladesh

It is worth mentioning that Bangladesh is a densely populated (1,015 inhabitants per square kilometer) agro-based country with around half of the working population living in rural areas. In the late 1970s, its economic focus started to shift from the agrarian to the industrial, involving particularly the textile and apparel enterprises.

Initially, there were 384 garments factories in Bangladesh during 1984 to 1985, and the number increased to 2182 in the next 10 years. According to a report of Bangladesh Garments Manufacturers and Exporters Association (BGMEA), over 2017 to 2018, there were 4560 garments factories in Bangladesh with 4 million laborers, of which 80% were women.³ The number stayed in the second position after China's, which is the largest garment exporter in the world. The RMG export is the highest earner in Bangladesh, where in the financial year 2017-2018, it earned US\$ 30.614 billion, which was 83.49% of the total export rates of Bangladesh.⁴

Some of the major industrial accidents that happened in Bangladesh between 2012 and 2013 have worldwide affected the image of the country, regarding the labourers' safety. This has pushed the whole RMG industry to new challenges. Several countries sourcing RMG from Bangladesh as well as many experts raised multiple queries as to the movement of the trade union and the labourers' right of collective bargaining, specifically the country's low standard of these in the RMG sector.

In 2012, there were only 132 trade unions in the Bangladesh's RMG sector, and since 2017, merely a total of 644 Trade Unions have been

³ Bangladesh Garments Manufacturers and Exporters Association, 'Trade Information' (BGMEA, 12 May 2019) <<https://www.bgmea.com.bd/home/pages/tradeinformation>> accessed 12 December 2018

⁴ Naimul Haq, 'Bangladesh's Garment Industry Boom Leaving Workers Behind' *Inter Press Service* (USA, 09 February 2018) <<http://www.ipsnews.net/2018/02/bangladeshs-garment-industry-boom-leaving-workers-behind/>> accessed 15 December 2018

registered there.⁵ Considering the total number of RMG factories, such number of trade unions remain low.

2. Legal Problems in Bangladesh Labour Law

This report focuses on some legal problems considered to be obstacles to the formation of trade unions and the labourers' right of collective bargaining in the RMG sector of Bangladesh. The weaknesses in the legal framework related to these issues are given below:

2.1 Required Membership of Trade Union

The formation of trade unionism in Bangladesh is very restricted under the Bangladesh's labour laws. As stated in Section 22 (b) of the Bangladesh Labour (Amendment) Act 2018, to register a new trade union, at least 20% of the entire amount of labourers is required as a member.⁶ In practice, the 20% of total labourers cannot be gathered because Section 193 of the Bangladesh Labour Act, 2006 does not allow a worker to enroll to be a member of more than one union at the same time,⁷ which contradicts the idea of the trade unionism's freedom.

2.2 Alternative Way of Trade Union

The Bangladesh Labour Act, 2006 provides an alternative way, called Participation Committee. According to Section 205, the Committee shall run

⁵ European Commission, 'Implementation of the Bangladesh Compact Technical Status Report' (October 2017)

http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf> accessed 15 December 2018

⁶ Bangladesh Labour (Amendment) Act 2018, s 22(b)

[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)> accessed 15 November 2018

⁷ The Bangladesh Labour Act 2006, s 193

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402> accessed 23 October 2018

activities related to laborers' interests in the case there is no trade union or until a trade union is formed.⁸ The Committee must be established with representatives of both the labourers and owners to work together for the benefits of labourers. In practice, it is not possible to protect labourers' rights properly since the representative of the employer is present in the same committee. Additionally, no time limit is mentioned in this Act to create a trade union in any industries, so the owner can easily ignore the formation of a trade union and instead rely on the Participation Committee.

2.3 Termination of Labourers' Employment

Under Section 11(3) of the Bangladesh Labour (Amendment) Act, 2013, termination of a labourer's employment due to misconduct is easy to do. The employer can terminate any labourers' employment at any time without any notice or compensation under this Section.⁹ The concern over this provision is that employers may abuse the law to menace laborers whenever the labourers try to claim their rights against the employers while the labourers are always under fear of losing their jobs.

2.4 Lawful Strike

According to Section 33 of the Bangladesh Labour (Amendment) Act 2018, at least 51% members of the entire trade union members are able to do a lawful strike.¹⁰ Nonetheless, practically it is rarely possible to do so.

⁸ The Bangladesh Labour Act 2006, s 205

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402> accessed 23 October 2018

⁹ Bangladesh Labour (Amendment) Act 2013, s 11(3)

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94286/110640/F482588609/BGD94286%20Eng.pdf>> accessed 23 October 2018

¹⁰ Bangladesh Labour (Amendment) Act 2018, s 33

[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)> accessed 15 November 2018

3. Trade Unions and Collective Bargaining under the ILO

3.1 Nature of Trade Unions under the ILO Conventions (no. 87)

According to the ILO Convention no. 87, a trade union is not an organization only for the labourers but also for the employers. In this regard, both employers and labourers should be able to exercise their rights collectively without any interferences. Moreover, the right to establish a trade union by the laborers or by the employers should be on the basis of impartiality. More importantly, the formation has to be flexible where the labourers and the employers should have full freedom to choose, join and leave the union it whenever they want. Trade unions should have adequate rights to maintain their own separate rules of association in order to pursue their administrative activities and to freely elect their representatives. Also, trade unions should have the right to appoint a legal assistant to deal with any legal proceedings, and shall have the right to connect with national or international federations, confederations or any other organizations of labourers and employers. There should not be any unreasonable restrictions or interferences in their activities, in which case the governments have to take any measures to guarantee that both laborers and employers can exercise their right to organize independently.¹¹

3.2 Nature of Collective Bargaining under the ILO Conventions (no. 98)

To effectively conduct the activities of trade unions, methods of negotiation are essential. To this end, collective bargaining is the best way for negotiation among the labourers and the employers. According to the Convention no. 98, there should not be any discrimination among the labourers who have joined a trade union and those who have not. Every

¹¹ International Labour Organization, 'Freedom of Association and Protection of the Right to Organize Convention, 1948' (No. 87)

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_COD E:C087> accessed 7 October 2018

labourer should have equal rights regardless of their association with trade union. Labourers must have their rights to join and leave any trade unions voluntarily. Conversely, no one can dismiss any labourers or employers due to their involvement in the union's activities.

The interference by the third party in the establishment and administrative activities of a trade union should be prevented. In addition, dominating the trade union of labourers or employers by supporting or controlling it through financial provisions or other facilities must be prohibited as well. To ensure these prohibitions, the national laws should be effective enough to develop or utilize the mechanism of independent negotiations between the employers and labourers.¹²

4. Legal Framework of Foreign Countries' Laws and Legal Problems

4.1 People's Republic of China

China is one of the largest country in the world with a population of 1.42 billion. It is located in East Asia and is bordered by 14 countries.¹³ In 1995, China achieved the 1st rank for export of textiles and garments in the world, and since then it has been maintaining this position. Every year China exports goods worth around 1.2 billion USD. According to the China National Garment Association (CNGA), there are more than 100,000 garment industrials in China and more than 10 million workers there.¹⁴ In 2017, China

¹² International Labour Organization, 'Right to Organize and Collective Bargaining Convention, 1949 (No. 98)' <https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C098> accessed 7 October 2018

¹³ World Population Review, 'China Population 2019' (Demographics, Maps, Graphs) <<http://worldpopulationreview.com/countries/china-population/>> accessed 13 February 2019

¹⁴ Professor Dr. Engr. AyubNabi Khan & Md. RashedUllah, 'Export Scenario Between Bangladesh and China: Opportunities of Bangladesh in RMG Sector' (2017) 13(28)

earned 158.4 billion USD as a top exporter country with 34.9% shares of the global market.¹⁵

4.1.1 Provisions of the Chinese Laws regarding Legal Problems

4.1.1.1 Required Membership of Trade Union

According to Article 10 of the Trade Union Law, the trade union of an enterprise, public institution, or government organ with 25 members or so shall establish a basic-level trade union committee. However, if the members are fewer than 25, such committee may be formed separately, or be established by the members of 2 units or more.¹⁶

4.1.1.2 Alternative Way of Trade Union

There is no alternative organization or committee of the trade union in China. According to Article 3 of the Trade Union Law of China, all labourers doing physical or mental work in enterprises, both in private and public within Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organizations pursuant to the law, regardless of their nationalities, races, sexes, occupations, religious beliefs or educations. No organization or individual may hinder them from doing so.¹⁷

<https://eujournal.org/index.php/esj/article/view/10060/9550>> accessed 13 February 2019

¹⁵ Dr. Sheng Lu, 'WTO Reports World Textile and Apparel Trade in 2017' (FASH455 Global Apparel & Textile Trade and Sourcing, 2017)

<https://shenglufashion.com/2018/08/16/wto-reports-world-textile-and-apparel-trade-in-2017/>> accessed 16 February 2019

¹⁶ Trade Union Law of the People's Republic of China (Amendment) 2009, art 10

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/30352/118793/F1165849917/CHN30352%202.pdf>> accessed 21 February 2019

¹⁷ Trade Union Law of the People's Republic of China (Amendment) 2009, art 3

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/30352/118793/F1165849917/CHN30352%202.pdf>> accessed 21 February 2019

4.1.1.3 Termination of Labourers' Employment

Termination of any workers' employment in China is not easy under the Labour Law of China, according to Chapter 3 of this Act, there must be a valid agreement between a laborer and an employer.

This agreement shall be terminated by the employer unit only under specific grounds such as an expiration of the contract's term, mutual termination and any proves of serious legal offenses by the worker.¹⁸

4.1.1.4 Lawful Strike

In China, the present scenario of lawful labour strike is in critical situation. There is no law banning labour's strike, but at the same time there is no law permitting it. So, under criminal or civil prosecution, the participants of a strike are not protected. In spite of this legal risk, labour strikes still occur frequently in the territory of China. According to a Hong Kong based NGO, named China Labour Bulletin, there were 2,600 strikes taking place in 2016.¹⁹

4.2 Republic of India

India is another largest country in the world with a population of 1.3 billion and an area of 3.1 million sq. km.²⁰ India holds the 4th position in RMG sector with 18 billion USD garment exports,²¹ which is 4.1% shares in

¹⁸ ibid ch 3.

¹⁹ Dr. Stefan Brehm, 'Collective Bargaining: New Hope for China's Workers?' (Institute for Security & Development Policy, 31 March 2017)

<<http://isdpeu/publication/collective-bargaining-new-hope-china/>> accessed 21 February 2019

²⁰ 'India Country Profile' *BBC News* (London, 18 February 2019)

<<https://www.bbc.com/news/world-south-asia-12557384>> accessed 3 March 2019

²¹ 'Bangladesh remains 2nd largest RMG exporter accounting 6.5% Market Share' *Textile Today* (Bangladesh, 7 August 2018) <<https://www.textiletoday.com.bd/bd-remains-2nd-largest-rmg-exporter-accounting-6-5-percent/>> accessed 3 March 2019

the global clothing market. In 2017, RMG sector of India contributed 2% to the GDP and 15% to total exports earnings of India.²²

4.2.1 Provisions of the Indian Laws and Legal Problems

4.2.1.1 Required Membership of Trade Union

Under Section 9A of the Trade Unions (Amendment) Act, 2001, minimum requirement for membership of a trade union shall continually have not less than 10% (ten percent) or one hundred of the workmen, whichever is less. In this respect, a minimum of 7 members thereof must also be engaged or employed in an establishment or industry with which the union is connected.²³

In addition, according to Section 24 of the Trade Union Act 1926, if minimum number of trade union members is less than required, any two or more registered trade unions may become amalgamated together as one trade union with or without dissolution or division of the funds of such trade unions or either or any of them.²⁴

4.2.1.2 Alternative Way of Trade Union

It is not permitted under any laws of India to establish any alternative committee or organization instead of a trade union. Every labourer has the right to organize and join a trade union with a view to making their voices heard in a cooperative way against any violation of labourers' rights.²⁵

²² India Brand Equity Foundation, 'Apparel And Garment Industry And Exports' (December, 2018) <<https://www.ibef.org/exports/apparel-industry-india.aspx>> accessed 3 March 2019

²³ The Trade Unions (Amendment) Act 2001, s 9A <[http://nclcil.in/infobank/act/The_trade_unions_\(amendment\)act_2001.pdf](http://nclcil.in/infobank/act/The_trade_unions_(amendment)act_2001.pdf)> accessed 10 March 2019

²⁴ *ibid* s 24.

²⁵ *ibid*.

4.2.1.3 Termination of Labourers' Employment

According to Section 25N of the Industrial Disputes Act, 1947, any worker, who has been in continuous working for more than 1 year, can be only laid off by the permission of a suitable government officer. Additionally, in the case of termination, the employer must provide a 3-month notice with a valid reason therefor, and also have to pay 15-day remuneration that the employer should have received regularly for each year during the employment.²⁶

4.2.1.4 Lawful Strike

According to Section 23 of the Industrial Disputes Act, 1947, no workman who is employed in any industrial establishment shall go on strike if it is in breach of contract. Furthermore, no employer of any such workman shall declare a lock-out during:

(a) the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings;

(b) the pendency of proceedings before a Labour Court, Tribunal or National Tribunal including two months after the conclusion of such proceedings;

(bb) the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings; or

(c) any period in which a settlement or award is in operation, with respect to any of the matters covered by the settlement or award.²⁷

From above, it is obvious that there are some limitations regarding the right to strike under Indian labour laws. However, there remain some valid and lawful specific approaches to exercise such right.

²⁶ The Industrial Disputes Act 1947, s 25N

<https://labour.gov.in/sites/default/files/THEINDUSTRIALDISPUTES_ACT1947_0.pdf>

accessed 10 March 2019

²⁷ The Industrial Disputes Act 1947, s 23

<https://labour.gov.in/sites/default/files/THEINDUSTRIALDISPUTES_ACT1947_0.pdf>

accessed 10 March 2019

5. Analysis

Owing to the worldwide modernization, clothing and textile have become a vital contributor in the world trade. In 2017, the industry shared 6% in the entire international trade of readymade products in the world.²⁸

Regarding RMG industries, China, India, and Bangladesh are the largest exporter countries. According to the World Trade Organization (WTO), of the global market share of clothing in 2017, China held 37.1% while Bangladesh and India held 6.5% and 4.1%, respectively.²⁹

Even though RMG manufacturing is modernized, human resources are still essential for this sector. The three mentioned countries are known for cheap labour. Bangladesh is a densely populated small country in South Asia, yet it holds the 2nd position in RMG sector in the global market. From the expert's view, Bangladesh could someday be the 1st in RMG sector, if it can improve the current situation and overcome some social and legal problems.

Though Bangladesh has cheaper labour than China and India, it sometimes cannot maintain a good quality of product and fails to deliver goods within the agreed time. The main reason for this failure is labour unrest, and it happens due to violation of their rights by the employers. The establishment of a trade union is not easy in Bangladesh because of some complications in the legal regulations. Therefore, most of the employers can easily violate the labourers' rights.

Even as a member of ILO, Bangladesh still fails to implement the Conventions in connection with 'Freedom of Association' and 'Right to Organize and Collective Bargaining'. On the other hand, China and India both have their own laws regarding trade unions in accordance with the ILO

²⁸ World Trade Organization (WTO), 'World Trade Statistical Review 2018' (ch 2, 11) <https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf> accessed 15 May 2019

²⁹ Dr. Sheng Lu (n 15).

conventions. This is despite that India has never ratified the ILO Conventions.³⁰

This research paper provides a comparative analysis between Chinese, Indian and Bangladeshi laws regarding their legal problems as follows:

First of all, according to Section 22 (b) of the Bangladesh Labour (Amendment) Act, 2018, to establish a new trade union, the minimum membership requirement is 20%.³¹ Furthermore, Section 193 of the Bangladesh Labour Act, 2006 also prescribes a bar for a worker to enroll in several trade unions at the same time.³² Apparently, it is difficult occasionally to gather the required minimum members in order to establish a trade union. This provision therefore violates the rights of laborers to join trade union independently without any interference, which is not pursuant to ILO Conventions.

Conversely, the minimum required membership is at least 25 members in China and 10% in India while both countries' laws provide an opportunity to merge two or more trade unions if they fail to gather the minimum membership to establish a new trade union.

Secondly, the Bangladesh Labour Act, 2006 has introduced an alternative way of trade union, called Participation Committee. According to Section 205 thereof, in the case where there is no trade union or until trade

³⁰ Delhi, 'ILO Fundamental Conventions: India ratified six out of the eight core/fundamental International Labour Organisation (ILO) Conventions' *Business Standard* (India, 25 July 2017) <https://www.business-standard.com/article/government-press-release/ilo-fundamental-conventions-india-ratified-six-out-of-the-eight-core-117072400725_1.html> accessed 7 March 2019

³¹ Bangladesh Labour (Amendment) Act 2018, s 22(b) <[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)> accessed 15 November 2018

³² The Bangladesh Labour Act 2006, s 193 <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402> accessed 23 October 2018

union is formed, the participation committee shall run activities regarding laborers' rights.³³ Additionally, no time limit is mentioned in this Act to create a trade union in any industry, in which case the employers most of the time rely on this provision to avoid a formation of a trade union. In China and India, there is no other choice apart from the trade unions, which helps maintain labourers' rights there.

Thirdly, dismissing a labourer for misconduct is another concern for the Bangladeshi labourers. Under Section 11(3) of the Bangladesh Labour (Amendment) Act, 2013,³⁴ it is easy to, without any prior notice or compensation, terminate any labourer's employment due to misconduct. Thus, when a labourer attempts to claim their rights against the employers, they abuse this provision to dismiss the labourer. This makes it harder for labourers to make their voices heard. Under the laws of China and India, termination of labourer's employment is difficult to do. In China, there must be a written contract between the employers and labourers, and the termination is permissible only for some grounds such as expiration of the contract, mutual agreement or any serious legal offenses proved against the workers. In India, a labourer can be dismissed only with the permission of a suitable government officer, and the employer has to mention a valid reason of such termination on the 3-month notice and has to pay the compensation.

The last but not least, labourers usually go for a strike as an optional measure to claim their rights when collective bargaining fails,. However, most of the countries do not allow the labour to initiate a strike. In Bangladesh, under Section 33 of the Bangladesh Labour (Amendment) Law

³³ The Bangladesh Labour Act 2006, s 205

<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402> accessed 23 October 2018

³⁴ Bangladesh Labour (Amendment) Act 2013, s 11(3)

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94286/110640/F482588609/BGD94286%20Eng.pdf>> accessed 23 October 2018

2018,³⁵ a valid strike is only permissible with 51% members of trade union. Like Bangladesh, China also restricts the right to strike. Under the Trade Union Law of China, strike of laborers is banned. Yet, in 2016, there were 2,600 labour strikes occurring there.³⁶ The situation of labour strikes in India is better than China and Bangladesh. Under the Industrial Disputes Act, 1947, India allows a labour's strike with some conditions. Strikes falling out of scope of such conditions are permissible. The practices of trade unions in China and India are not perfect, but are still better than Bangladesh. China and India are the most populated countries in the world, and they employ their population to improve their economy. Previously, the labourers of China and India were uneducated and unskilled, but they have been gradually educated and trained. This has made the laborers' safety, health, wages, and living standard of China and India better than Bangladesh's.

To resolve the legal problems regarding labours, Bangladesh should adopt certain provisions identical to those of China and India despite the differences in their legal systems.

6. Conclusion and Recommendation

In the industrial era, labourers are a very crucial part of a business. The improvement of the working conditions can increase their productivities. However, employers in developing countries fail to achieve this long-term goal and usually violate the rights of the labourers. To protect the labourers' rights and to make their voice heard, the concept of trade union and collective bargaining has been introduced.

³⁵ Bangladesh Labour (Amendment) Act 2018, s 33

[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)

accessed 15 November 2018

³⁶ Dr. Stefan Brehm, 'Collective Bargaining: New Hope for China's Workers?' (Institute for Security & Development Policy, 31 March 2017)

<http://isdp.eu/publication/collective-bargaining-new-hope-china/> accessed 21 February 2019

The study has shown that strong trade unionism might be beneficial for both labourers and employers. The trade union is a proper platform for the underprivileged laborers, where they can make their voices effectively heard against the employers. To support trade unionism, the national legal framework has to be robustly supportive.

However, legal provisions in each country are not well-organized to support trade union, which might be harmful to the economy of the country. Economist has pointed out that trade union activities with interferences by third party could be unhealthy for the businesses. So, the legal system of any country should provide reasonable assistances for the owners and the laborers. The Bangladesh Labour Act, as of now, is still incompetent to ensure the labourers' rights and benefits. Thus, Bangladesh should focus on those rigid provisions, which are not supportive of trade union formation and their activities.

In this paper, some recommendations are made to remove the weaknesses of legal framework related to trade unionism and collective bargaining through amending the Bangladesh Labour Act, 2006. The suggestions are given below:

To begin, the requirement of minimum members to register a new trade union, which is 20% members of total workers (Section 22 (b) of the Bangladesh Labour (Amendment) Act 2018³⁷), contradicts the provision of ILO convention no. 87. By this convention, the formation of a trade union has to be flexible and unconditional, and in order to establish the union, it should require only a small number of members. To make the labour laws of Bangladesh in accordance with the ILO Conventions, this requirement of minimum members to register a new trade union should be less strict. On the other hand, the barrier for a worker to enroll in several trade unions at

³⁷ Bangladesh Labour (Amendment) Act 2018, s 22(b)

<[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)>
accessed 15 November 2018

the same time (under Section 193 of the Bangladesh Labour Act, 2006³⁸) should be eliminated. Additionally, provisions permitting merging two or more trade unions if they fail to gather the required member to set up a new trade union should also be adopted.

Besides, the Bangladesh Labour Act, 2006, provides an alternative way of a trade union, which is called Participation Committee. According to Section 205, where there is no trade union and until trade union is formed, this committee shall run activities regarding labourers' rights.³⁹ Additionally, no time limit is mentioned in this Act to create a trade union in any industry. To solve this, a timeframe therefor must be prescribed under this Act.

In addition, termination of the labourer's employment due to misconduct, under Section 11 (3) of the Bangladesh Labour (Amendment) Act, 2013,⁴⁰ must be amended. Like India, Bangladesh can add a new provision stating that for dismissing a laborer who has worked more than a year, the dismissed laborer should be given some compensation, and the employer should also seek the permission of government officer in order to justify the reason of dismissing.

Finally, in order to initiate a strike, the trade union members have to submit a notice with 51% members' signature through a collective bargaining agent under Section 33 of the Bangladesh Labour (Amendment) Law 2018.⁴¹ This requirement should be more flexible to ensure the workers

³⁸ The Bangladesh Labour Act 2006, s 193

<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402> accessed 23 October 2018

³⁹ *ibid* s 205.

⁴⁰ Bangladesh Labour (Amendment) Act 2013, s 11(3)

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94286/110640/F482588609/BGD94286%20Eng.pdf>> accessed 23 October 2018

⁴¹ Bangladesh Labour (Amendment) Act 2018, s 33

<https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_infor

rights thereof. The signatures of the laborers should also be gathered confidentially.

Through the amendment of the Bangladesh Labour Act, by eliminating the provisions which prevent the formation of a trade union and restrict its activities, this Act will be in accordance with the ILO Conventions. It will also achieve the international standard, which will help attract foreign investors to Readymade Garments sector of Bangladesh, contributing to the long-run success of the industry.

[mation/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://www.dca.gov.bd/portal/Information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)>
accessed 15 November 2018

Bibliography

Books

Kamal A and Al Imran HF, *Labour Law in Bangladesh: Doctrine, Theory and Practice* (1st Published February, 2018, Muhit Publications, Dhaka)

Ahmed Z, 'A Textbook of the Bangladesh Labour Act, 2006 and Other Related Laws with Commentaries (1st Publication December 2017, Shams Publications, Dhaka)

Taher Md, 'Legal Environment for Industrial Relations in Bangladesh: A Critical Evaluation', *Chittagong University Journal of Law*, Vol. 2, 1997

'A Short History of British Trade Unionism' *Trade Union Congress* (London, 1947)

<<http://collections.mun.ca/PDFs/radical/AShortHistoryofBritishTradeUnionism.pdf>>

Online Journals

Khan E and RashedUllah Md, 'Export Scenario Between Bangladesh and China: Opportunities of Bangladesh in RMG Sector'

<<https://eujournal.org/index.php/esj/article/view/10060/9550>>

Khan Md, 'Economic Impact of Rana Plaza Collapse' (2016) Vol 10, No. 2, 2016 WASET <<https://waset.org/publications/10003780/economic-impact-of-rana-plaza-collapse>>

Newspaper

Haq N, 'Bangladesh's Garment Industry Boom Leaving Workers Behind' *Inter Press Service* (USA, 9 February 2018)

<<http://www.ipsnews.net/2018/02/bangladeshs-garment-industry-boom-leaving-workers-behind/>>

Labour relations in China: Some frequently asked questions' *China Labour Bulletin* (Hong Kong, July 2018) <<https://clb.org.hk/content/labour-relations-china-some-frequently-asked-questions>>

'Bangladesh remains 2nd largest RMG exporter accounting 6.5% Market Share' *Textile Today* (Bangladesh, 7 August 2018)
<<https://www.textiletoday.com.bd/bd-remains-2nd-largest-rmg-exporter-accounting-6-5-percent/>>

Bhuiyan Md, 'Analysing the Draft Bangladesh Labour (Amendment) Act, 2018' *The Daily Star* (Bangladesh, 25 September 2018)
<<https://www.thedailystar.net/law-our-rights/law-analysis/news/analysing-the-draft-bangladesh-labour-amendment-act-2018-1638034>>

ILO Fundamental Conventions: India ratified six out of the eight core/fundamental International Labour Organisation (ILO) Conventions, *Business Standard* (India, 25 July 2017) <https://www.business-standard.com/article/government-press-release/ilo-fundamental-conventions-india-ratified-six-out-of-the-eight-core-117072400725_1.html>

Research Papers & Dissertations

Brehm S, 'Collective Bargaining: New Hope for China's Workers?' (Institute for Security & Development Policy, 31 March 2017)
<<http://isdpc.eu/publication/collective-bargaining-new-hope-china/>>

Shrestha B, 'The Effect of Trade Unionism on Workers' (bhrestha, 2012)
<http://adapt.it/adapt-indice-a-z/wp-content/uploads/2014/08/bhrestha_2012.pdf>

'Implementation of the Bangladesh Compact Technical Status Report'
European Commission (October 2017)
<http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf>

Merz R, 'All-China Federation of Trade Unions: Structure, Functions and the Challenge of Collective Bargaining' (Global Labour University, September 2011)

<https://www.researchgate.net/publication/265742460_All_China_Federation_of_Trade_Unions_Structure_Functions_and_the_Challenge_of_Collective_Bargaining>

Shroff V and Brargav A, 'Trade Unions Act and State Laws Provide Legal Protections to Trade Unions in India' (Society for Human Resource Management)

<http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Trade_Unions_Act_and_State_Laws_Provide_Legal_Protections_to_Trade_Unions_in_India.pdf>

Marx K and Engles, 'Analytical Perspective of the Trade Union Act 1926' (Chapter 3)

<https://shodhganga.inflibnet.ac.in/bitstream/10603/32178/8/08_chapter%2003.pdf>

Legislations

'Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)', International Labour Organization

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087>

'Right to Organize and Collective Bargaining Convention 1949 (No. 98)' International Labour Organization

<https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO::P12100_ILO_CODE:C098>

The Constitution of the People's Republic of China

<http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm>

Labour Law of the People's Republic of China

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/37357/108026/F1930029246/CHN37357%20Eng.pdf>>

Trade Union Law of the People's Republic of China (Amendment) 2009,

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/30352/118793/F1165849917/CHN30352%202.pdf>>

'The Constitution of India', Ministry of Law and Justice Legislative Department, Government of India (31 July 2018)

<<http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf>>

The Industrial Disputes Act 1947,

<https://labour.gov.in/sites/default/files/THEINDUSTRIALDISPUTES_ACT1947_0.pdf>

The Trade Unions (Amendment) Act 2001,

<[http://nclcil.in/infobank/act/The_trade_unions_\(amendment\)act_2001.pdf](http://nclcil.in/infobank/act/The_trade_unions_(amendment)act_2001.pdf)>

The Constitution of the People's Republic of Bangladesh,

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/33095/73768/F2125404014/BGD33095%20Eng2.pdf>>

The Bangladesh Labour Act 2006,

<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402>

The Bangladesh Labour (Amendment) Act 2013,

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94286/110640/F482588609/BGD94286%20Eng.pdf>>

The Bangladesh Labour (Amendment) Act 2018,

[https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law\(Amendment\)2018.pdf](https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/legislative_information/aafe70e2_3742_445c_a3f6_de7f057538cc/Labour_Law(Amendment)2018.pdf)

THE IMPOSITION OF TAX ON OVER-THE-TOP CONTENT PROVIDERS IN THAILAND^{*}

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Abstract

Due to abrupt growth of technology, digital contents are conveyed to the consumer via the internet or other telecommunication networks., This is called Over-the-top (OTT) service. Most of the OTT service providers are foreign companies which have no taxable presence in Thailand. Their incomes are from subscription fees and advertising fees collected from consumers or advertisers in Thailand, where they pay no tax to the Thai tax authorities. The Organisation for Economic Co-operation and Development (OECD) insists that profit should be taxed in a jurisdiction where the digital service is consumed. However, under the Thai Revenue Code, the current provisions related to income tax and VAT on a foreign company whose services are consumed in Thailand are not efficient and not practicable.

This article suggests that the relevant provisions for income tax and VAT on foreign entities under the Revenue Code should be amended in order to enforce and convince the large foreign OTT service providers to comply with tax measures in Thailand.

^{*} This article is summarized and rearranged from the thesis “The Imposition of Tax on Over-the-top Content Providers in Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

Keywords: Over-the-top, Digital Services, Income Tax, Value Added Tax, Fiscal Measures.

1. Introduction

During the last few years, many forms of content providers around the world have increased, and their businesses have expanded throughout multiple countries. News, advertisement, programs, information and other media contents are transmitted to the public in the form of sound and image via internet connection without using traditional broadcasting networks. The delivery of those media contents through a platform is Over-the-top (OTT) service. This service allows consumers to pick any content they want. Moreover, consumers may skip advertisements, duration of which is in general shorter than regular TV broadcasting.

OTT can be largely categorized into three different revenue models, which are SVOD (subscription-based services such as Netflix and Amazon), AVOD (free and ad-supported services such as Youtube and Crackle) and TVOD (transactional services such as iTunes and Amazon Instant Video that allow users to pay for an individual piece of content).¹

In Thailand, many huge OTT businesses, e.g., Facebook, Google or YouTube, have expanded their services in Thailand. Under the Thai Revenue Code, income of foreign OTT service providers is considered to be assessable income from service under Section 40 (8) which is not subject to withholding tax. In general, a foreign company which does not carry on business in Thailand but gained the income from Thailand will be liable for withholding tax only if such income is the assessable income under Section 40 (2) (3) (4) (5) or (6). From the given fact, the law on withholding tax in Thailand has not yet covered an income of foreign OTT service providers. However, such foreign OTT providers are subject to VAT since the OTT contents are provided abroad and consumed in Thailand. The consumer in Thailand, during the payment for a service, is required to remit VAT instead

¹ Roshan, 'Video on Demand Revenue Models: What's the best for your business?' (Muvi, 20 March 2018) <www.muvi.com/blogs/video-on-demand-revenue-models-whats-the-best-for-your-business.html> accessed 23 October 2018

of a foreign OTT service provider (a business person).² Nevertheless, in practice, no VAT is remitted by the consumer in Thailand. A large number of incomes without tax liability generally causes a challenging issue for the Thai government, especially, the Revenue Department, to find an appropriate measure to impose the tax on these businesses.

2. The Definition of Over-the-top (OTT) Service

YouTube, Netflix, IFLIX and Line TV are some samples of the online content providers who provide media content to the audience through the internet including audio, video, and live broadcasting. Nowadays, the audiences are able to access their favorite contents or updated news via the internet. They do not need to have a traditional cable or satellite TV subscription which has been a dominant way of watching TV from national free-to-air TV services and any Pay-TV operators. Those prominent content providers are Over-the-top (OTT) service provider. OTT service is known as a new media platform allowing audiences to pause, stop, and continue their contents freely. OTT service enables the consumer to watch TV programs anywhere and at anytime. The contents are delivered to the consumer in form of streaming or downloaded file. Consumers can choose to watch the content by using internet-enabled and portable device such as smart phone, tablet and etc.

3. The Problems on the Enforcement of Current Tax Laws on OTT Service Providers in Thailand

The Thai Revenue Code cannot effectively enforce tax laws on multinational transactions in OTT business. Several forms of tax avoidance, which are regarded as Base Erosion and Profits shifting (BEPS), are used by

² Chaiyasit Trachutham, Kham Sorn Vicha Kodmhai Pasee-arkoen [Taxation] (Institute of Legal Education of the Thai Bar Association, 10th edn, 2015)) ชัยสิทธิ์ トラชูธรรม, คำสอนวิชากฎหมายภาษีอากร (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา พิมพ์ครั้งที่ 10, 2558)

foreign OTT providers and other multinational companies to decrease the tax burden in the countries where their incomes are generated. The current domestic tax authority is not competent to collect tax from foreign OTT providers. The international government organizations, such as the OECD, have strongly determined to cope with tax avoidance of digital businesses by releasing an Action Plan and other fiscal measures. In this regard, the Revenue Department as well as other domestic organizations such as the Office of National Broadcasting and Telecommunication Commission, which is liable for regulating the current TV platform and another registered platform, are also trying to find a suitable measure to tax the revenues of OTT business in Thailand. And, amending the current tax law is a tool that the Revenue Department should rely on to deal with such tax avoidance arising from multiple gaps of the current law.

4. Tax Mechanism and Legal Measure to Address Tax Avoidance of OTT Service Providers

4.1 Withholding Tax

Withholding tax is a mechanism which applies at a source of payment related to digital supplies and intangible services. The jurisdictions, where withholding tax is enforced, are the place where the digital supplies are provided. The supplies can be produced by a non-resident provider.

In the Article 7 of OECD Model Tax Convention, the business profits of a provider who is in a Contracting State shall be taxed only in such jurisdiction, except the business profits of a provider who carries on its business in another Contracting State through its permanent establishment located therein.³

³ OECD Model Tax Convention, art 7

“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on

There is a current issue regarding the enforcement of withholding tax on the consumer in the business to consumer (B2C) transaction since many private consumers have low experience in withholding tax payment, which will result in administrative cost to the government. On the other hand, in case of business to business (B2B) transaction, the purchaser who is a business operator has enough experience to comply with withholding tax. To this end, the use of intermediary may alleviate the withholding burden of the consumer in the source country. However, it needs a mandatory registration system for non-resident providers to register a bank account which is used for a payment from the resident consumer so that the intermediary is able to withhold the tax from the payment transacted via such bank account.⁴

4.2 Value-Added-Tax (VAT)

Value-added-tax (VAT) is an indirect tax imposed on the exchange of goods and services with a value. VAT is collected by the goods and services providers and absolutely charged from the final consumer. The VAT/GST Guidelines were accepted by the Council of the OECD in 2016. The issues of the collection of tax on cross-border transaction of digital supplies have also been mentioned in OECF/G20 BEPS Project.⁵ The providers (traders) will charge VAT from the consumers by giving an invoice in which

business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

⁴ Organisation for Economic Cooperation and Development , ‘Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report’ (OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015) <www.oecd-ilibrary.org/docserver/9789264241046en.pdf?expires=1563848849&id=id&accname=guest&checksum=2DF5195A88AC0A670498330F3EEADFF4> accessed 18 June 2019

⁵ Organisation for Economic Cooperation and Development, ‘International VAT/GST Guidelines’ (OECD) <www.oecd.org/ctp/international-vat-gst-guidelines-9789264271401-en.htm> accessed 20 June 2019

the amount of tax charged is shown. The tax charged from the consumers is at the rate specified for goods and services.

In case of the international trade of services and intangible properties, the border controls and fiscal frontiers cannot effectively proceed. According to the rules of the place of consumption, international trade services and intangible supplies should be taxed on consumption. The reasons for using destination principle for VAT on digital supplies are to maintain the international neutrality and to set up a robust barrier to tax evasion and tax avoidance.

In case of OTT services and other digital supplies that the foreign provider has remotely provided and has no business presence, it will be difficult for the tax authority to regulate and enforce VAT over them. Moreover, a private consumer has low incentive to pay or declare VAT, and the administrative costs of collection of a small amount of VAT from numerous private consumers are high. Therefore, a foreign provider of a digital supply should be responsible for the accurate charging and remittance of VAT to the tax authority in the jurisdiction where the final consumption occurs. However, this method can be slightly complicated because the provider is not located in the jurisdiction of consumption. Moreover, a non-resident provider is also required for registration, collection and remittance of VAT therein. The procedures of VAT registration and compliance should be simple and separated from a domestic registration since the foreign providers are obliged to register for VAT in several jurisdictions.

4.3 Diverted Profits Tax (DPT)

Diverted Profits Tax (DPT) or Google tax is a new tax measure which is not a part of corporation tax and mostly enforced in the UK. It applies to large multinational enterprises where their business activities are carried out in the UK and the profits are diverted to avoid creating the UK taxable presence or to use other agreements between affiliated entities or intra-

group expenditure to exploit tax mismatch.⁶ DPT aims to apply to diverted profits arising on or after 1 April 2015 with tax charge at rate 25% while the UK current corporation tax is 19%. Hence, it is expected that the multinational enterprises will adjust their tax structures in compliance with corporation tax in order to avoid the higher rate of DPT.

The significant strength of DPT is that it is not covered by tax treaties. Accordingly, the foreign company cannot take advantages of tax treaties for tax avoidance. In order to comply with the EU law, DPT has been a measure ensured to enforce against unacceptable tax planning designed to erode the UK tax base.

5. Foreign Law and Policies on OTTS and Other Digital Supplies Taxation

In Germany the OTT service provider is liable for paying a film levy to the German Federal Film Board (FFA).⁷ Such levy is not an ordinary tax since it will be a fund for German local film production. Moreover, in the case of Netflix, the European Court of Justice mentioned that German government is empowered to impose a film levy on foreign OTT providers and other VoD providers even though their headquarters are located outside Germany.

In Colombia, in accordance with Colombian Tax Code and Law 1819 of 2016, 19% of VAT has been imposed on OTT service providers including

⁶ HM Revenue & Customs, 'Diverted Profits Tax: Guidance' (November 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768204/Diverted_Profits_Tax_-_Guidance__December_2018_.pdf> accessed 18 June 2019

⁷ German Federal Film Board, 'FFA in Brief' (FAA) <www.ffa.de/ffa-overview-1.html> accessed 17 May 2019

both domestic and foreign companies.⁸ The VAT will be imposed in the circumstance where the consumer is in Colombia or the OTT service receives a benefit therein.

In Argentina, according to the Decree No. 354/ 2018, the VAT rate for digital services is 21%. Under the Decree, the digital service provided by a foreign company and carried out through the internet or any adaptation or application of protocols, platforms or technology for a consumer in Argentina is subject to VAT.

6. Conclusion

The revenues and profits of OTT service providers have increased. However, many OTT service providers such as Facebook have been criticized for paying only a small amount of tax to their local tax authorities since the company uses a contrived structure to move the profits and liabilities to other jurisdictions where there is no or lower tax rates. Several tax mechanisms have been introduced to eliminate tax avoidance and enforce the OTT service providers as well as other digital platform providers to comply with the tax measures of the countries where their services are consumed and bring about revenue. The introduction of the effective and practical tax measures under Thai laws, especially the Revenue Code, will enforce and convince many foreign OTT service providers to conform to those Thai tax laws. Their revenues and profits will be under supervising by the Revenue Department of Thailand. The unacceptable tax planning will be addressed and the Thai government will gain a large number of revenues from such foreign entities.

⁸ Laura Duran, 'VAT on digital services in Colombia' (Baker Mckenzie, *Lexology*, 28 February 2019) <www.lexology.com/library/detail.aspx?g=6803a06d-da3b-472c-a25b-0074cf0026ed> accessed 21 May 2019

Bibliography

Book

Trachutham C, Kham Sorn Vicha Kodmhai Pasee-arkoen [Taxation] (Institute of Legal Education of the Thai Bar Association, 10th edn, 2015) ชัยสิทธิ์ ตราชูธรรม, คำสอนวิชากฎหมายภาษีอากร (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา พิมพ์ครั้งที่ 10, 2558)

Convention

OECD Model Tax Convention, art 7

Websites and Blogs

Duran L, 'VAT on digital services in Colombia' (Baker Mckenzie, *Lexology*, 28 February 2019) <www.lexology.com/library/detail.aspx?g=6803a06d-da3b-472c-a25b-0074cf0026ed>

German Federal Film Board, 'FFA in Brief' (FAA) <www.ffa.de/ffa-overview-1.html>

HM Revenue & Custom, 'Diverted Profits Tax: Guidance' (November 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768204/Diverted_Profits_Tax_-_Guidance_December_2018_.pdf>

Organisation for Economic Cooperation and Development, 'Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project' (OECD/G20 Base Erosion and Profit Shifting Project, *OECD*, 2015) <www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1563848849&id=id&accname=guest&checksum=2DF5195A88AC0A670498330F3EEADFF4>

Organisation for Economic Cooperation and Development, 'International VAT/GST Guidelines' (OECD) <www.oecd.org/ctp/international-vat-gst-guidelines-9789264271401-en.htm>

Roshan, 'Video On Demand Revenue Models: What's the best for your business?' (Muvi, 20 March 2018) <www.muvi.com/blogs/video-on-demand-revenue-models-whats-the-best-for-your-business.html>

LEGAL ISSUES ON THE AGRICULTURAL WATER CHARGES^{*}

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Abstract

Water charge is a system that charges the utilization of water in financial terms, in order to support water allocation by recovering its costs and helping create an incentive to reduce the excessive use of water. In Thailand, the agricultural sectors are considered to be the largest water user. However, they have been exempt from water charge. Most of the laws related to the water use exclude the agricultural sectors from water charges, or are unenforceable. Moreover, the exemption of water charges provided by Thai laws tends to focus on the types of water use rather than the amount of water used. The foreign laws related to the agricultural water charges, such as England, the United States, China, and Brazil, provide that the collection of the agricultural water charges is based on the volumetric quantity of water utilization. Furthermore, they tend to separate the insignificant water use from other users by providing a volumetric limit for insignificant use which does not require the collection of water charges. The study of those foreign laws can be the models for effectively imposing the agricultural water charges in Thailand, especially in the case of exempting

^{*} This article is summarized and rearranged from the thesis “Legal Issues on the Agricultural Water Charges” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

the insignificant and small amount of the agricultural water, and of applying the water charges based on the suitable level of water use.

Keywords: Agricultural Water Charges, Agricultural Water Law, Volumetric Charges, Volumetric Exemption

1. Introduction

Water charge is a system that charges the utilization of water in financial terms.¹ Charges which precisely reflect the true value of available water and affect the decision of water users to create incentives for more necessary water uses.² Water charge serves the objective of recovering financial costs of water allocation which helps the government provide sufficient services and maintain the effectiveness of the water supply systems. It also helps create an awareness that water is a limited resource and ensuring water availability requires costs. This can be an incentive for water users to utilize water only for essential purposes, or adopt an agricultural practice that uses less water as well.³

In Thailand, however, the agricultural sectors that use the largest amount of water are exempted from water charges. The existing laws related to the agricultural water charges exempt or, in other words, are unable to impose water charges on the agricultural sectors. Moreover, the categorization and the exemption of water charges, provided by the existing laws and regulations in Thailand, tend to focus on types of water use rather than the amount of water used. With such limitations and lack of law enforcement, it is impossible to collect charges on agricultural water use. Consequently, the agricultural sectors are prone to use more water than necessary.

2. Foreign Law Related to the Agricultural Water Charges

The laws and regulations on water allocation and water pricing of the agricultural sector vary in each country due to their distinctive

¹ European Commission, *The Role of Water Pricing and Water Allocation in Agriculture in Delivering Sustainable Water Use in Europe – FINAL REPORT* (Project number 11589, February 2012) 8 <<https://publications.europa.eu/s/IDAG>> accessed 4 January 2019

² Ariel Dinar, Mark W Rosegrant and Ruth Meinzen-Dick, 'Water Allocation Mechanisms: Principles and Examples' (Research working paper; no. WPS 1779. Washington, DC: World Bank, July 1997) 1

³ European Commission (n 1) 16-17

conditions. To analyze Thai law related to water charges for amendment, studying foreign laws is necessary for the purpose of comparing and finding a suitable model. The author chooses to study the laws of the following countries as they have unique laws and similar policies of water pricing to Thai law.

2.1 England

In England, the Water Act 2003 provides a volumetric limit to the abstraction of water which does not require a license. Any type of water users may abstract up to 20 cubic meters (m³) of water within a period of twenty-four hours.⁴ Furthermore, the Agency may apply a lower or higher rate of the 20 m³/day exemption in a different area related to a geographical condition, a class of surface waters or a class of underground waters.⁵ Therefore, if a small quantity of water use causes significant damage upon watercourse, the authority may reduce the exemption rate to relieve the impact and regulate those abstractions.

In the case where a license is required, water users need to pay a fixed amount of charges on application and administration on an annual basis, based on the quantity of water used (volumetric charge). The license is usually issued for a period of 12 years with a condition that prohibition or reduction of the abstraction may be made when a river level reduces to the prescribed limit.⁶

⁴ The Water Act 2003 (UK) s 27

⁵ *ibid*, s 27A

⁶ European Commission, *The Role of Water Pricing and Water Allocation in Agriculture in Delivering Sustainable Water Use in Europe – FINAL REPORT – ANNEXES* (Project number 11589, February 2012) 13-21

<http://ec.europa.eu/environment/water/quantity/pdf/agriculture_report_ANNEXES.pdf

> accessed 4 January 2019

2.2 The United States of America

In the U.S. federal system, each state has the authority to allocate water resources within their territory. In the western states, there is a legal system called a prior appropriation to govern water allocation, in which the person who first makes a valid appropriation of water has a prior water right to all other subsequent appropriations. In the eastern states, which is much more humid compared to the western, they adopt a legal system called riparian rights, in which the person who owns and occupies land adjacent to the watercourse receives water use rights through the occupation of that land.⁷ As the water allocation varies between each state, the author chooses to cover two distinctive states, namely California (a western state) and Georgia (an eastern state).

2.2.1 California

The irrigation water project in California applies the water pricing with a full-cost rate, which includes the recovery of operation and maintenance costs with interest and the capital costs for the irrigation. This water charge is to be collected in every year, even if the amount of water provided by the project is less than the promised volumes. In each year, water users are obliged to pay all of the full supply-costs, even though they receive less or no water from the project. Only the water service costs are lowered in the year with less water supplied.⁸

Many agricultural water users are charged with a fixed rate, based on the amount of area cultivated and type of crop instead of the volume of water used. However, a recent law in California requires all large irrigation

⁷ Institute for Water Resources, 'Aspects of Governing Water Allocation in the U.S.' (Report Prepared for Agencia Nacional de Aguas in accordance with a 2013 ANA-USACE Agreement Component, Regulatory Aspects, Task 4, Document 4.1, December 2014) 23-28 <https://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2014-R-4_Aspects_of_Governing_Water_Allocations_in_the_US.pdf> accessed 4 January 2019

⁸ Dennis Wichelns, 'Agricultural Water Pricing: United States' (OECD, 2010) 15-18 <<https://www.oecd.org/unitedstates/45016437.pdf>> accessed 4 January 2019

districts (with more than 25,000 irrigated acres) to adopt the volumetric method of water charges (e.g., Water Conservation Act of 2009, Senate Bill x7-7). Before imposing the volumetric charges, the authority must assure that necessary conditions are met, such as the ability to measure the volume of allocated water, the capability of data management, and the implementation of a suitable collection mechanism of water charges. In addition, any changes related to the water charges must be approved by a majority of water users.⁹

2.2.2 Georgia

The agricultural sector in Georgia is not charged for water use. However, the permit is required for the agricultural sector to irrigate.¹⁰ Under the Official Code of Georgia Annotated (O.C.G.A.), the surface water or groundwater users who abstract or store more than 100,000 gallons per day requires a permit.¹¹ The duration of permits is generally 10 to 50 years.¹² Holders of water use permits must occasionally report the amounts of water used, and identify their source of water and the nature of the use.¹³ For the violation of groundwater use permit, the authority may enforce civil penalties up to 1,000 dollars, with further penalties of 500 dollars per day for continuous violations.¹⁴ For the violation of surface water use permit, the authority may enforce civil penalties up to 50,000 dollars per day, and to

⁹ Juliet Christian-Smith and Chris Kaphiem, 'Volumetric Water Pricing and Conjunctive Use: Alta Irrigation District' (*Pacific Institute*) <https://www.pacinst.org/reports/success_stories/volumetric_water_pricing_and_conjunctive_use.pdf> accessed 4 January 2019

¹⁰ Dennis Wichelns (n 8) 22

¹¹ The Official Code of Georgia Annotated (O.C.G.A.), s 12-5-31(a)(1), 12-5-96(a)(1)

¹² O.C.G.A., s 2-5-31(h), 12-5-97(a)

¹³ O.C.G.A., s 12-5-31(m), 12-5-97(d),(e)

¹⁴ O.C.G.A., s 12-5-106

100,000 dollars per day if a separate violation occurs within one year of the original violation.¹⁵

2.3 China

In China, under the Water Law 2002, the state applies the license system and the charges collection for the use of water, with the exception for the use of the water in the ponds and reservoirs by rural collective economic organizations and their members.¹⁶ In order to acquire the right to use water, anyone who collects water directly from a river or lake or from the underground requires the license from the authority and pays the water charges. The license is not required for the use of a small amount of water for domestic use or livestock.¹⁷

The regulation of water charges was enacted in 2006 by State Council Decree No. 460 - Regulation for Water Drawing Permit and Collection and Management of Water Resources Fee (SCD 460). The main feature of the SCD 460 indicates that in order to use water, the water user shall apply for a permit and pay water charges.¹⁸ The water charges shall be determined by the actual quantity of water used,¹⁹ and shall be paid with an increasing rate if the quantity of water used exceeds the quota.²⁰ For agricultural water use, water charges are not required for agricultural water use which does not exceed the established quota.²¹

Water charges are calculated by the volumetric quantity of water used with the increasing block rate. However, water charges in many irrigation districts in China still do not recover full water supply costs, and

¹⁵ O.C.G.A., s 12-5-52

¹⁶ Water Law of The People's Republic of China of 2002, art 7

¹⁷ *ibid*, art 48

¹⁸ State Council Decree No. 460 (SCD 460), art 2

¹⁹ SCD 460, art 32

²⁰ SCD 460, art 28

²¹ SCD 460, art 33

many irrigation districts lack the volumetric measurement facilities and cannot measure the true volume of water used in the district.²²

2.4 Brazil

In Brazil, the National Water Act of 1997 treats water as an economic commodity; therefore, the government may charge for the actual quantity of the water used.²³ However, charges only apply to water use that requires a permit.²⁴ Hence, insignificant uses, diversions, captures, or discharges of water are free from charges.²⁵ The determination of what is an insignificant use requires the consideration of each specific criteria. For agricultural use, the criteria for insignificant use is the withdrawals of water that do not exceed 1 liter per second and their corresponding effluents.²⁶

Water charges calculation is based on the volumes specified through both the permits and the volumes measured by the water users themselves. The measured volumes are to be declared to the National Water Association by means of the Annual Declaration of Water Resources Use. However, meters are not always installed, especially in the agricultural sector. Setting a water charge is the outcome of both a political and technical process within the river basin committees. In practice, a technical group within the river basin committee carries out this function, then the

²² Yongsong Liao, Zhanyi Gao, Ziyun Bao, Qingwen Huang, Guangzhi Feng, Di Xu, Jiabin Cai, Huijing Han and Weifeng Wu, 'China's Water Pricing Reforms for Irrigation: Effectiveness and Impact' (Comprehensive Assessment of Water Management in Agriculture Discussion Paper 6 2008) 10-18
<<http://www.environmentportal.in/files/CADiscussionPaper6.pdf>> accessed 28 March 2019

²³ The National Water Act 1997, art 19

²⁴ *ibid*, art 20

²⁵ *ibid*, art 12 para 1

²⁶ Monica Scatista and Rosa Maria Formiga-Johnson, 'Bulk Water Pricing in Brazil : Advancements, Resistance, Controversies and Ambiguities' (2003) 8
<https://iwra.org/member/congress/resource/MADRID2003_MONICA_SCATISTA_EN.pdf>
accessed 16 April 2019

proposal is discussed with the stakeholders within the river basin committee and finally submitted to the national or state water councils. Eventually, the decision on the level of charges is predominantly political, as it is the result of negotiation amongst stakeholders.²⁷

3. Thai Laws Related to the Agricultural Water Charges

3.1 State Irrigation Act B.E. 2485 (1942)

The State Irrigation Act is a law that regulates the water use and water allocation within the irrigation area, operated by the Royal Irrigation Department under the Ministry of Agriculture and Cooperatives. The Ministry of Agriculture and Cooperatives is authorized to collect the irrigation fees from the owner or possessor of the land within the irrigation area, or from any users who use water from irrigation waterway within or outside the irrigation area; including the use for agriculture, factory, waterworks or other purposes.²⁸ The rate of the irrigation fees to be collected from the agricultural users within or outside the irrigation area shall not exceed 5 baht per rai per year,²⁹ which is a fixed charge based on the amount of land owned or possessed, not by the exact unit of water used. However, these rates under this Act is not the exact rates that will apply. To collect irrigation fee, the Ministry regulations need to be prescribed to formulate the terms and conditions including the exact rate of the irrigation fees. Nevertheless, until now, the Ministry of Agriculture and Cooperatives have not prescribed any regulations for the collection of the irrigation fees from the agricultural users, which results in no irrigation fees for the agricultural users.³⁰

²⁷ OECD, *Water Charges in Brazil : The ways forward* (OECD Studies on Water, OECD Publishing, Paris 2017) 41-42

²⁸ State Irrigation Act B.E. 2485 (1942), s 8

²⁹ *ibid*, s 8 para 2

³⁰ Natsuda Rattamane, 'Regulation on the Riparian Rights Outside the Irrigated Area' (Master of Laws Thesis, Thammasat University 2014) 100

3.2 Agricultural Land Consolidation Act B.E. 2558 (2015)

The Agricultural Land Consolidation Act is a law that authorizes the state agencies to develop the agricultural land by method of land consolidation, including agricultural water management for the agricultural sector. Under the provision of this Act, after the announcement of the agricultural water management area, a landowner within the agricultural water management area shall pay for charges from agricultural water management, repair, maintenance, and the use of water for the benefit of agricultural business operation, or unnecessary use of excessive water, in accordance with the regulations prescribed by the Central Land Consolidation Committee.³¹

The Central Land Consolidation Committee had issued two regulations regarding the collection of the charges under this Act : the regulations in accordance with the rules, procedure and conditions of the payment for charges from agricultural water management³², and the regulations in accordance with the rules, procedure and conditions of the payment for the repair and maintenance of the public constructions for the common use.³³ The collection of the charges under these regulations focuses on recovering construction and maintenance costs, which are a

³¹ Agricultural Land Consolidation Act B.E. 2558 (2015), s 26

³² Ra Biap Kana Kammakan Jat Rup Tidin Klang Wa Duai Lakkain Witikarn Lae Ngueankhai Kan Chamra Kachajjai Nai Kan Jut Rabob Nam Puea Kasetrakam Po So 2559 [Rule of the Central Land Consolidation Committee on the Rules, Procedure and Conditions of the Payment for Charges From Agricultural Water Management B.E. 2559] (ระเบียบคณะกรรมการจัดรูปที่ดินกลางว่าด้วยหลักเกณฑ์ วิธีการ และเงื่อนไขการชำระค่าใช้จ่ายในการจัดระบบน้ำเพื่อเกษตรกรรม พ.ศ. 2559)

³³ Ra Biap Kana Kammakan Jat Rup Tidin Klang Wa Duai Lakkain Witikarn Lae Ngueankhai Kan Chamra Kachajjai Nai Kan Som Saem Lae Bamrung Raksa Sueng Chai Prayot Ruam Kan Po So 2559 [Rule of the Central Land Consolidation Committee on the Rules, Procedure and Conditions of the Payment for the Repair and Maintenance of the Public Constructions for the Common Use B.E. 2559] (ระเบียบคณะกรรมการจัดรูปที่ดินกลาง ว่าด้วยหลักเกณฑ์ วิธีการ และเงื่อนไขการชำระค่าใช้จ่ายในการซ่อมแซมและบำรุงรักษาซึ่งใช้ประโยชน์ร่วมกัน พ.ศ. 2559)

fixed charge based on the actual construction or maintenance costs, not by the quantity of water used.

3.3 Groundwater Act B.E. 2520 (1977)

The Groundwater Act is a law that regulates the groundwater operations to protect the groundwater from damages, pollution or uncontrolled drill. Any abstraction of groundwater within the groundwater area requires a license from the Department of Groundwater Resources.³⁴ The licensee for a groundwater usage license shall pay the groundwater usage fee at the rates as prescribed in the Ministerial Regulation.³⁵ The groundwater conservation fee is additionally collected from groundwater license holders in Groundwater Critical Areas.³⁶

The regulation of the collection of groundwater usage fee³⁷ and the regulation of the collection of groundwater conservation fee³⁸ provide that the rate of the groundwater usage fee and groundwater conservation fee are based on a volumetric charge which is based on the per-unit use of groundwater (baht/m³). In an area with no access to tap water supply, these fees shall be exempted for individuals with a license to use groundwater for the purpose of the domestic consumption, agriculture, and livestock (exemption for livestock use shall not exceed 50m³/day).

³⁴ Groundwater Act B.E. 2520 (1977), s 16

³⁵ *ibid*, s 25/1

³⁶ *ibid*, s 7

³⁷ Kot Krasuang Chabup Ti 7 (Por Sor 2540) Ork Tam Kwam Nai Pra Ratchabanyat Nam Badan Por Sor 2520 [Ministerial Regulation No. 7 (B.E. 2540) issued under the Provisions of the Groundwater Act B.E. 2520] (กฎกระทรวง ฉบับที่ 7 (พ.ศ. 2540) ออกตามความในพระราชบัญญัติน้ำบาดาล พ.ศ. 2520)

³⁸ Kot Krasuang Kamnod Attra Ka Anurak Nam Badan Lae Lakkain Witikan Lae Nguen Kai Kan Riak Kep Ka Anurak Nam Badan Por Sor 2547 [Ministerial Regulation Prescribing of the Rate of Groundwater Conservation Fee and the Rules, Procedure and Conditions of the Collection of Groundwater Conservation Fee B.E. 2547] (กฎกระทรวง กำหนดอัตราค่าอนุรักษ์น้ำบาดาล และหลักเกณฑ์ วิธีการ และเงื่อนไขการเรียกเก็บค่าอนุรักษ์น้ำบาดาล พ.ศ. 2547)

3.4 Water Resources Act B.E. 2561 (2018)

The Water Resources Act is a law which regulates water allocation, water development, water conservation, water restoration, and water rights. Under this Act, the use of water resources was categorized into three types. The first category is the use in a small amount (including the use for household consumption, agriculture or livestock for subsistence). The second one is the use for industry, tourism, electric power production, water supply, and other business. The third one is the use for large-scale business that uses a large amount of water, or may cause the effect across the basins or covers the large scale of land.³⁹ The details of each type of water uses shall be later provided by the Ministerial Regulations issued by the Prime Minister with the approval of the National Water Resources Committee.⁴⁰

For the charges of water use, the first category of water use does not require the permit and there is no water charges imposed.⁴¹ In this regard, the other existing laws related to water allocation shall follow and shall not contradict the provisions under this Act.⁴² Therefore, those categorizations and the exception to the permit and water charges for the first category of water use under this Act shall apply to those under the other related laws as well. And, accordingly, any of the other related law that charges the water fee on the first category of water use under this Act (such as the State Irrigation Act) has likewise become unenforceable. Conversely, the provision and the exception for the first category of water use shall not apply to the use of groundwater under the Groundwater Act,⁴³ which results in no changes for the enforcement of the Groundwater Act. In other words, the first category of water use still requires a permit as well as payment for the groundwater usage fee.

³⁹ Water Resources Act B.E. 2561 (2018), s 41

⁴⁰ *ibid*, s 41 para 2

⁴¹ *ibid*, s 42

⁴² *ibid*, s 3

⁴³ *ibid*, s 55

4. Analysis and Proposal for the Issues Related to the Agricultural Water Charges in Thailand

After conducting the studies on Thai Laws that relate to agricultural water charges, the author realizes that without any amendment of these laws, imposing water charges on the agricultural sector is impossible. In this regard, the amendment to the Water Resources Act is an adequate solution as it supersedes other laws related to water charges and will apply to those other laws.

Furthermore, the author suggests that the details under the Water Resources Act regarding the categorization of each type of water use under the Ministerial Regulations should not only be based on how the water is used, but also on the amount of water used. Imposing the volumetric limit for the first category of water use is also essential. It helps separate the water use that requires only a small amount of water and is eco-friendly, which should be exempted from water charges, from other uses that consume large amount of water or is not eco-friendly, which should be regulated and imposed on charges.

Besides, the author views that water use for the agricultural purpose should be charged by the volumetric method with the exemption for insignificant use set by the volumetric limit. The volumetric method of water charges reflects the true price of water used, which creates an incentive for the agricultural sector to decrease unnecessary water use, and develop the cultivation method or technology that waste less water or shift to growing more economically beneficial crops. To avoid the water charges, the volumetric exemption encourages the agricultural sector to control its water use to stay under the exemption limit. The proposal of the volumetric charges and the volumetric limit is based on the practices under the UK, China, and Brazil's water laws.

However, adopting the method of agricultural water charges from those countries might not be successful in Thailand. This is because imposing water charges based on volumetric basis may significantly burden the majority of the agricultural sectors in Thailand, and might cause the

poverty situation in the Thai agricultural sector to be worse. Additionally, other factors such as the unavailability and inaccessibility of water, water quality, the misconceptions that water is abundant, and the system transparency give rise to the agricultural sector's unwillingness to pay water charges. Without any improvements in relation to these factors, such unwillingness to pay the charge will remain.

Apart from above, the author is of the opinion that imposing volumetric charges for the agricultural sector in Thailand requires a long-term plan with crucial support from the related government sectors as well as largely-funded project. To increase the water users' ability and willingness-to-pay water charges, irrigation and water allocation systems need improvement in order to increase the water availability, accessibility and quality. Introduction of the effective system to create transparency of water charges and its management is also necessary. Likewise, public hearing from the related water users and the increasing of public awareness by educating agricultural sector of the water situation and the importance of water charges are important. There should also be the provisions of the volumetric measurement facilities, and meters installment, to determine the volumetric limit that exempts the water charges based on the insignificant amount of water use or the necessary amount of water use. With a view to make water users familiar with the volumetric method of water charges, it is inevitable to employ subsidization by primarily collecting charges at a low rate and gradually increasing it over a number of years until reaching the charging rate. Moreover, the government needs to improve the poverty situation within the agricultural sectors to increase their ability to pay and relieve the burden of the increasing costs.

5. Conclusion

After studying Thai laws and regulations related to the agricultural water charges, it is clear that most of the laws prescribe the agricultural water charges to be based on a fixed rate rather than volumetric method (except the groundwater charges). The Water Resources Act even excludes

from water charges the use for agriculture or livestock for subsistence, and also applies those exemptions to the other laws related to the agricultural water charges (except the Groundwater Act). However, when compared to the foreign laws, the exemption from the water charges under Thai laws tends to be based on the types of water use, not by the volumetric limit.

The lack of enforcement for the provision of agricultural water charges is a factor indicating that the collection of agricultural water charges in Thailand is practically unsuccessful. Even if the laws impose water charges on the agricultural sector, the government are unable to, or choose not to, enforce those laws. Such negligence to impose the charges arise partly from the agricultural sector's inability and unwillingness to pay.

In this regard, the author suggests that agricultural water use should be charged on the volumetric quantity of the water use. Furthermore, the exemption to the water charges for the household use or agricultural use for subsistence that requires only a small amount of water should not be based only on the types of the use, but also on the volumetric limit of the water used for each type. For the Water Resources Act, the author is of the view that the details for the categorization of each type of water use under the Ministerial Regulations should likewise not only be based on the categories of water use, but also on the amount of water used.

The author further opines that to impose water charges on the agricultural sector, the amendment to the laws related to the agricultural water charges does not suffice. Imposing volumetric charges for the agricultural sector in Thailand requires a long-term plan with crucial support from the related government sectors and largely-funded project, in order to increase the ability and willingness to pay water charges by the agricultural sector. As the ability and willingness to pay water charges increases, imposing water charges on the agricultural sector is prone to be more practicable. Even though this proposal requires largely-funded projects from the government which will be costly in the short-term period, it will help increase the availability of water resources for the future generations,

enhance the economic value of water allocation as well as reform the system of such allocation in Thailand.

Bibliography

Articles

Christian-Smith J and Kaphiem C, 'Volumetric Water Pricing and Conjunctive Use: Alta Irrigation District' (*Pacific Institute*)
<https://www.pacinst.org/reports/success_stories/volumetric_water_pricing_and_conjunctive_use.pdf>

Scatasta M and Formiga-Johnson R, 'Bulk Water Pricing in Brazil: Advancements, Resistance, Controversies and Ambiguities' (2003)
<https://iwra.org/member/congress/resource/MADRID2003_MONICA_SCATAS_TA_EN.pdf>

Books and Book Articles

OECD, *Water Charges in Brazil : The ways forward* (OECD Studies on Water, OECD Publishing, Paris 2017)

Laws and Regulations

Brazil

The National Water Act 1997

China

State Council Decree No. 460 (SCD 460) - Regulation for Water Drawing Permit and Collection and Management of Water Resources Fee

Water Law of The People's Republic of China of 2002

England (UK)

The Water Act 2003

Thailand

Agricultural Land Consolidation Act B.E. 2558 (2015)

Groundwater Act B.E. 2520 (1977)

Kot Krasuang Chabup Ti 7 (Por Sor 2540) Ork Tam Kwam Nai Pra Ratchabanyat Nam Badan Por Sor 2520 [Ministerial Regulation No. 7 (B.E. 2540) Issued under the Provisions of the Groundwater Act B.E. 2520] (กฎกระทรวง ฉบับที่ 7 (พ.ศ. 2540) ออกตามความในพระราชบัญญัติน้ำบาดาล พ.ศ. 2520)

Kot Krasuang Kamnod Attra Ka Anurak Nam Badan Lae Lakkain Witikan Lae Nguen Kai Kan Riak Kep Ka Anurak Nam Badan Por Sor 2547 [Ministerial Regulation Prescribing of the Rate of Groundwater Conservation Fee and the Rules, Procedure and Conditions of the Collection of Groundwater Conservation Fee B.E. 2547] (กฎกระทรวง กำหนดอัตราค่าธรรมเนียมเก็บค่าอนุรักษ์น้ำบาดาล และ หลักเกณฑ์ วิธีการ และเงื่อนไขการเรียกเก็บค่าอนุรักษ์น้ำบาดาล พ.ศ. 2547)

Ra Biap Kana Kammakan Jat Rup Tidin Klang Wa Duai Lakkain Witikarn Lae Ngueankhai Kan Chamra Kachajjai Nai Kan Jut Rabob Nam Puea Kasetrakam Po So 2559 [Rule of the Central Land Consolidation Committee on the Rules, Procedure and Conditions of the Payment for Charges From Agricultural Water Management B.E. 2559] (ระเบียบคณะกรรมการจัดรูปที่ดินกลาง ว่าด้วยหลักเกณฑ์ วิธีการ และเงื่อนไขการชำระค่าใช้จ่ายในการจัดระบบน้ำเพื่อ เกษตรกรรม พ.ศ. 2559)

Ra Biap Kana Kammakan Jat Rup Tidin Klang Wa Duai Lakkain Witikarn Lae Ngueankhai Kan Chamra Kachajjai Nai Kan Som Saem Lae Bamrung Raksa Sueng Chai Prayot Ruam Kan Po So 2559 [Rule of the Central Land Consolidation Committee on the Rules, Procedure and Conditions of the Payment for the Repair and Maintenance of the Public Constructions for the Common Use B.E. 2559] (ระเบียบคณะกรรมการจัดรูปที่ดินกลาง ว่าด้วยหลักเกณฑ์ วิธีการ และเงื่อนไขการชำระค่าใช้จ่ายในการซ่อมแซมและบำรุงรักษาซึ่งใช้ประโยชน์ ร่วมกัน พ.ศ. 2559)

State Irrigation Act B.E. 2485 (1942)

Water Resources Act B.E. 2561 (2018)

The United States of America

The Official Code of Georgia Annotated

Water Conservation Act of 2009

Reports

Dinar A, Rosegrant M and Meinzen-Dick R, 'Water Allocation Mechanisms: Principles and Examples' (Research working paper; no. WPS 1779. Washington, DC: World Bank, July 1997)

European Commission, *The Role of Water Pricing and Water Allocation in Agriculture in Delivering Sustainable Water Use in Europe – FINAL REPORT* (Project number 11589, February 2012)
<<https://publications.europa.eu/s/IDAG>>

European Commission, *The Role of Water Pricing and Water Allocation in Agriculture in Delivering Sustainable Water Use in Europe – FINAL REPORT – ANNEXES* (Project number 11589, February 2012)

Institute for Water Resources, 'Aspects of Governing Water Allocation in the U.S.' (Report Prepared for Agencia Nacional de Aguas in accordance with a 2013 ANA-USACE Agreement Component, Regulatory Aspects, Task 4, Document 4.1, December 2014)
<https://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2014-R-4_Aspects_of_Governing_Water_Allocations_in_the_US.pdf>

Liao Y, Gao Z, Bao Z, Huang Q, Feng G, Xu D, Cai J, Han H and Wu W, 'China's Water Pricing Reforms for Irrigation: Effectiveness and Impact'

(Comprehensive Assessment of Water Management in Agriculture Discussion Paper 6, 2008)

<<http://www.environmentportal.in/files/CADiscussionPaper6.pdf>>

Wichelns D, 'Agricultural Water Pricing: United States' (OECD, 2010)

<<https://www.oecd.org/unitedstates/45016437.pdf>>

Thesis

Rattamanee N, 'Regulation on the Riparian Rights Outside the Irrigated Area' (Master of Laws Thesis, Thammasat University 2014)

CERTAIN LEGAL ASPECTS OF AIRBNB IN THAILAND^{*}

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Abstract

This article examines the problems on the Airbnb online business platform in Thailand, which is becoming a major problem in Thailand. It is because Thailand is one of the best tourist destinations. Hence, the country does not have the law supporting Airbnb.

Because of this problem, this article applies a comparative study to examine how other countries i.e. the United Kingdom and the United States of America, has been dealing with Airbnb. In order to find a recommendation for Thailand.

From the comparative study, the article proposes that, Airbnb in Thailand should be recognized and regulated to facilitate the country's tourism and economy and ensure the safety of the people involved in the Airbnb services. In the meanwhile, the government should consider amending Section 4 of the Hotel Act B.E. 2547 (2004) by redefining the definition of the hotel in the current Hotel Act.

Keywords: Airbnb, Sharing Economy, Illegal, Thailand, Hotel Act

^{*} This article is summarized and rearranged from the thesis "Certain Legal Aspects of Airbnb in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

1. Introduction

Airbnb is an online platform to help the world to move forward into technology. Nowadays, there are a lot of people who are traveling all the time on a business trip or a family trip. Everyone needs a good and safe place to stay. Good place does not mean all the expensive hotels but also guesthouses where Airbnb has started.¹ Airbnb is an easy and affordable place where people can book a place to stay and it depends on the visitors that in which particular area they want to stay and today, Airbnb has over 6,000,000 listings in 81,000 cities and 191 countries including Thailand². Now people may see that Airbnb is growing extremely fast in our society and with little help of them we can grow our country economically as well. In the meanwhile, Thailand has invested a lot in the hotel, residence, guesthouse businesses and giving service to foreigners with excellent accommodations but as we know these days the businesses are down everywhere, Airbnb could be an excellent opportunity to grab and promote our tourism section in Thailand.³ However, the fact that Airbnb business in Thailand is still not approved by the Government, people still list properties through Airbnb listing, it is because, people believe that, they should be allowed to make more income from their properties. Therefore, the sharing economy concept has been embraced by the entrepreneurs as delivering new forms of opportunity for local and national economies.

¹ Erika Rawes and Kailla Coomes, 'What is Airbnb?' (*Digital Trends*, 13 September 2019) <<https://www.digitaltrends.com/home/what-is-airbnb/>> accessed 1 March 2019

² Craig Smith, '105 Airbnb Statistics and Facts (2019) | By the Numbers'(DMR, 6 September 2019) <<https://expandedramblings.com/index.php/airbnb-statistics/>> accessed 6 September 2019

³ Parichart Bootvong and Than Dendoung, 'Review Article: The Review of Legal Issues Related to the Impacts of Online Vacation Rental Platforms (OVRPS) on Vacation Condominium Rentals and the Hotel Industry in Thailand' (*Journal of Architectural/ Planning Research and Studies*, 2018) 15(1) 1-16 <<https://www.tci-thaijo.org/index.php/jars/article/view/154189>> accessed 3 April 2018

2. Characteristics of Airbnb

Airbnb is still a very young business concept. The short-term rental home for vacation means there are no strict rules and regulations. However, there are a lot of common qualities that set Airbnb most successful from the rest online business operators. The first and most important key is location, location is everything⁴ that a person would look for on their vacation and recently San Diego and Miami were ranked the top most productive Airbnb cities, it is because of the location and affordable price as well. Next, Airbnb focus on the experience, Airbnb claims that travelers are not interested in just seeing museums or famous cathedral but also having a truly amazing experience like a local.

The most listed Airbnb in Thailand would be Phuket, Bangkok, and Chiang Mai respectively.⁵ However, Thailand does not have any specific law for Airbnb and it comes with a huge problem because some group of people prefers Airbnb and when it is not legal then it cannot be safe and that means it does affect to our country's economy. Also, Thai's government has just announced on 13th May, 2018, that Airbnb is an illegal business in Thailand according to Hotel Act B.E. 2547.⁶

2.1 Sharing Economy

Sharing economy is a concept of shared economic society⁷ which

⁴ Airbnb, 'Spaces and Places' (Airbnb, 27 June 2014) <<https://blog.airbnb.com/spaces-places-guests-want-know-location/>> accessed 24 June 2014

⁵ Suchat Sritama, 'Thai Airbnb hosts serve 1.2M' *Bangkok Post* (Bangkok, 17 February 2018) <<https://www.bangkokpost.com/business/1413510/thai-airbnb-hosts-serve-1-2m>> accessed 17 February 2018

⁶ Post Reporters, 'Airbnb bookings illegal, court declares' *Bangkok Post* (Bangkok, 18 May 2018) <<https://www.bangkokpost.com/thailand/general/1467442/airbnb-bookings-illegal-court-declares>> accessed 18 May 2018

⁷ Arun Sundararajan *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (Massachusetts, The MIT Press 2016)

was first mentioned since 1978 in the academic article "Community Structure and Collaborative Consumption" by Marcus Felson and Joe Spaeth, to generate revenue that comes from the exchange of consumption of goods or services with the economic value from unused resources between individuals and groups through digital platforms. The keys factor that makes sharing economy concept more accepted are;

1. weak economic conditions after the global financial crisis in 2008, which is a period of high unemployment and people would do something to earn more.

2. access to information on social networking and increased cloud that gives access to qualitative and quantitative information about factors that influence demand and better consumer behavior.

The business can use technology and digital data to match between users and service providers. The service provider can allocate time to share that product or service. While consumers can choose and access such products or services without having to waste money to buy as owners, such as cars, homes, bicycles or home appliances, etc. Examples of popular businesses in a shared economy are growing. As leaps and bounds include Airbnb and Uber.

2.1.1 Advantages of Sharing Economy

The major advantages of this concept are:⁸

1. reduce costs instead of buying assets or renting assets from the lessor in the same way and

2. pushing for changes in consumer behavior in regard to value and better resource allocation Especially in the case of having to decide to buy products that can be shared or high-priced products by Ernst & Young's research in 2015, evaluating the value of products that can be shared, such

⁸ Hannah Neuburger, 'The ever-growing sharing economy: Pros and Cons' (*EU-Startups*, 25 February 2019) <<https://www.eu-startups.com/2019/02/the-ever-growing-sharing-economy-pros-and-cons/>> accessed 12 February 2019

as vehicles, drilling equipment, lawnmowers, accounting for 20-30% of the total cost of the household and from the Harvard Business Review survey⁹ found that most customers are willing to share resources if they can save at least 25% of that asset price.

Besides, economic benefits in addition to saving money It also encourages consumers to use their remaining income to invest in further expansion.

2.1.2 Disadvantages of Sharing Economy

The first disadvantage of this concept is that it creates a temporary consumption culture. The consumers will choose to buy products and services that focus on convenience and price rather than considering the relationship between consumers and business groups because most will use that product or service also, this concept also affects the standards and the labor market.

Besides, these changes also add to the challenges of traditional businesses, especially in mature markets. The Oxford Martin School research unit assessed the impact of sharing economies that accounted for 0.25% of GDP¹⁰, although the proportion of the impact on the economy is still not very high. But can have a significant impact on some industries, for example, since the end of 2015, competition in the tourism and service industries has become fiercer when Airbnb businesses provide millions of rooms Which is more than a room at a hotel chain InterContinental and Hilton Worldwide, which are open for service at the same time or Uber's business service and

⁹ Alexandra Samuel, 'What customers want from the collaborative economy'(Harvard Business Review, 8 October 2015) <<https://hbr.org/2015/10/what-customers-want-from-the-collaborative-economy>> accessed 8 October 2015

¹⁰ Credit Suisse, 'The sharing economy' (Investment Strategy & Research, Global Investor 2.15, November 2015)<https://www.oxfordmartin.ox.ac.uk/downloads/GI_215_e_GesamtPDF_01_high.pdf> accessed 15 November 2015

passenger car business, causing the numbers of new taxis in the UK to drop by 97% in the first 4 months of 2016¹¹

3. Difference between Booking.com, Agoda, and Airbnb

Airbnb platform is more like a short rental houses based, whereas booking.com and Agoda platform are mostly used by hotels. There is some difference between Airbnb, booking.com, and Agoda.¹² One of the best examples is the guest's expectations. It is because Airbnb is more like stay at home accommodation, so they are aware that they are going to stay in someone's house, their expectation will be accordingly. While booking.com and Agoda are hotels which can be a high expectation from the guests. A place at the hotel standards 24 hours check-in, hospitality of the hotel, on time breakfast.

Also, Airbnb must have a host who owns or take care of the property or accommodation, in some country, the owner needs to stay with the guests at the property too. However, Agoda and booking.com do not need to have the owner to stay at the property at all.

While Airbnb has two-way reviews where the owner can leave reviews for the guests too. Even though this feature is very useful for keeping the guests responsible for their actions, booking.com does not have this feature. So, these are the reasons why Airbnb, booking.com, and Airbnb are the difference. However, the purpose of my study in this thesis will not apply to booking.com and Agoda since their main purpose of business is with the hotel, not a house accommodation.

¹¹ Nicholas Megaw, 'Uber expansion leaves taxi industry in urgent need of a lift' *Financial Times* <<https://www.ft.com/content/c4ded228-1910-11e6-bb7d-ee563a5a1cc1>> accessed 16 May 2016

¹² Michael Rozenblit, 'Airbnb vs booking.com for Guests & Hosts: The Pros and Cons,' (The World Was Here first, 20 June 2019) <<https://www.theworldwasherefirst.com/airbnb-vs-booking-com/>> accessed 30 May 2019

4. Types of Contracts Related to Airbnb

Airbnb has several of legal relationships involved. (i.e. host with Airbnb, Airbnb with guest, host with guest) However, the main focus is the contract between the owner and the guest. It is because when a person uses Airbnb, there's already a contract made via Airbnb.com (right after the registration on the website) between them, no matter if he or she is the guest or the owner.

Airbnb is not an owner or operator of the properties. To access certain features of the Airbnb website and its tools, and to book an accommodation or create a rental listing, the person must register to create an account and become a member. To do that, the person must agree to its Terms of Service. This is the contract which people are signing with Airbnb.

Once the registration has been made as a member of the Airbnb website and the guest have chosen the particular accommodation then the guest must sign a separate contract with the owner (if any). At that time, guest will be paying for the use of service of Airbnb because Airbnb has provided the service of room or house hunting for a short period of time. So, the rent which has been paid is for the accommodation which is in addition to the Airbnb fees. However, the rental money will be paid to Airbnb once the guest has chosen the accommodation and that money will be transferred to the owner or the owner from Airbnb only after the guest has checked out of the accommodation.

Besides, hosts can ask guests to sign a contract because some hosts required guests to sign contracts or rental agreements prior to check-in, however, the owner must disclose the actual contract terms before the booking and include the contract terms when messaging the guests¹³.

¹³ Airbnb, 'Terms of Service' (*Airbnb*) <<https://www.airbnb.co.in/terms>> accessed 21 January 2019

5. The Legal status of Airbnb under Thai Law

According to the Hotel Act in Thailand, Section 4, Hotel means “an accommodation established for business purposes of providing temporary accommodation service for travelers or any other person in exchange for compensation.” This law does not include the meaning of the treehouse hotel, guesthouses, tent houses.

Airbnb is the largest business platform online to create a listing or renting a house or rooms for a short period of time through a computer or smartphone which is convenient and easy for tourists all around the world. In the past years, there are around 4 million Airbnb in 191 countries with 160 million of the guests. In the past few years, there are many users of Airbnb because the price and the location are the keys where we can find cheap rooms and near tourist attractions. In the view of tourists, it should be considered a good thing because we have a cheap room in a good location also convenience but not for the neighbors.

However, there is no specific law or involved authority who support the status of such businesses in many countries. Especially in Asian countries, which results in Airbnb being seen as a grey business or illegal business. The only way to legalize Airbnb in Thailand is that we should amend the law of the Hotel Act and support this online platform.¹⁴ However, some laws involved in this business are the Hotel Act, the Immigration Act, the Condominium Act, the Civil and Commercial Code, the Public Health Act and the Town Planning Act.¹⁵

6. Legal tatus of Airbnb under the United Kingdom Law and the United States of America Law

6.1 Legal status of Airbnb in United Kingdom

¹⁴ Hotel Act B.E. 2547 (2004)

¹⁵ Immigration Act B.E. 2522 (1979)

‘The United Kingdom Visit Britain and Visit England’ have joined as a partner with Airbnb to promote local tourism of the United Kingdom to let people come and visit so the government can boost their local economy and income. The reason behind why they have partnered with Airbnb is to promote marketing product such as local experiences, tour program lead by the local experts and other activities, therefore, Airbnb can also generate income from those activities. The target of this campaign is mainly for the young population of the Great Britain, as the government wants to boost young people to travel domestically. So, this new partnership which has established in 2019, will be the reason for the increasing own fresh revenue for local business, the government and Airbnb itself. Also, will help the United Kingdom gain the number of tourists and promote their locality.¹⁶

6.2 Legal status of Airbnb in New York

It is a no surprise that the New York City is one of the most USA’ biggest tourist spot and New York alone has over 16,000 Airbnb listing on the website.¹⁷ However, the strictest Airbnb regulations are found in New York and San Francisco and Santa Monica. It is because New York law allows only permanent resident to rent out the property in which the landlord or the owner of the property must be staying or present during the stay of the guests, where the stay should not exceed 30 days.¹⁸

Here are the laws and regulations of New York City that should be in consideration before listing on Airbnb platform.

¹⁶ Tracey Edginton, ‘Tourists to UK forecast to spend record level in 2018’ (*Visit Britain*) <<https://www.visitbritain.org/tourists-uk-forecast-spend-record-level-2018>> accessed 3 June 2019

¹⁷ Jon Fingas, ‘Airbnb agrees to share data for over 17,000 NYC listings’ (*engadget*, 26 May 2019) <<https://www.engadget.com/2019/05/26/airbnb-nyc-listing-data-sharing-agreement/>> accessed 26 May 2019

¹⁸ Airbnb, ‘Traveling help: New York’ <<https://www.airbnb.com/help/article/868/new-york—ny>> accessed 27 March 2018

1. Business License: must obtain a special permit or a license before investing in Airbnb rental properties under the law of City's new business portal¹⁹ and the New York Administrative Code or called ADC

2. Rental Control: If the property is under rent control, the first thing to consider is that the 'The New York Rent Guidelines Board's website',²⁰ to see if the investment property is subject to rent stabilization or rent control and to ensure that there is no violation to any regulations.

6.3 Legal status of Airbnb in San Francisco

As mentioned above, San Francisco is one of the strictest for Airbnb business same as New York, where the owner or the landlord must stay or present with the guests during their stays²¹. However, city of San Francisco short-term rental law claims that the duration of the rental must not exceed 90 days and the property must register with the city council before accepting guest on Airbnb platform. However, San Francisco is one of the most profitable Airbnb cities at the start of 2018. Yet, still due to the new Airbnb laws and regulations, it is because short-term investments for Airbnb is strict now and the city might face some more difficulty in putting the property online. To avoid falling into the illegal part of the laws, the investors need to keep an eye on the updated existing laws and regulations in Airbnb in San Francisco.

Here are the laws that should be considering before listing Airbnb platform.

1. Permanent Residents Only: This rule applies in order to register the property on the listing, the owner must live there in the property and

¹⁹ NYC Business, 'What's required to do business in New York City?' (*NYC Business*)

<<https://www1.nyc.gov/nycbusiness/startabusiness/>> accessed 3 June 2019

²⁰ *ibid.*

²¹ Airbnb, 'San Francisco's Registration Process: Frequently Asked Questions' (*Airbnb*)

<<https://www.airbnb.com/help/article/1849/san-franciscos-registration-process-frequently-asked-questions#Who%20needs%20to%20register>> accessed 20 April 2017

United States of America particularly San Francisco for at least 275 days per year. Also, it is necessary to provide the full documents in proof that the address of the property will be registered as the primary residence. And if this cannot be proved then the owner would not be eligible to take part in Airbnb San Francisco.

2. Registration and taxes: Every Airbnb investor must register in the city to obtain a business registration certificate and short-term residential rental certificate in order to put the property on the Airbnb online platform. However, the owner is required to pay the tax which required a 14 percent transient occupancy tax (TOT) on a property reservation for less than 30 days

3. The 90 days rule: The 90 days rule means the limitation where the owner of the property is not present in the Airbnb property of a maximum 90 days a year then the said property cannot be rented out for more than 90 days

4. Liability Insurance: the owner is required to cover liability insurance with a minimum 500,000 dollars in coverage.

5. The hotel taxes must be paid: Airbnb investor in the San Francisco must and need to pay the hotel taxes as mentioned above the TOT tax 14 percent and it must be collected from the renters and paid to the city as well.

7. Conclusion and Recommendation

The United Kingdom and the United States have recognized the business of Airbnb in their countries. However, they also have put some restrictions over the business to make it fair and equal for the hotel business as well. They know the importance of the tech world, where you can easily book things online and it is easier for every age of the group. Since both countries have a lot of tourists each year and that is what generates revenue of the tourism and travel department. The government does not want to miss the chance or the opportunity to grow and make

more income into the country by supporting their people to put their properties in use to make more income because this way both people and the government will get to generate their revenue and also get more tourists in their country as well.

However, in Thailand, this kind of business is also very popular is being used by the tourists every day but letting the properties listed in Airbnb in Thailand means it is illegal and not yet recognized.²²

However, an online platform for accommodation like Airbnb is not yet recognized, just because the short-term rental is not legal in Thailand according to the law. Meanwhile, Airbnb plays an increasingly important part in Thailand's hospitality sector especially in Phuket, Koh Samui and Bangkok, it is because Airbnb offers affordable accommodation and it is very budget- friendly for the budget-travelers and it is also contributed in the growth of our country or Thailand's economies.²³

Recommendations

Nowadays, Airbnb is having a big impact on the tourism accommodation industry. However, there is still the question exist of why people tend to use or choose Airbnb rather than traditional hotel accommodation and what will be the impact of the traditional hotel business in the future. Airbnb represents a very actual topic and most popular tools in the tourism department, as the fact that younger users are the main customer that could lead to the future expansion of this Airbnb business because a lot of youngsters is starting to do a solo travel or so-called independent travel, meanwhile, Airbnb is not very popular or well known by the senior travelers because Airbnb required to use the technology but the senior could be the perfect Airbnb owner because

²² Chakri Adunnirat, Panha Kotmai Kiawkap Kan Nam Hongchut Condominium Haichao Rayasan [Legal Problem Concerning Condominium Unites offering Short-Term Rental] (Naresuan University Law Journal 11(2)) (จักรี อุดลนิตรัตน์, ปัญหากฎหมายเกี่ยวกับการนำห้องชุดคอนโดมิเนียมให้เช่าระยะสั้น (ปีที่ 11 ฉบับที่ 2 วารสารนิติศาสตร์ มหาวิทยาลัยนเรศวร))

²³ n 10.

usually seniors own a very traditional houses which is, by the way, is very appreciated by the Airbnb users who wants to live as a local and experience the authentic of the place.

The positive impact or effect of Airbnb is that they have the power to bring more tourists or visitors to a destination based on the fact that they are going to stay at the Airbnb accommodation. That is why the economy of the country is higher and the government can generate so much income if they allow such online business type in Thailand.

Also, Airbnb is one of the most popular and successful sharing economy business, sharing economy is the economic model that anyone has to share it in the form of rental to create additional value of assets or the simplest terms where it is the use of the technology to facilitate the exchanged access of goods or services between two or more parties and this value exchange occurs through a shared platform or marketplace.

Therefore, Airbnb in Thailand should be recognized and regulated to facilitate the country's tourism and economy and ensure the safety of the people involved in the Airbnb services. In the meanwhile, the government should consider amending Section 4 of the Hotel Act B.E. 2547 (2004) by redefining the definition of the hotel because, in the current Hotel Act, hotel means an accommodation established for business purposes of providing temporary accommodation. However, the capsule hotel, treehouse hotel or the gampling hotel are not recognized as the hotel business because for operating a hotel business in Thailand, the operator needs to have the construction permit (these listed hotels are not constructed) therefore, these hotels cannot apply for the construction permit and eventually are not legally operated hotel business in Thailand.²⁴

²⁴ Tourism Development, 'Office of Tourism Development, Ministry of Tourism and Sports' (1979) Thai Home Stay Standard, 4 edn, Bangkok, Chulalongkorn University

Bibliography

Books

Sundararajan A, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (Massachusetts, The MIT Press 2016)

Journal Articles

Adunnirat C, Panha Kotmai Kiawkap Kan Nam Hongchut Condominium Haichao Rayasan [Legal Problem Concerning Condominium Unites offering Short-Term Rental] (Naresuan University Law Journal 11(2)) (จักรี อุดุนิรัตน์, ปัญหากฎหมายเกี่ยวกับการนำห้องชุดคอนโดมิเนียมให้เช่าระยะสั้น (ปีที่ 11 ฉบับที่ 2 วารสารนิติศาสตร์ มหาวิทยาลัยนเรศวร))

Tourism Development, 'Office of Tourism Development, Ministry of Tourism and Sports' (1979) *Thai Home Stay Standard*, 4 edn, Bangkok, Chulalongkorn University

Laws and Regulations

The Hotel Act B.E. 2547 (2004)

The Immigration Act B.E. 2522 (1979)

Newspaper Articles

Post Reporters, 'Airbnb bookings illegal, court declares' *Bangkok Post* (Bangkok, 18 May 2018)

<<https://www.bangkokpost.com/thailand/general/1467442/airbnb-bookings-illegal-court-declares>>

Sritama S, 'Thai Airbnb hosts serve 1.2M' *Bangkok Post* (Bangkok, 17 February 2018) <<https://www.bangkokpost.com/business/1413510/thai-airbnb-hosts-serve-1-2m>>

Online Journal

Bootvong P and Dendoung T, 'Review Article: The Review of Legal Issues Related to the Impacts of Online Vacation Rental Platforms (OVRPS) on Vacation Condominium Rentals and the Hotel Industry in Thailand' (Journal of Architectural/ Planning Research and Studies, 2018) 15(1) <<https://www.tci-thaijo.org/index.php/jars/article/view/154189>>

Websites and Blogs

Airbnb, 'San Francisco's Registration Process: Frequently Asked Questions' (Airbnb) <<https://www.airbnb.com/help/article/1849/san-franciscos-registration-process-frequently-asked-questions#Who%20needs%20to%20register>>

Airbnb, 'Spaces and Places' (Airbnb, 27 June 2014) <<https://blog.airbnb.com/spaces-places-guests-want-know-location/>>

Airbnb, 'Terms of Service' (Airbnb) <<https://www.airbnb.co.in/terms>>

Airbnb, 'Traveling help: New York' (Airbnb) <<https://www.airbnb.com/help/article/868/new-york—ny>>

Credit Suisse, 'The sharing economy' (Investment Strategy & Research, Global Investor 2.15, November 2015)

Edginton T, 'Tourists to UK forecast to spend record level in 2018' (Visit Britain) <<https://www.visitbritain.org/tourists-uk-forecast-spend-record-level-2018>>

Fingas J, 'Airbnb agrees to share data for over 17,000 NYC listings' (engadget, 26 May 2019) <<https://www.engadget.com/2019/05/26/airbnb-nyc-listing-data-sharing-agreement/>>

Megaw N, 'Uber expansion leaves taxi industry in urgent need of a lift' *Financial Times* <<https://www.ft.com/content/c4ded228-1910-11e6-bb7d-ee563a5a1cc1>>

Neuburger H, 'The ever-growing sharing economy: Pros and Cons' (EU-Startups, 25 February 2019) <<https://www.eu-startups.com/2019/02/the-ever-growing-sharing-economy-pros-and-cons/>>

NYC Business, 'What's required to do business in New York City?' (*NYC Business*) <<https://www1.nyc.gov/nycbusiness/startabusiness/>>

Rawes E and Coomes K, 'What is Airbnb?' (*Digital Trends*, 13 September 2019) <<https://www.digitaltrends.com/home/what-is-airbnb/>>

Rozenblit M, 'Airbnb vs booking.com for Guests & Hosts: The Pros and Cons,' (The World Was Here first, 20 June 2019) <<https://www.theworldwasherefirst.com/airbnb-vs-booking-com/>>

Samuel A, 'What customers want from the collaborative economy' (*Harvard Business Review*, 8 October 2015) <<https://hbr.org/2015/10/what-customers-want-from-the-collaborative-economy>>

Smith C, '105 Airbnb Statistics and Facts (2019) | By the Numbers' (*DMR*, 6 September 2019) <<https://expandedramblings.com/index.php/airbnb-statistics/>>

**LEGAL STATUS OF WORKERS UNDER THE SHARING ECONOMY:
A PROPOSAL OF HYBRID EMPLOYMENT***

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Abstract

The internet revolution has contributed to a better standard of living and brought about the concept of “Disruptive Technology”. This concept is disrupting the structures of existing business industries by introducing new commercial platforms or economic models which can be referred to as the “Sharing Economy”. This article examines problems on the emergence of the Sharing Economy that has given rise to complexity of employment relationships, which need a distinction between hire of work and hire of service. This paper studies an examples of the Sharing Economy which is a transportation network company (TNC), a ridesharing business such as Uber, Grab and Lyft. The characteristics of TNC’s workers resemble those of both employee and independent contractor. It is therefore crucial to distinguish one from the other in order to correctly apply the relevant laws. Therefore, this article surveys the provisions concerning the legal status of hybrid worker in Italy, Spain, and Canada that aims to minimize the problem of the

* This article is summarized and rearranged from the thesis “Legal Status of Workers under the Sharing Economy: A Proposal of Hybrid Employment” The Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

worker misclassifications. From the comparative study, this article proposes to apply the dependent contractor status into Thai domestic law to reduce legal uncertainty for the Sharing Economy in Thailand in order to protect those working for this type of business.

Keywords: Transportation Network Company, Dependent Contractor, Hybrid Employment

1. Introduction

In the era of internet and mobile phone application, business activities and consumers' behavior have drastically changed in many ways¹. Since the Third Industrial Revolution² in 1969, technology has significantly influenced over how people live their lives. Currently, the Fourth Industrial Revolution³ is happening and is more potential to improve life quality of everyone worldwide and increase their income levels⁴. This latest revolution has combined technology with various fields of sciences to produce a better standard of living, contributing to what is called "Disruptive Technology".⁵

Experts have estimated that by 2020 in the US, contingent workers will make up nearly half of all US workers, and 11% of these will be working through on-demand platform⁶. In the EU, the gross revenue from

¹ Klaus Schwab, *The Fourth Industrial Revolution* (World Economic Forum 2016), 12

² Simon Chan, 'Digital Transformation and The Third Industrial Revolution' (*Linkedin*, 11 November 2016) <<https://www.linkedin.com/pulse/digital-transformation-third-industrial-revolution-simon-chan/>> accessed 27 October 2017

³ Daniel Araya and Creig Lamb, 'Surfing the 4th Industrial Revolution: Artificial intelligence and the liberal arts' (*Brookings*, 11 April 2017) <<https://www.brookings.edu/blog/brown-center-chalkboard/2017/04/11/surfing-the-4th-industrial-revolution-artificial-intelligence-and-the-liberal-arts/>> accessed 27 October 2017

⁴ The World Bank, 'WDI 2017 Maps' (*The World Bank*, 2017) <<https://data.worldbank.org/products/wdi-maps>> accessed 27 October 2017

⁵ Paul Armstrong, *Disruptive Technologies: Understand, Evaluate, Respond* (Kogan Page 2017) 11

⁶ Ursula Huws, 'The rise of platform labor: a fair 'sharing economy' or virtual Wild West?' (University of Hertfordshire 2016) 27 <https://s3-eu-west-2.amazonaws.com/bulletin-pr/wp-content/uploads/2019/01/08162835/UniofHerts_Research-briefing_Rise-of-platform-labour.pdf> accessed 27 October 2017

collaborative platforms of 2015 was approximately at 28 billion euros, almost doubling when compared to 2014⁷.

The Sharing Economy allows individuals to earn from underutilized assets by sharing their resources, such as equipment, services, and skills with other people, normally with significantly lower cost than traditional retail or employment arrangements.

The emergence of the Sharing Economy has given rise to more complex employment relationships, which need a distinction between hire of work and hire of service. One of the outstanding examples of Sharing Economy is TNC, which is a ridesharing business such as Uber, Grab and Lyft. The question of legal status of the workers in this type of businesses arises, and it is crucial to find the answer in order to correctly apply the relevant laws.

Many countries also experience this similar problem. Some countries such as Italy, Spain and Canada have solved this issue by creating a new employment category called the hybrid employment or the Dependant Contractor, which is expected to provide protection on workers in the Sharing Economy. The Dependent Contractor is a combination partly of a traditional employee and an independent contractor. In other words, on one hand, the intermediary, which is the owner of service applications, has major power to control how the Dependent Contractor does and deliver their work. For example, the intermediary has its power to set amounts of fee or charge, and even to dismiss their workers through barring them from using the service application. In this respect, the Dependent Contractor is comparable to traditional employees. On the other hand, the Dependent

⁷ European Parliament, 'THE SITUATION OF WORKERS IN THE COLLABORATIVE ECONOMY' (In-depth-Analysis, October 2016)
<[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf)> accessed 27 October 2017

Contractor has the freedom to design his/her work schedules, which is comparable to independent contractors.

2. Basic Concept of the Sharing Economy

The term “Sharing Economy” has been mentioned in the Oxford Dictionary in 2017 as “an economic system in which assets or services are shared between private individuals, either free or for a fee, typically by means of the Internet”.⁸ It is also a hub of peer-to-peer activity for obtaining, giving, or sharing access, and is coordinated through a web interface featuring community feedback.⁹

Sharing Economy is a communal economic concept. It was initially introduced in 1978 in an academic journal "Community Structure and Collaborative Consumption" by Marcus Felson and Joe Spaeth¹⁰, who are now both social scientists at University of Illinois, Urbana-Champaign. The idea was to generate income from the exchange of services or goods with an underutilized property that belong to individuals or groups, over several digital platforms. It became widespread in early 21th century as a new model of business using the technology as an advantage after the Fourth Industrial Revolution.

⁸ Lexico, ‘Definition of Sharing Economy in English: sharing economy’ (*Lexico*, 2017) <https://en.oxforddictionaries.com/definition/sharing_economy> accessed 24 August 2017

⁹ Juho Hamari, Mimmi Sjöklint, and Antti Ukkonen, ‘The sharing economy: Why people participate in collaborative consumption’ (2015) *Journal of the Association for Information Science and Technology*, DOI: 10.1002/asi.23552 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271971> accessed 25 August 2017

¹⁰ Marcus Felson and Joe L. Spaeth, ‘Community Structure and Collaborative Consumption: A Routine Activity Approach’ (1978) 21(4) *American Behavioral Scientist* 614–624 <<http://journals.sagepub.com/doi/10.1177/000276427802100411>> accessed 11 May 2018

3. Transportation Network Company: Ridesharing Services

A well-known transportation network company such as Uber, Lyft and Grab are a part of a disruptive digital market called the Sharing Economy¹¹. Ridesharing service is a platform that allows car owners to become entrepreneurs by taking private vehicles to others for short-term rental in exchange for compensation. Examples of this type of business in the United States are RelayRides and Getaround. It also includes a platform that allows car owners to bring their vehicles for delivering people from one location to another.

4. The Interpretation of Uber's Legal Status

Uber is one of the famous disruptive businesses under the scope of "Sharing Economy". Through the use of Uber applications on smartphones, Uber carries on its business by pairing "driver" who uses their own private cars with "passenger" who wants transportation to different destinations. Uber's fee is based on distance, time, and current demand for the services.

Uber has always insisted that it is a technology company, not a taxi company or a public transport operator. However, these claims became invalid when the European Court of Justice (ECJ) has interpreted the legal status of Uber in the case - the *Asociación Profesional Elite Taxi v. Uber Systems Spain SL* - upon the request by the Commercial Court No. 3 of Barcelona for a preliminary interpretation on December 20, 2017¹². In this

¹¹ Arun Sundararajan, 'The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism' (The MIT Press 2016)

¹² C-434/15 – *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, Judgment of the Court (Grand Chamber) of 20 December 2017

regard, the ECJ followed the opinion of Mr. Maciej Szpunar¹³, a legal advisor of the ECJ (Advocate General) and decided that:

*“... an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as **a service in the field of transport** within the meaning of Article 58(1) TFEU.”*

Under this judgment, Uber must make its operations comply with the relevant transport regulations governing local taxi services in the same way as regular taxi in European countries. Thereby, driver registration with rigorous training and testing is also required.

5. The Concept of Hybrid Employment

Hybrid employment has been created to deal with employment relationships that fall between traditional employees and independent contractors. It is claimed that this hybrid category will provide advantages for workers in the Sharing Economy and create specific measures to tackle the relevant problems. To this end, the author studies legal provisions related to hybrid employment of 3 countries as follows:

¹³ C-434/15 – Asociación Profesional Elite Taxi v Uber Systems Spain, SL, Opinion of Advocate General Szpunar delivered on 11 May 2017

5.1 Italy

Italy recognizes the existence of hybrid employment under the circumstances where the workers have great discretions over the manners or performance of their own work but still greatly rely or depend on employer's wages ("lavoratore parasubordinato" or "quasi-subordinate"). In order for the hybrid worker to receive their protection, they must meet the four requirements; namely, (1) collaboration, (2) continuity and length of the relationship, (3) functional coordination with the principal, and (4) a predominantly personal service. With these four conditions, the hybrid workers are entitled to a variety of social security benefits such as maternity leave, sick leave, and worker's compensations.

5.2 Spain

Spain has adopted Estatuo del trabajo autonomo - LETA or Statute for Self-Employed Workers regulating the work of independent contractors, freelance jobs and all aspects of self-employment. The law is defined as "individuals not subject to the authority or organization of another person". This type of workers is entitled to such benefits as maternity and paternity leave, temporary sick leave, and beneficial social security programs for special groups.

However, LETA has also created a hybrid category of workers: "Trabajador Autonomo Economicamente Dependiente" (TRADE or self-employed worker with economic dependence). This employment category resembles the Italy's hybrid category of quasi-subordinated or "lavoratore parasubordinati".

In determining whether a worker is a TRADE or employee, they must meet the threshold of economic dependency at 75%. In addition, the following four criteria also need to be considered; (1) amount of independent work or reliance on the principal's directives; (2) the worker undertakes an obligation of personal service, without using subcontractors;

(3) the worker bears the entrepreneurial risk; and (4) actual ownership of the tools and instrumentalities of production. Besides, in order for TRADE workers to be recognized by law, they must also disclose to the principal their status as TRADE at the beginning of the contract as well as make their positions registered with the social administration agency.

5.3 Canada

Canada adopted the Ontario Labor Relations Act (1995) that provides a wider definition of employee in order to include the Dependent Contractor in its law as follows:

“a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.”

The concept of hybrid employment was adopted with a view to clarifying the definition of workers who are in the grey area, and in need of labor protections. To ascertain the status of hybrid worker, an economic dependency of 75% with a single company however needs to be considered as well.

6. Conclusion

After conducting the comparative studies on the laws related to hybrid employment in the three different jurisdictions; namely, Italy, Spain and Canada, the author has found that their laws have been substantially developed to embrace the utilization and execution of the work's unique nature under their legal systems. This is despite that the original purpose of

such developed laws is not to protect the workers specifically in the Sharing Economy, but generally those in the grey area. In this regard, due to the rapid growth of the Sharing Economy business in Thailand, the author suggests that Thailand should also adopt legal provisions of hybrid employment to protect the workers in these business industries as follows:

6.1 Criteria of Dependent Contractor Status

In order to expand labor protections on workers in the Sharing Economy, whose status falls between traditional employee and independent contractor, the author views that Thailand should adopt the Canadian approach as a model to widen its definition of “Employee” under the Labor Protection Act, B.E. 2541, aiming to cover the “Dependent Contractor” status. In this respect, the requirement of the following four criteria shall also be prescribed: (1) workers work predominantly for one principal with a 75% of economic dependency, (2) they are subject to the control of the principal as to how the services are provided, (3) they use their own tools in the provision of the services, and (4) they have undertaken any business risks, or expects a profit from the provision of the services. If these criteria of Dependent Contractor are fulfilled, the workers will be able to gain the Dependent Contractor status and be eligible to the same labor rights as a traditional employee.

6.2 Safe Harbor for Sharing Economy Business

Thailand should also create a safe harbor to exclude some people, who carry on the Sharing Economy for good causes without being paid or for the purpose of a community’s benefits etc., from being treated as a traditional employee. To illustrate, people who use the ridesharing service through the smartphone application only to save fuel or parking fees should not be regulated as a traditional employee. However, it remains difficult to determine who should be within the scope of the safe harbor. In this regard,

the author suggests the criteria of economic dependency per a single company at least 75% of the total income and the number of working hours per month that is close to those of traditional employees.

Bibliography

Books

Armstrong P, *Disruptive Technologies: Understand, Evaluate, Respond* (Kogan Page 2017) 11

Schwab K, *The Fourth Industrial Revolution* (World Economic Forum 2016)
12

Sundararajan A, 'The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism' (The MIT Press 2016)

Case

C-434/15 - Asociación Profesional Elite Taxi v Uber Systems Spain, SL, Opinion of Advocate General Szpunar delivered on 11 May 2017

C-434/15 – Asociación Profesional Elite Taxi v Uber Systems Spain, SL, Judgment of the Court (Grand Chamber) of 20 December 2017

Websites and Blogs

Araya D and Lamb C, 'Surfing the 4th Industrial Revolution: Artificial intelligence and the liberal arts' (*Brookings*, 11 April 2017) <<https://www.brookings.edu/blog/brown-center-chalkboard/2017/04/11/surfing-the-4th-industrial-revolution-artificial-intelligence-and-the-liberal-arts/>> accessed 27 October 2017

Chan S, 'Digital Transformation and The Third Industrial Revolution' (*LinkedIn*, 11 November 2016) <<https://www.linkedin.com/pulse/digital-transformation-third-industrial-revolution-simon-chan/>> accessed 27 October 2017

European Parliament, 'THE SITUATION OF WORKERS IN THE COLLABORATIVE ECONOMY' (In-depth-Analysis, October 2016) <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf)> accessed 27 October 2017

Felson M and Spaeth J, 'Community Structure and Collaborative Consumption: A Routine Activity Approach' (1978) 21(4) American Behavioral Scientist 614–624 <<http://journals.sagepub.com/doi/10.1177/000276427802100411>> accessed 11 May 2018

Hamari J, Sjöklint M, and Ukkonen A, 'The sharing economy: Why people participate in collaborative consumption' (2015) Journal of the Association for Information Science and Technology, DOI: 10.1002/asi.23552 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271971> accessed 25 August 2017

Huws U, 'The rise of platform labor: a fair 'sharing economy' or virtual Wild West?' (University of Hertfordshire 2016) 27 <https://s3-eu-west-2.amazonaws.com/bulletin-pr/wp-content/uploads/2019/01/08162835/UniofHerts_Research-briefing_Rise-of-platform-labour.pdf> accessed 27 October 2017

Lexico, 'Definition of Sharing Economy in English: sharing economy' (Lexico, 2017) <https://en.oxforddictionaries.com/definition/sharing_economy> accessed 24 August 2017

The World Bank, 'WDI 2017 Maps' (The World Bank, 2017) <<https://data.worldbank.org/products/wdi-maps>> accessed 27 October 2017

TRADE DRESS PROTECTION ON THE OVERALL APPEARANCE OF STORES IN THAILAND*

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Abstract

The overall appearance of stores has become a crucial factor for the business nowadays. Consequently, the company must not want any competitor to copy the successful stores' appearance easily. However, there is no specific provision in order to protect the overall appearance of stores in Thailand. Because of this problem, this article applies a comparative study to examine how other countries i.e. the United States, Germany and Republic of Korea protects the overall appearance of stores in order to find the best solution for Thailand. The analysis shows that although the overall appearance of stores plays a role as same as trademark does, it does not fall into the definition of the mark under the Trademark Act of Thailand. Therefore, the owner cannot exploit any benefits or rights provided under the act. Accordingly, it is important to amend the relevant provisions of Trademark Act of Thailand in order to cover the protections of the overall appearance of stores.

Keywords: Intellectual Property, Trade Dress, Trademark, Overall Appearance of Stores

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1. Introduction

To be a successful business nowadays, the improvement of the quality of products and services alone is not sufficiently effective. The remarkable presentation that products or services are shown to customers is also essential. Therefore, the business must create a variety of strategies in order to attract consumers and defeat other competitors. Apart from a design of product packaging or products configuration, an overall design or environment of the places in which the products and services are presented and provided is an efficient method. The overall appearance of stores refers to exterior, interior, decoration, or atmospheric such as sound, aroma or lighting, and including the manner of services and sale techniques¹ which is legally recognized in the United States (“U.S.”) as ‘trade dress.’

One of the purposes of designing outstanding stores is to attract consumers and enhance sales.² The better experiences they get, the stronger they desire in spending more money.³ More importantly, a significant purpose for investing in developing remarkable business places is to promote brand awareness. It can be said that the appearance of stores plays the same role as a business trademark, a brand identifier. Consequently, unique stores are essential for the recognition of the brand. In other words, the noticeable stores can distinguish one business from others who present the same category of products or services.

Because of these important factors, the business, therefore, put a great effort into developing the overall appearance of stores. A lot of surveys and research shall be conducted, and a huge amount of investment shall be put in order to serve customer satisfaction and create the recognition of the brand identity to the visitors. By investing a big amount

¹ Steven W Kopp and Jeff Langender ‘Protecting Appearance and Atmospherics: Trade Dress as a Component of Retail Strategy’ (Journal of Public Policy & Marketing, 2014) 33(1) 34

² *ibid*, 35

³ Erica J Weiner and Monica Richman, ‘Trade Dress Protection for Retail Store Design’ (2014) 32 Acc Docket 100

of money, putting a lot of effort and times, the businesses deserve protection for their endeavor.

In Thailand, currently, Intellectual Property (“IP”) laws can partially protect the overall appearance of stores. The copyright protects the architecture works such as interior or exterior design. However, it does not cover all elements of stores’ trade dress such as the manner of services or atmosphere of stores. Furthermore, although trade dress functions for identifying the source of the product or service as similar to the feature of trademark, trade dress protection is limited by the strict definition of trademark that only the defined article can be registered and protected. Alternative speaking, Thai Trademark Act does not include the overall appearance of stores as the subject-matter of trademark.

Because of the lack of protection and explicit law, it, therefore, gives an opportunity to the offenders in easily seizing and imitating the well-known stores’ design. In 2017, Japanese news reported that Thai restaurant had imitated ICHIRAN Japanese Ramen restaurant in various aspects such as a recipe, dining table design, materials used for providing service and shop system which could together be constituted as the overall appearance of stores or trade dress of stores.⁴ Nevertheless, the Department of Intellectual Property of Thailand (“DIP”) informed that such overall appearance could not be protected under the current IP laws of Thailand because of the absent of the law relating to trade dress.⁵ Therefore, the owner of the

⁴ Boss Mar Eang! Jang Pom Ron Ram Ramenthai Lork Korsorb Ramen Yeepun Mar Tang Doon [‘Boss comes! Explain the issue regarding Thai ramen restaurant copy the whole Japanese Ramen Restaurant’] *Thairath* (Bangkok, 13 December 2017) (‘บอสมาเอง! แจงปมร้าน ร้านราเมงไทย ลอกข้อสอบ ‘ราเมงญี่ปุ่น’ มาทั้งดุ้น’ *ไทยรัฐ* (กรุงเทพฯ, 13 2560)) <<https://www.thairath.co.th/content/1151655>> accessed 4 November 2018

⁵ Krom Sapsin Thang Panya Yan Ramen ICHIRAN Tontamrab Perd Sakar Nai Thai Dai [‘Department of Intellectual Property confirm the original ramen restaurant can open in Thailand’] *Thai PBS* (Bangkok, 13 December 2017) (‘กรมทรัพย์สินทางปัญญา ยันราเมงอิชิรัน ต้นตำรับ เปิดสาขาในไทยได้’ *ไทยพีบีเอส* (กรุงเทพฯ, 13 ธันวาคม 2560)) <<https://news.thaipbs.or.th/content/268483>> accessed 11 October 2018

Japanese restaurant cannot gain any protection on the overall appearance of its restaurant in Thailand.

This imitation causes problems to the existing stores' owners and consumers. Firstly, it does not serve a fair competition to the business. The business should have a right to use their own distinctively creative stores exclusively and monopoly. This affects both Thai and foreign operators. That is, the Thai business would be discouraged to design new creative stores as the protection is unreliable. Furthermore, the foreign business is the most target of stores to be copied which would eventually block the foreign investment in Thailand.

Secondly, it also affects the consumers in misunderstanding the origin of products and services. The consumers should have a right to consume products or services from the source that they actually intend to. From such Japanese restaurant example, the consumers might mislead that the ramen restaurant in Thailand is the same origin from Japan.

Thirdly, it affects trade competition in widespread as has been said; the business owners are discouraged in creating any new design because of the piracy which eventually results in the poor competitive situation of the society.

More importantly, from the absence of a specific law in relation to trade dress protection on the overall appearance of stores and the most relevant law which is trademark, in particular, cannot adequately serve the protection, the law should be amended to protect the overall appearance of stores in order to hinder the aforementioned problems.

2. General Concepts of Trade Dress and the Overall Appearance of Stores

In order to clearly understand the background of protection over the overall appearance of stores, it is essential to understand the general concepts of trade dress and the overall appearance of stores.

2.1 Trade Dress

Trade dress is one category of Intellectual Property Rights, under the umbrella of trademark that protects the total image or the overall appearance of products or services. The common trade dress for a product is packaging or labeling while the commercial enterprise is the design and decoration of stores.

The U.S. is a country that first developed this concept⁶, and even though trade dress term is mentioned in the Lanham Act or Trademark Act, the specific definition is silent and is not specified in any other laws. The U.S. Court had gradually developed trade dress term since the nineteenth century. It was firstly used for packaging of products and further expanded to other types of trade dress such as label or product configuration.⁷ Trade dress is a total look that includes size, shape, color or color combinations, texture or graphics.⁸ Consequently, the term has been broadly interpreted to cover the overall appearance of places providing services such as retail stores which comprise of exterior or interior design, decorations, sales techniques or manner of services.⁹

The total image or overall appearance that is registrable trade dress has to meet certain criteria as follows:

2.1.1 Distinctiveness

Trade dress plays the same role as trademark in the sense that they have the main feature for identifying the source of products or services. Either trade dress or trademark can be protected only in the case that such dress or mark is distinctive.

⁶ Shilpa Chaudhury, 'Trade Dress Protection: Comparative Analysis Between USA and India' (*academia*)

⁷ William E Levin, *Trade Dress Protection* (2nd edn, Clark Boardman Callaghan 2016) s 1:5

⁸ *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 973 (11th Cir.1983)

⁹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)

In other words, the dress or mark must be able to distinguish products and services from other sources. The distinctiveness is considered of the dress, not the products and services themselves, that whether it can identify and differentiate the source or not. It can be easily said that when one walks along the street and can recognize 7-eleven, the convenient store only by seeing three colors i.e. orange, green and red which are using to be a light exterior decoration without seeing the name of the store.

Distinctiveness can be acquired in two ways. The first way is inherent distinctiveness. It emerges since the creation of certain trademark or trade dress of products or services or being distinctive by itself. It is simply that the mark or dress itself almost automatically tells consumers that certain mark or dress refers to a certain brand. Alternatively, although trade dress is not distinctive by itself, it can acquire by second way which are the distinctiveness by recognition and the length of use of such dress with certain products and services. It also can be called ‘secondary meaning’. It can be said that although the distinctiveness of certain dress is absent, by proving the use of trade dress, such trade dress can become distinctive in another meaning of reputation and long use.¹⁰

2.1.2 Non-functionality

To consider the functionality doctrine under trade dress, it has to be non-functional and shall remain aware that it is the test of products or services ‘appearance’ not the products or services themselves. The rationale of non-functionality requirement is to avoid a certain manufacturer or service provider from creating unfair competition.¹¹ The laws need to remain the state of competition to the market for the functional features of products or services and let the businesses only compete with the design or

¹⁰ What Tingsamitr, *Kruangmhai Kam Kar [Trademark Law]* (1st edn, Nititham 2002) (วัส ดิงสมิตร, เครื่องหมายการค้า (พิมพ์ครั้งที่ 1, นิตินธรรม 2545)) 10-11

¹¹ Alessandro Bianchi, ‘Trade dress infringement found in restaurant decoration’ (Lexology, 19 April 2011) <<https://www.lexology.com/library/detail.aspx?g=369a02b3-7dec-4afd-b581-ddfd87eedb75>> accessed 31 May 2018

appearance.¹² Furthermore, it is to avoid the extension of the protection period of patent. As the functionality of products is currently protectable under patent law, however, it is limited to a short period of time before falling to the public domain as the government needs the technology to be developed or to promote inventive creation. Trade dress or trademark serves the other perspective and is renewably protected. If the state allows any functional products to be further eternally protected by seeking in trade dress or trademark, it would obstruct the growth of technology and block the trade competition with a monopoly situation which would contrast with patent law.

The question to the test is whether trade dress is for only uniquely identifying the products or services or whether it relates to consumers expectation. Trade dress has to have a feature only for distinguishing the source of products or services or shows a connection between products or services with the brand. It can be shown by a design of slogan, logo, shape or a combination of those or any feature that is ornamental.¹³ By considering this factor, it has to be considered as a whole of trade dress whether it is functional. In other words, it is irrelevant if each component is individually functional, but the overall trade dress is non-functional.¹⁴

2.2 Overall Appearance of Stores

The overall appearance of stores is one of the crucial factors of a successful business because it is the main channel that the retailers communicate to the consumers and represents the brand. In the retail industry nowadays, the quality of the goods or services alone are not sufficient but how they are presented and provided to the consumers are another key success factor. Thus, the design of stores is essential. The good

¹² Levin (n 7) s 17:1

¹³ 'Trade Dress: Everything You Need to Know' (*Upcounsel*)
<<https://www.upcounsel.com/trade-dress>> accessed 1 June 2018

¹⁴ Charles Lee Israel Slamowitz 'Adjusting the Dress Code: Implementing Trade Dress Reform to Burgeon User Experience (UX) Protections' (2017) 41 Colum. J.L. & Arts 99

design stores that are capable of providing an impressive experience to the consumers are not only attracted more visitors but also reflect the good reputation to the brand and, at the same time, raising brand loyalty. More importantly, the strong brand identity which is shown by the store design can boost up the brand awareness which simultaneously functions as a distinguisher of a particular brand from another.

In order to design a certain store, the important element to be considered in order to meet explained purposes is a theme of stores. Basically, the theme would present the brand and corporate identity and create the environment harmoniously through the overall appearance of stores. Thus, the customers will experience the stores with the same emotion for all touch points and can link back to the brand origin without getting lost.¹⁵

Furthermore, other elements such as exterior and interior design are also be considered.¹⁶ The exterior design is the first impression that the customers would decide to enter the stores and also a major tool for differentiating each store. It can be designed on the architecture work, such as building, storefront or fixture, sign or logo, or window display.¹⁷

The interior design relates to how the products are stored and how the products and services are presented to the customers. It shall conform to the corporate and store identity. The interior can be designed on decoration, lighting, color or music background.¹⁸

¹⁵ Alexandra Sheehan, '8 Ways to Incorporate Brand Identity Into Your Retail Store' (Shopify, 15 February 2017) <<https://www.shopify.com/retail/8-ways-to-bring-brand-identity-to-life-in-your-retail-store>> accessed 4 November 2018

¹⁶ Supanne Inkaew, *Kam Boriham Kam Kar Pleek [Retailing Management]* (2nd edn, Tanapress 2010) (สุพรรณณี อินทร์แก้ว, *การบริหารการค้ำปลีก* (พิมพ์ครั้งที่ 2, ธนาเพรส 2553)) 106-114

¹⁷ *ibid.*

¹⁸ Tony Kent and Ogenyi Omar, *Retailing* (Palgrave Macmillan 2003)

3. Protection on the Overall Appearance of Stores in Thailand

Thailand does not have any explicitly law that wholly provides protection to the overall appearance of stores. Even copyright that mentioned about the protection on a ‘work of architecture’, it still does not serve the characteristic of the overall appearance of stores and the purpose of overall appearance of stores protection.

However, trademark is the legal approach that best suits the overall appearance of stores. It is because of the main features of trademark, and the feature of stores design is consistent. The duration of protection that is renewable, therefore, serve the purpose of it. Nevertheless, the current Trademark Act of Thailand does not protect the overall appearance of stores.

There are several problems regarding the protection on the overall appearance of stores which can be elaborated as follows:

3.1 Strict of Definition of Mark

‘Mark means a photograph, drawing, invented device, logo, name, word, phrase, letter, numeral, signature, combination of colors, figurative element, sound or combination thereof.’

The above definition of mark as defined in Section 4 of Trademark Act B.E. 2534 (1991) (as amended up to Trademark Act (No. 3) B.E. 2559 (2015) (“**Trademark Act**”) is limited. Section 4 provides a definition by using the word “mean”, therefore, the article that can be protected under the act is strictly listed to the article and any further interpretation cannot be made.

Historically, the ‘mark’ is defined in section 3 of Trademark Act B.E. 2474 (1931). This act had been enacted by following English law.¹⁹ The mark

¹⁹ Ratinuch Kawnachaimongkol, ‘Pan Har Kodmhai Nai Karn Hai Kwam Khumkrong Kae Kruangkhai Karn Kar Nai Rooprang Roopthrong Kong Watthu’ [‘Legal Protection for Figurative Elements as a Trademark’] (Master Degree Thesis, Thammasat University 2002) (รติณัฐ ก้าวหน้าชัยมงคล, ‘ปัญหากฎหมายในการให้ความคุ้มครองแก่เครื่องหมายการค้าในรูปร่างรูปทรงของวัตถุ’ (วิทยานิพนธ์ปริญญาโท, มหาวิทยาลัยธรรมศาสตร์ 2545))

‘includes’ photograph, logo, address, label, named ticket, signature, word, letter, number or any combination thereof. It is seen that the articles listed are only what the law intended to cover which could enlarge to other articles by using the term ‘includes’. In other words, the definition of mark, at that time, does not limit the article to be only the listed item.

However, in that time, the law was interpreted to include the figurative element or configuration which made the overlapped protection with the ‘product design’ of patent. This overlapping caused the consequent problems to patent protection. The patent law has a limited period of protection in order to encourage people to continuously developed new work. Trademark, on the other hand, is renewable. The business operator, therefore, used trademark as a loophole for expanding period of protection of their product design instead of using patent which provide only a limited period of protection. Consequently, the definition of mark was amended.²⁰

In 1991, Trademark Act was amended, and the definition of mark is strictly defined in Section 4. Consequently, the article protected under Trademark Act is limited. Thus, the overall appearance of stores is not included in the definition of mark, although it plays a role as same as trademark does which is the ability to distinguish the products and services. However, it still not a ‘mark’ under this act. Any protection or right under this act, therefore, cannot apply to the overall appearance of stores.

In other countries, i.e., the U.S.²¹ and Germany²², provide a definition of trademark broadly by using the term ‘include’. This might leave an open space for further interpretation and allow other to be interpreted as trademark in the next future.

The characteristic of overall appearance of stores basically is the overall theme which is presented by design on the exterior or interior design

²⁰ *ibid.*

²¹ The Lanham Act 15 U.S.C. 1127 (U.S.), s 45

²² German Trademark Act (Markengesetz) (GER), s 3

and design layout which comprises with various elements such as furniture, decoration, signage, choice of colors, light or sound. It is the combination of visually perceptible and non-visually perceptible. Thus, it can be seen that the overall appearance of stores ‘wholly’ does not fall into the definition of mark. Therefore, the overall appearance of stores is not a mark subject to this definition. If the store's owners would like to seek for protection under Trademark Act, the owner has to separately register in particular parts such as logo or words that individually play a role as trademark and service mark.

In order to expand the definition to cover the overall appearance of stores, the writer deems that the law should be amended by adjusting the use of word ‘means’ to be ‘includes’ in order to not limiting the definition of mark. This is to open a space for the court to further interpret the term ‘mark’ to suit upcoming circumstances. However, it is not necessary to include all types of trade dress as it would be too strict, which would not conform to the rapid growth of the technology.

If the law is amended to cover the overall appearance of stores it will open the space for the owner of the stores design to exploit the rights and protection provided in Trademark Act.

3.2 Characteristic of Distinctiveness

The strict definition of mark is not the only problem that makes the overall appearance of stores not protected. In the case that the definition of mark has solved and covered the overall appearance of stores, it still has to meet the requirement of distinctiveness.

The distinctiveness under Trademark Act can be acquired in two ways, which are inherent distinctiveness and the length of the use. The focused issue is on the inherent distinctiveness.

According to Section 7 paragraph one of Trademark Act, the distinctive trademark refers to ‘trademark that enables the public or consumers to distinguish the goods with which the trademark is used from other goods’. This is the general criteria for considering inherent distinctiveness. Thus, if the overall appearance of stores meets the

characteristic of inherent distinctiveness provided in Section 7 paragraph one, it is sufficient to acquire inherent distinctiveness.

Furthermore, the characteristic listed in Section 7 paragraph two (1) to (11) is a presumption for inherently distinctive mark. In the item listed, there is no any item that is or can be interpreted to meet the characteristic of the overall appearance of stores. When considering the inherent distinctiveness of the overall appearance of stores, the general criteria in Section 7 paragraph one shall be applied.

In order to consider the inherent distinctiveness according to Section 7 paragraph one, there is the guideline for considering inherent distinctiveness that is prescribed in the Manual for Examination of Trademark Office Registrar B.E. 2559 (2016). The manual explains the mark that is not distinctive according to Section 7 paragraph one which is elaborated as follows:²³

1. Mark that is a common phrase such as Treat the Condition Transform the Life, Natural Defense 2-Way Powder Foundation.

2. Mark that is a common word, for example words that mean international, guaranty or a word that describe the series of products such as Nano, Eco, Green, Nseries, Nine Million.

3. Mark that is commonly used in commerce.

However, as has been seen, such guideline is quite broad and contain just a limited example. Furthermore, it is designed for only the traditional mark (such as words or phrases). Thus, it may not be suitable to consider the inherent distinctiveness of the overall appearance of stores.

The proof of inherent distinctiveness of the overall appearance of stores might not be easy because the overall appearance of stores is different from the traditional trademark that is visual perception and a straight-forward mark. On the other hand, the overall appearance of stores

²³ Khumue Naewthang Karn Pidcharana Sangkarn Khong Naitabien Samnak Kruangmhai Karn Kar [Manual for Examination of Trademark Office Registrar 2016] (Trademark Office, Department of Intellectual Property 2016) (คู่มือแนวทางการพิจารณาสิ่งการของนายทะเบียน สำนักเครื่องหมายการค้า พ.ศ. 2559 (สำนักเครื่องหมายการค้า, กรมทรัพย์สินทางปัญญา 2559))

combines with many elements that may or may not be separately distinctive and are visual or non-visual perception. Therefore, it is the challenge of the owner of store design to show the registrar that the certain store appearance is capable of distinguishing the products or services provided in that stores from other stores. Alternatively, it is also challenging for the registrar to consider the distinctiveness of stores if the guidance is inadequate.

In the case that the exterior appearance of store is totally new, it will not be that challenging because the exterior appearance is clearly distinctive. However, for the case that the stores combine with many common elements to incorporate the store, it may be difficult to examine the inherent distinctiveness. Therefore, a clear guideline for the registrar is essential.

3.3 Functionality Element

In Trademark Act the element of functionality is absent. The elements of functionality are crucial because they can remain trade competition and prevent the misuse of trade dress.

Many of the overall appearances of stores incorporate with the functional features. For example, the restaurant has food prep area, counter or ringing bell for waiter and waitress. Those features are a necessity and serve for the utilitarian purpose, which other restaurants could also have the same feature. Trademark protection is to provide an exclusive right to use to the owner; therefore, if the functional features are protected under trademark approach, it means that other restaurants cannot use the same feature. This would block the trade competition. The protection of trade dress should not hinder the other businesses to enter the market. Therefore, the functional feature should not be protected and leave the competitor compete for only the design of the stores to create the source identifier according to the main purpose of trade dress.

Furthermore, the open space of trademark for functional feature may open an opportunity for the applicant to apply the expired patent

through trademark approach. As has been said, inevitably, most of stores have some stuff that is for a utilitarian purpose. Thus, it may be doubtful that some element may already be protected or is capable for acquiring protection under patent approach which an overlapped protection would occur. As the invention under patent is protected for only a limited period of time, trademark may be misused for the patent owner to expand the period of protection by using trademark that can be forever protected. This is not fair because the purpose of trademark and trade dress is created to be a source identifier, while patent protects the technology invention. Although the separate feature is functional and essential to the use, trade dress is considered the 'overall' elements that incorporated just to be a source identifier, not the separate features. Therefore, to avoid the doubtfulness and the misuse of trade dress, the non-functionality requirement is essential.

To be summarized, trademark is the suitable legal approach to provide protection to the overall appearance of stores as it functions to be a source identifier as same as trademark. However, it cannot currently be protected under Trademark Act because the strict definition of mark which does not cover the overall appearance of stores. Apart from that, the examination guideline for determining the characteristic of distinctiveness provided under Trademark Act is too broad and cannot apply with the character of the overall appearance of stores. Moreover, there might be a doubt of whether the protection of the overall appearance of stores would be overlapped with the patent law and would hinder the competition.

To protect the overall appearance of stores would hinder the misleading consumers as it helps to identify the brand origin of stores. Furthermore, it is a fair reward for the business operator who conducts research and invests considerable money in order to create one store. Moreover, it also encourages foreign investors to enter to Thai market as there is legal security assuring the protection on the overall appearance of stores of their companies.

Bibliography

Articles

Chaudhury S, 'Trade Dress Protection: Comparative Analysis Between USA and India' (*academia*)

Richman M and Weiner E, 'Trade Dress Protection for Retail Store Design' (2014) 32 *Acc Docket* 100

Slamowitz C, 'Adjusting the Dress Code: Implementing Trade Dress Reform to Burgeon User Experience (UX) Protections' (2017) 41 *Colum. J.L. & Arts* 99

Books

Inkaew S, *Karn Boriharn Karn Kar Pleek [Retailing Management]* (2nd edn, Tanapress 2010) (สุพรรณณี อินทร์แก้ว, *การบริหารการค้าปลีก* (พิมพ์ครั้งที่ 2, ธนาเพรส 2553))

Kent T and Omar O, *Retailing* (Palgrave Macmillan 2003)

Levin W, *Trade Dress Protection* (2nd edn, Clark Boardman Callaghan 2016)

Tingsamitr W, *Kruangmhai Karn Kar [Trademark Law]* (1st edn, Nititham 2002) (วัศ ดิงสมิตร, *เครื่องหมายการค้า* (พิมพ์ครั้งที่ 1, นิติธรรม 2545))

Journal Article

Kopp S and Langender J, 'Protecting Appearance and Atmospherics: Trade Dress as a Component of Retail Strategy' (*Journal of Public Policy & Marketing* 2014) 33(1)

Judgments

United States

John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 973 (11th Cir.1983)

Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)

Laws and Regulations

Germany

German Trademark Act (Markengesetz) (GER)

United States

The Lanham Act 15 U.S.C. 1127 (U.S.)

Newspaper Articles

Krom Sapsin Thang Panya Yan Ramen ICHIRAN Tontamrab Perd Sakar Nai Thai Dai [‘Department of Intellectual Property confirm the original ramen restaurant can open in Thailand’] *Thai PBS* (Bangkok, 13 December 2017) (‘กรมทรัพย์สินทางปัญญา ยันราเมงอิชิรันต้นตำรับ เปิดสาขาในไทยได้’ *ไทยพีบีเอส* (กรุงเทพฯ, 13 ธันวาคม 2560)) <<https://news.thaipbs.or.th/content/268483>>

Boss Mar Eang! Jang Pom Ron Rarn Ramenthai Lork Korsorb Ramen Yeepun Mar Tang Doon [‘Boss comes! Explain the issue regarding Thai ramen restaurant copy the whole Japanese Ramen Restaurant’] *Thairath* (Bangkok, 13 December 2017) (‘บอสมาเอง! แจงปมร้อน ร้านราเมงไทย ลอกข้อสอบ ‘ราเมงญี่ปุ่น’ มาทั้งคืน’ *ไทยรัฐ* (กรุงเทพฯ, 13 2560)) <<https://www.thairath.co.th/content/1151655>>

Thesis

Kawnachaimongkol R, ‘Pan Har Kodmhai Nai Karn Hai Kwam Khumkrong Kae Kruangkhai Karn Kar Nai Rooprang Roopthrong Kong Watthu’ [‘Legal Protection for Figurative Elements as a Trademark’] (Master Degree Thesis, Thammasat University 2002) (รติณัฐ ก้าวหน้าชัยมงคล, ‘ปัญหากฎหมายในการให้ความคุ้มครองแก่เครื่องหมายการค้าในรูปร่างรูปทรงของวัตถุ’ (วิทยานิพนธ์ปริญญาโท, มหาวิทยาลัยธรรมศาสตร์ 2545))

Website and Blogs

Bianchi A, ‘Trade dress infringement found in restaurant decoration’

(*Lexology*, 19 April 2011)

<<https://www.lexology.com/library/detail.aspx?g=369a02b3-7dec-4afd-b581-ddfd87eedb75>>

Sheehan A, ‘8 Ways to Incorporate Brand Identity Into Your Retail Store’

(*Shopify*, 15 February 2017) <<https://www.shopify.com/retail/8-ways-to-bring-brand-identity-to-life-in-your-retail-store>>

‘Trade Dress: Everything You Need to Know’ (*Upcounsel*)

<<https://www.upcounsel.com/trade-dress>>

Others

Khumue Naewthang Karn Pidcharana Sangkarn Khong Naitabien Samnak Kruangmhai Karn Kar [Manual for Examination of Trademark Office Registrar 2016] (Trademark Office, Department of Intellectual Property 2016) (คู่มือแนวทางการพิจารณาสั่งการของนายทะเบียนสำนักเครื่องหมายการค้า พ.ศ. 2559 (สำนักเครื่องหมายการค้า, กรมทรัพย์สินทางปัญญา 2559))

PROBLEMS ON THE PROHIBITION OF TRADEMARK REGISTRATIONS
CONSISTING OF FOREIGN COUNTRY NAMES AND/OR FOREIGN COUNTRY
ABBREVIATIONS UNDER TRADEMARK ACT B.E. 2534 (1991) AMENDED BY
TRADEMARK ACT (NO.2) B.E. 2543 (2000) AND TRADEMARK ACT (NO.3)
B.E. 2559 (2016)*

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Abstract

The name and/or abbreviation of a country has the ability to unify business in a particular country under one banner, allowing trademark owners to benefit from the reputation and heritage of the country. However, under the Trademark Act B.E. 2534 (1991) as amended by the Trademark Act (No.3) of B.E. 2559 (2016), marks consisting of foreign country names and foreign country abbreviations can be either prohibited by law as per Section 8 (6) or can be considered non-distinctive as per Section 7 Paragraph 2 (2), depending on the official's discretion. Without solid provisions controlling such discretion, officers may select one or both

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grounds for rejection of an application. This causes inconsistency in registration of marks comprised of foreign country names and/or foreign country abbreviations. In addition, the only route to overcome Section 8 (6) “unless permission is given by the competent officer of the foreign country” is also difficult to comply with in practice as the current law does not define who constitutes a “competent officer of the foreign country”.

This Article will aim to find the root of the prohibition grounds for marks consisting of foreign country names and foreign country abbreviations in Thai trademark law and compare Section 8 (6) of Trademark Act B.E. 2534 (1991) as amended by the Trademark Act (No.3) of B.E. 2559 (2016) with Article 6ter of the Paris Convention and the trademark law of other foreign countries such as the United Kingdom, the United States of America and the Republic of Singapore in order to find a recommendation for Thailand. The study will also include judgments of the Supreme Court, Trademark Board Decisions and Trademark Registrar’s Instructions together with the opinion of an intellectual property lawyer and related authorities to find better alternatives to Section 8 (6).

The analysis elaborates that United Kingdom, the United States of America and the Republic of Singapore do not prohibit the registration of the mark consisting of “foreign country name” and “foreign country abbreviation” This can be adopted into Thailand by simply omitting the words “foreign countries” and “or” of Section 8 (6) of the current Thai Trademark Act.

Keywords: Trademark, Prohibition, Foreign Country Name, Foreign Country Abbreviation

1. Introduction and Background

Due to the drive from the globe, specifically the developed countries, claiming that it is necessary to make a change in the intellectual property law so that the global trade can move forward, a number of new intellectual property laws were enacted in accordance with the needs and requirements of the trade.¹ Thailand has enacted trademark law to regulate the registrability of marks several times in order to conform to the objectives of the TRIPs Agreement and Paris Convention. In the year 2000, Article 6ter of the Paris Convention was implemented in Section 8 (6)² in B.E. 2543 extending the prohibition to a mark consisting of “national emblems and flags of foreign countries, emblems and flags of international organizations, emblems of head of foreign countries, official emblems and quality control and certification of foreign countries or international organizations, names and abbreviations of foreign countries or international organizations”. The only route to overcome this ground for rejection is to receive permission from a competent officer of the foreign country or international organization.

When comparing the provisions in the Act of B.E. 2534 with that of the amended Act in B.E. 2543, the study found that several new items were prohibited in Section 8 (6):

- (1) flags of international organizations;
- (2) emblems of head of foreign countries;
- (3) official emblems and quality control and certification of foreign countries;

¹ Jumpol Pinyosinwat and Bhumindr Butr-indr, *Prawatsart Lae Naewkid Kiewkub Sapsin Thang Panya [History and Concepts of Intellectual Property]* (2nd edn, Faculty of Law Thammasat University 2018) 176-177 (จุมพล ภิญโญสินวัฒน์ และภุมินทร์ บุตรอินทร์, *ประวัติศาสตร์และแนวคิดเกี่ยวกับทรัพย์สินทางปัญญา* (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2561)) 176-177

² Legislative Assembly Report of Group 1 No. 2 (79/2541) 53/2541 concerning Draft Trademark Act (No. ...) B.E. ... (1998) 9

- (4) official emblems and quality control and certification international organizations;
- (5) names of foreign countries;
- (6) abbreviations of foreign countries;
- (7) names of international organizations;
- (8) abbreviations of international organizations.

2. Legal Problems after the Implementation

It is understandable and reasonable to extend the prohibitions in Section 8 (6) to meet the purpose of Article 6ter of the Paris Convention. However, the author found that the prohibition extension to “foreign country names” or “foreign country abbreviations” is not aligned to Article 6ter and its objective. In addition, the author cannot find the rationale behind the extension of the prohibition of marks to include those consisting of “foreign country names” or “foreign country abbreviations”.

2.1 The Terms “Foreign Country Name” and “Foreign Country Abbreviation” are Undefined

Although there is no definition of the terms “foreign country name” and “foreign country abbreviation” in the current Trademark Act, some trademark officers³ and trademark practitioners⁴ believe that both the terms “foreign country name” and “foreign country abbreviation” stated in Section 8 (6) have to be the official terms given by the respective government of the particular country in question. For example, the country Singapore’s official name is the “Republic of Singapore” and official

³ Interview with Siriwan Tantispupaphol, Trademark Registrar with 25 years of Experience in Intellectual Property Practice, Department of Intellectual Property (Bangkok, Thailand, 21 March 2019)

⁴ Interview with Nathapong Tongkaew, Partner / Attorney at Law with 14 years of Experience in Intellectual Property Practice, Domnern Somgiat & Boonma Law Office Ltd. (Bangkok, Thailand, 14 March 2019)

abbreviations are “Singapore”, “SG” (two-letter country abbreviation) and “SGP” (three-letter code).

This is unlike the definition of the term “geographical name” in Section 7 Paragraph 2 (2), which has clearer meaning, as Ministerial Regulations have already expanded and specified what the term “geographical name” means, although there are a series of amendments re-specifying the term.

2.2 Problems Due to the Vague Term of “Competent Officer”

The only solution to overcome a prohibition under Section 8 (6) for a trademark consisting of a “foreign country name” and/or “foreign country abbreviation”, is that the trademark owner must seek authorization from a “competent officer of the foreign country”. However, there is no definition of the term to identify who such a person may be, as the Trademark Act does not specify who can be a competent officer.

2.3 Problems Due to the Inconsistent Use of the Provision

It is interesting to note that the prohibition grounds under Section 8 (6) for trademarks consisting of foreign country names and/or foreign country abbreviations was not used during the very first year of the amendment of this provision. The Trademark Registrars once viewed and considered that foreign country names and foreign country abbreviations were within the scope of geographical names and should be rejected due to their lack of distinctiveness under Section 7 Paragraph 2 (2).⁵

The frequent use of Section 8 (6) has started only in recent years. In some scenarios, the Registrars rejected the mark solely on the grounds of prohibition under Section 8 (6) as they viewed that the mark, consisting of a foreign country name and/or foreign country abbreviation, should not be registered unless there is authorization from a competent officer.⁶

⁵ Interview with Siriwan (n 3)

⁶ Interview with Nathapong (n 4)

However, in some other cases, the Registrars rejected the mark on the grounds of prohibition under Section 8 (6) together with Section 7 Paragraph 2 (2). The overlapping use of these two provisions causes a huge burden on an applicant to overcome both of these grounds. To overcome Section 8 (6), as said above, the applicant needs to find a competent officer of the country in question to authorize him to use the country name as a trademark, and who that person may still be undefined. Additionally, in order to overcome Section 7 Paragraph 2 (2), an applicant would be required to file a huge amount of evidence in order to prove that the mark has acquired distinctiveness through use, specifically in Thailand. In addition, the consideration on grounds of acquired distinctiveness is done on case by case basis with regard to the whole combination of the mark, rather than as isolated elements.⁷ There are no general rules or standard regulations to consider this matter.⁸

2.4 Two Major Supreme Court's Judgments Reflecting that having Section 8 (6) Blocking the Registration of the Word "Foreign Country Name" and/or "Foreign Abbreviation" is Problematic in Practice

(1) Supreme Court's Judgment No. 9971/2558 "SINGAPOREAIR"

The Plaintiff attested that the Plaintiff invented the word "SINGAPOREAIR" by combining the words "SINGAPORE" and "AIR", thereby

⁷ Chaiyos Hemrachata, *Laksana Khong Kodmhai Sapsin Thang Panya Phuentarn Kwam Roo Thuapai Likasit Sithibat Kruangmai-Karn-Kar Kwamrub Thang Karn Kar Semiconductor Chip Phunpued Mai [General Characteristics of Trademark: General Knowledge of Copyrights, Patents, Trademark, Trade Secret, Semiconductor Chip, New Plants]* (4th edn, Nititham Publishing House 2002) 280 (ไชยยศ เหมรัชตะ, ลักษณะของกฎหมายทรัพย์สินทางปัญญาพื้นฐานความรู้ทั่วไป ลิขสิทธิ์ สิทธิบัตร เครื่องหมายการค้า ความลับทางการค้า เซมิคอนดักเตอร์ชิป พันธุ์พืชใหม่ (พิมพ์ครั้งที่ 4, นิติตธรรม 2545) 280

⁸ What Tingsamitr, *Kham Athibai Kodmhai Kruangmhai Karn Kar [Trademark Law]* (Bangkok, Nititham Publishing House 2002) 10-11 (วัส ดิงสมิตร, คำอธิบายกฎหมายเครื่องหมายการค้า (2545) 10-11

creating a new word which has no dictionary meaning. Even though the word that the Plaintiff invented is new, general public still calls it “SINGAPORE AIR” which is the pronunciation of the mark. The word “SINGAPORE” according to the dictionary and the knowledge of general public refers to “SINGAPORE (country)” and “AIR” refers to “air (regarded as necessary for breathing)”. Thus, the point that the mark does not have the dictionary meaning that the Plaintiff introduced is not acceptable. Since the Service Mark “SINGAPOREAIR” the Plaintiff uses is in relation to Class 39 services “air transportation services; people transportation; products transportation etc.”, the mark must be directly descriptive of the character of services. Thus, the mark is not distinctive as per Section 7 Paragraph 2 (2) of Trademark Act B.E. 2534.

The word “SINGAPORE” refers to the Republic of Singapore which is the country name. Thus, this can be considered that the Service Mark “SINGAPOREAIR” of the Plaintiff contains the country name. Since there is no fact provided that the Plaintiff has the permission of the competent officer of the foreign country to use the word “SINGAPORE” as a trade name, the mark should not be registered in accordance with Section 8 (6) of Trademark Act B.E. 2534.

(2) Supreme Court’s Judgment No. 5402/2551 “SOUTH AFRICAN AIRWAYS”

The service mark of the Plaintiff comprises of 2 terms “SOUTH AFRICAN” and “AIRWAYS”. Even though the first term is not a direct geographical name as per the Ministerial Notification, it has a definition in relation to South Africa which can be considered a common word in relation to South Africa. The word “AIRWAYS” has the dictionary meaning as well, referring to “a route of air transportation services” and “an organization providing a regular public service of air transport on one or more routes” which is known in general. This can be considered descriptive of the characteristic of services. Thus, the service mark of the Plaintiff is non-distinctive. Moreover, the word “AIRWAYS” refers

to services in relation to air transportation including the installation, maintenance, and repair of airship and also includes other services in Classes 37 and 39 which are related to main services of the Plaintiff. Considering the mark in respect of each Class, the Service Mark of the Plaintiff is still descriptive of the character of services.

Even though the Service Mark of the Plaintiff has a direct relation to the meaning “Airline of South Africa”, the Service Mark of the Plaintiff relates to services in relation to air transportation which directly leads to the character of services. Trademark Act does not regulate that the mark can be registered if the Service Mark of the Plaintiff has been used as a trade name and the state as an entrepreneur who holds shares agrees to use such name. In contrast, the law has no intention to register the words or signs in relation to foreign countries. Thus, the mark should be prohibited in accordance with Section 8 (6).

2.5 Other Registration Case Examples

In trademark consideration, the Registrar viewed that the trademark application “”⁹ should be prohibited pursuant to Section 8 (6) since “UK” refers to “United Kingdom” which is a foreign country abbreviation unless the applicant agrees to delete the element “UK”. It was also found in Board of Trademarks Decision No. 11/2557, where the Board

considered that the mark “” contains the letters “UK”, an abbreviation of “United Kingdom” and considered that a foreign country abbreviation and should be considered non-registrable under Section 8 (6). However, some other marks containing letters “GB” were registered without any objection on ground of prohibition under Section 8 (6), for examples, “



⁹ Thai Trademark Application No. 827146 in Class 14

¹⁰ Thai Trademark Application No. 755947 Registration No. Kor345801 in Class 3

3. International Instruments and Laws of Foreign Countries

International instruments and laws of foreign countries hereunder help illustrate a larger picture of the trademark registration system. Yet, they also lead to the origin of Article 6ter which is the origin of Section 8 (6) of the current Thai Trademark law and how other countries implement Article 6ter into the trademark law in their respective jurisdictions. Laws of foreign countries also help reveal other related grounds with regards to marks consisting of country names and/or country abbreviations.

3.1 International Instruments

The 1986-94 Uruguay Round¹⁴, the largest trade negotiation ever, brought about the world's trading system by introducing a set of rules and principles to cover all global trade. This included the introduction of intellectual property rules into the multilateral trading system for the first time in the TRIPs Agreement. Since Thailand became a member of the General Agreement on Tariffs and Trade (GATT) in 1982, and later one of the founding members of WTO in 1995, during the Uruguay Round of negotiations, Thailand had to ensure that their standard of intellectual property protection followed the TRIPs Agreement and Paris Convention or at least met the minimum standard as far as global standards were concerned.

3.1.1 The TRIPs Agreement

¹¹ Thai Trademark Application No. 170109731 Registration No. 181127791 in Class 3

¹² Thai Trademark Application No. 756304 Registration No. Kor336308 in Class 19

¹³ Thai Trademark Application No. 969365 Registration No. Kor419544 in Class 9

¹⁴ The Uruguay Round was the 8th round of Multilateral Trade Negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1994 and embracing 123 countries as "contracting parties".

On December 11, 1995, arrangements for the implementation of the obligations under the TRIPS Agreement stemming from the incorporation of the provisions of Article 6ter of the Paris Convention (1967) were made. The implementation only included certain prohibitions with regard to the registration and use of state emblems, official hallmarks and emblems of intergovernmental organizations trademarks.¹⁵ Article 3 of the Agreement was completed on December 22, 1995 between the World Intellectual Property Organization and the World Trade Organization. This Article provided procedures in regards to the communication of emblems and transmittal of objections under Article 6ter of the Paris Convention for the purposes of the TRIPs Agreement.¹⁶

3.1.2 Paris Convention

The initial purpose of Article 6ter, as part of common rules mentioned above, was to protect the following items:

- (1) armorial bearings of the State party to the Paris Convention
- (2) flags of the State party to the Paris Convention
- (3) other State emblems of the State party to the Paris Convention
- (4) official signs of the State party to the Paris Convention
- (5) hallmarks indicating control and warranty adopted by the State party to the Paris Convention

The initial purpose of Article 6ter, as part of common rules mentioned above, was to protect the following items:

- (1) armorial bearings of the State party to the Paris Convention

¹⁵ Decision of the Council for TRIPS, document IP/C/7.

¹⁶ The text of the Agreement can be found in IP/C/6.

- (2) flags of the State party to the Paris Convention
- (3) other State emblems of the State party to the Paris Convention
- (4) official signs of the State party to the Paris Convention
- (5) hallmarks indicating control and warranty adopted by the State party to the Paris Convention

Preventing the registration and use of marks representing emblems or official signs characteristics (as mentioned above), whether at a similar or identical level, is the objective of Article 6ter of the Paris Convention.¹⁷ The Article does not actually oblige Paris Convention member states to reject or cancel the registration and prohibit the use of service marks consisting of or having characteristics of emblems or official signs.¹⁸ Likewise, state members may include the prohibition of said emblems and signs. On this issue, Article 16 of the Trademark Law Treaty (TLT)¹⁹ mentions that states which are member countries of the Treaties are obliged to provide Article 6ter protection against registration and use of service marks having the characteristics of state emblems or other official signs.²⁰ Thus, currently, the prevention of registration and use of marks representing emblems or official signs characteristics covers both trademarks and service marks.

Under the Paris Convention, member countries may freely choose the way they prohibit marks consisting of flags and emblems of states

¹⁷ Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Fifteenth Session, Geneva, November 28 to December 2, 2005 - art 6ter of the Paris Convention: Legal and Administrative Aspects (WIPO/SCT/15-3 REV. 10, 2005)

¹⁸ World Intellectual Property Organization, 'Article 6ter' (WIPO)

<<https://www.wipo.int/article6ter/en/>> accessed 20 July 2019

¹⁹ Singapore Treaty on the Law of Trademarks, art 16 (Service Marks):

Any Contracting Party shall register service marks and apply to such marks the provisions of the Paris Convention which concern trademarks.

²⁰ World Intellectual Property Organization, 'Trademark Law Treaty (TLT)' (WIPO)

<<https://www.wipo.int/treaties/en/ip/tlt/>> accessed 31 March 2019

that are party to it. However, Article 6ter does not extend the protection to foreign country names and foreign country abbreviations at present.

3.2 Laws of Foreign Countries

The implementation of Article 6ter of the Paris Convention in trademark law the United Kingdom, the United States of America and the Republic of Singapore shall be studied as they are all developed countries that have a strong foundation in intellectual property. The author would like to present other provisions in relation to the registrability of trademarks consisting of foreign country names and foreign country abbreviations.

3.2.1 The United Kingdom (“UK”)

Pursuant to Sections 56 - 59 of the Trade Marks Act 1994 Part II Community Trade Marks and International Matters, an applicant cannot register a mark consisting of any emblem which has protection under an international agreement. One of the essential agreements available in the Act regarding this matter is the Paris Convention.

Having reviewed Sections 56 – 59 of the Act, the author found that all Sections are available to protect and prevent the registration and use of marks which are identical with, or very similar to the following objects:

- (1) armorial bearings
- (2) flags and other State emblems
- (3) official signs
- (4) hallmarks
- (5) other emblems
- (6) abbreviations of international intergovernmental organizations and
- (7) names of international inter-governmental organizations

It is important to note that UK trademark law does not mention that the names and abbreviations of foreign countries are items to be protected under Article 6ter of the Paris Convention, the law does not include the prohibition of such items. Unlike the listed items, the prohibition of marks consisting of such items is provided under Sections 56 - 59 of Trade Marks Act 1994.

Foreign country names and foreign country abbreviations do not form a separate category of protected elements under the current legislation applicable to the United Kingdom but they are regarded as being an indication of geographical origin, and thus prevented from registration under Article 3(1)(c) of the UK Trade Marks Act 1994.²¹ This is because the name of the geographical location and its reputation are potential to create an “expectation” among potential consumers that could possibly lead them to a deceptive understanding in cases where such expectation cannot be fulfilled. Objection to registration under Section 3(3)(b) happens at the first examination stage for both names of geographical locations and figurative trademarks which indicate geographical origin, and the variations of them, where the reputation of the geographical location is known for the goods or services²², for example: SWISSTEX for “Watches and horological instruments” because Switzerland is famous for high quality watches. For some circumstances, the use of a geographical name where it has a reputation can create an “expectation” in the minds of the consumers and

²¹ Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Protection of Country Names Against Registration and Use as Trademarks: Practices, Approaches and Possible Areas of Convergence – Comments by Members (WIPO/ SCT/37/3 REV. 8, 2017)

²² Submission by the Delegation of the United Kingdom

this may lead consumers to “deception” if their expectation is not fulfilled by the goods/services.²³

3.2.2 United States of America (“U.S.”)

The United States is a member of the Paris Convention for the Protection of Industrial Property, as per the revisions made in Stockholm on July 1967, their membership created a Union for the protection of industrial property and the Paris Convention for the Protection of Industrial Property Article 6ter of March 20, 1883.

(1) As per the U.S. Trademark Act of 1946, as Amended, Section 1052. Trademarks registrable on principal register; concurrent registration (a) and (b)²⁴, it appears that the United

²³ Olga Kreshchenko, 'Protection of Official Names of States and Prevention of their Registration and Use as Trademarks' (IPWatchdog, 12 July 2016) <<https://www.ipwatchdog.com/2016/07/12/official-names-states-trademarks/id=70718/>> accessed 5 October 2018

²⁴ 15 U.S.C. §1052 Trademarks Registrable on the Principal Register; Concurrent Registration:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of title 19) enters into force with respect to the United States.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

...

States has agreed to reject or instruct the registration to be an invalid one, and to prohibit the unauthorized use of trademarks or elements of trademarks consisting of the following items:

armorial bearings

(2) flags and

(3) other State emblems

(4) official signs and hallmarks indicating control and warranty adopted by

member countries, and

(5) any imitation from a heraldic point of view

The same discretion also applies to armorial bearings, flags, emblems, abbreviations, and names of intergovernmental organizations which one or more countries of the Union are members, except for the items that are subject of international agreements ensuring their protection for example Red Cross is under the protection of the Geneva Convention of August 12, 1949.

In the view of the same Act, marks which have foreign country names and/or foreign country abbreviations cannot be registered right away as per the following grounds for rejection and related provisions available in Section 1052. Trademarks registrable on principal register; concurrent registration (a) and (e)²⁵:

²⁵ *ibid*, 15 U.S.C. §1052:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title,

(1) Deceptively misdescriptive: under § 1052(e), deceptively misdescriptive marks refer to marks that are an incorrect description of the designated goods/services. Marks which have this characteristic have the potential to lead consumers to incorrect information about the underlying goods/services.

(2) Deceptive: an absolute bar shall arise at the time of considering the registration of the mark which has “deceptive” character under § 1052(a) together with Section 2(a) on either the Principal Register or the Supplemental Register.²⁶

(3) Primarily geographically descriptive: a mark would be geographically descriptive if it portrays an idea of where the goods or services are derived from. In order for the requirements to be met, the mark must contain the features in Trademark Manual of Examining Procedure (TMEP) § 1210.01 like (a) the essential element (known as “primary significance”) of the mark indicates a generally-known geographical location and (b) the mark demonstrates an idea that such goods or services are derived from (or else it could be primarily geographically misdescriptive) said location; and (3) consumers would base their purchasing decisions on the geographical location of such goods or services.

(4) Geographically deceptively misdescriptive: illustrations of the concepts of “geographically deceptively misdescriptive” includes a mark that is deceptive about the place of origin of the goods for instance: HAVANA CLUB for cigars that are not from CUBA or NEAPOLITAN for sausages that should be made in Naples, but are actually made in Florida. However, unless it has misled a certain amount of people, it would not be considered as geographically deceptively misdescriptive. Below is an example of this concept.

(5) Any of the marks above shall be registered if the mark can prove a secondary meaning: marks that are merely descriptive, deceptively misdescriptive, or primarily geographically descriptive, are

²⁶ See *In re Charles S. Loeb Pipes, Inc.*, 190 USPQ 238, 241 (TTAB 1975)

registrable only on the condition that the mark can acquire a secondary meaning as per Section 1052. Trademarks registrable on principal register; concurrent registration (f)²⁷. In practice, the secondary meaning can be constituted by a five-year exclusive and The USPTO would allow the Trademark to be registered only if it is subjected to certain conditions which are to disclaim certain parts of the Trademark that lack distinctiveness or are generic under the application.²⁸ Along with the status of less distinctive marks, merely descriptive and generic marks share different characteristics.

²⁷ 15 U.S.C. §1052 (n 25):

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(f) Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made. Nothing in this section shall prevent the registration of a mark which, when used on or in connection with the goods of the applicant, is primarily geographically deceptively misdescriptive of them, and which became distinctive of the applicant's goods in commerce before the date of the enactment of the North American Free Trade Agreement Implementation Act. A mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 43(c), may be refused registration only pursuant to a proceeding brought under section 13. A registration for a mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 43(c), may be cancelled pursuant to a proceeding brought under either section 14 or section 24.

²⁸ Danielle Weitzman, 'Significance of Disclaimers in U.S. Trademark Law' (Ladas, 9 October 2014) <<https://ladas.com/education-center/significance-disclaimers-u-s-trademark-law/>> accessed 5 October 2018

3.2.3 The Republic of Singapore (Singapore)

The provision implemented by Article 6ter of the Paris Convention in Singapore Trade Marks Act is provided under Section 7(11) which is in connection with Sections 56²⁹ and Section 57³⁰. Both provisions are concerned with the protection of emblems of Paris Convention member countries and of intergovernmental organizations. In the Singaporean Trademark Act the member countries are called a “Convention country” which is defined in Section 2(1) of the Act as “a country or territory, other than Singapore, which is a party to the Paris Convention or a member of the World Trade Organization.”³¹

Trademarks containing the flags of member countries are prohibited from registration automatically under the law. On the other hand, state emblems will only gain protection once there is a notification following the procedure found in Section 58³². A member country has to notify Singapore of its desire to obtain protection for the subject emblem. Consequently, the Singapore Trademark Office will allow such notification by accepting the application within or around 2 months after the notification has been submitted. Once Singapore has accepted the notification of the protection of the emblems the Trade Marks database will

²⁹ Singapore Trade Marks Act (Chapter 332, Revised Edition 2005) s 56:

National emblems, etc., of Convention countries: Article 6ter of Paris Convention, etc.

³⁰ Singapore Trade Marks Act (Chapter 332, Revised Edition 2005) s 57:

Emblems, etc., of certain international organisations: Article 6ter of Paris Convention, etc.

³¹ Intellectual Property Office of Singapore, ‘Other Grounds for Refusal of Registration’ (IPOS, June 2017) <https://www.ipos.gov.sg/docs/default-source/resources-library/trade-marks/infopacks/tm_work-manual_11-other-grounds-of-refusal_jun2017.pdf> accessed 7 April 2019

³² Singapore Trade Marks Act (Chapter 332, Revised Edition 2005) s 58:

Notification under Article 6ter of Paris Convention, etc.

collect data for future appropriate search during the examination process, so that the emblems will be revealed as protected elements.

While a formal notification for emblems is required, flags of other countries do not need any notification for protection as per Article 6ter of the Paris Convention which states that notification for flags of countries of the Union is not necessary. Thus, for trademark examination in Singapore, flags of countries should be researched outside of the Trade Marks database to identify flags belonging to the member countries.

At the time of the trademark examination, if a mark similar to an emblem as notified is found, the examination would look at the next step, whether the emblem was notified for the designated goods or services, or if the sign is generally prohibited from use as a mark. For flags, coats of arms and emblems of a country, they apply to goods and services in all classes. This is unlike the protection for the signs of intergovernmental organizations and signs of warranty that have limited goods and/or services. For instance, a hallmark designated for metal goods cannot cause confusion for an application for use of a mark on textile goods.

For examination purposes, the Trademark Registrar will raise the following objection under section 7(11) of the Trade Marks Act if the mark consists of/contains:

- (1) a flag of a Convention member country
- (2) the state emblem of a Convention member country
- (3) an official sign or hallmark adopted by a Convention member country
- (4) the armorial bearing/flag/emblem of an international intergovernmental organization
- (5) the abbreviation/the name of an international intergovernmental organization

The rejection of the mark can overcome with the consent of a competent authority of the country/organization concerned. The consent must be made in the written form.

Any trademark consisting of a geographical name should not be registered as it is considered the “designation of geographical origin” under Section 7(1)(c)³³. Singapore trademark law allows the designation of geographical origin to be open to be used freely by all traders as an indication of origin which connects with the country name.

In order to determine whether a mark is registrable or it is a geographical origin of the goods/services subject to the grounds of distinctiveness, the Singaporean authority has to consider the followings points:

- (a) The geographical location: the authority would consider the reputation of the geographical location associated with the designated goods/services;
- (b) The characteristics of the geographical origin: the authority would consider the characteristics of the geographical origin and determine whether they have the potential to indicate where the place is or to become a geographical source for the designated goods/services in the application; and
- (c) The reputation of the geographical name as known by the people of Singapore: how well the location is known to the particular target group of people in Singapore – and at what point it is known.

The authority would make their assessment on the basis of the balance of probabilities. The mark may be registrable in cases where the particular group of people related to the trade or potential consumers are unable to assume with their knowledge where the goods/services originate from. The test would be whether the name is “simply because some place

³³ Singapore Trade Marks Act (Chapter 332, Revised Edition 2005) s 7:

Absolute grounds for refusal of registration;

(11) A trade mark shall not be registered in the cases specified in sections 56 and 57.

upon the earth's surface had been called it" (Magnolia Metal Company [1897] 2 Ch 371). If the geographical name has no connection with the designated goods or services, the mark itself must be distinctive enough and can be registered. In contrast to this, in cases where the people concerned may associate the goods and services with the geographical name, the mark may be rejected on this ground, even if, the goods in fact do not originate from that location.

After studying the trademark law in the United Kingdom, the United States, and Singapore, which are related to the implementation of Article 6ter in their local trademark legislation, the author cannot find any problems concerning the prohibition of trademarks consisting of foreign country names and foreign country abbreviations as none of law in the aforementioned countries specifically prohibit registration of trademarks that contain foreign country names and foreign country abbreviations. Likewise, the trademark law of all the selected countries considers foreign country names and foreign country abbreviations to be geographical names falling into the grounds of non-distinctiveness.

4. Analysis of the Problems on the Prohibition of Trademark Registrations Consisting of Foreign Country Names and/or Foreign Country Abbreviations under the Thai Trademark Act B.E. 2534, as Amended by Thai Trademark Act (No.3) B.E. 2559

It is understandable and reasonable to extend the prohibition in Section 8 (6) to the point where it meets the purpose of Article 6ter of the Paris Convention. However, the author found that the prohibition extension to "foreign country names" or "foreign country abbreviations" is not aligned with Article 6ter and its objective. In addition, the author cannot find the rationale behind the extension of the prohibition of marks to those consisting of "foreign country names" or "foreign country abbreviations".

The author believes that the following points are possibilities for the reasoning behind the extension of the prohibition of marks to include “foreign country names” or “foreign country abbreviations” under Section 8 (6):

(1) Misunderstanding of Article 6ter of the Paris Convention

The legislative assembly might have believed that the prohibition against marks consisting of “foreign country names” or “foreign country abbreviations” would meet the purpose of Article 6ter of Paris Convention as well as Article 2 of the TRIPs Agreement which, in fact, is untrue as there is no prohibition of such items.

(2) Over-extension of the protection beyond Article 6ter of Paris Convention

The prohibition in accordance with Article 6ter might have been viewed as too weak and in need of further extension to prohibit marks consisting of “foreign country names” and “foreign country abbreviations”. This might have been considered reasonable as the intention would have been to treat “foreign country names” and “foreign country abbreviations” as equal to flags and emblems of foreign countries

By this reasoning on the idea of over-extension of Article 6ter, it comes into question whether the name of our country, “Thailand” and its abbreviation e.g. “TH” or “THA”, should also be prohibited similarly to the current practices regarding foreign country names and foreign country abbreviations. The author cannot find the rationale behind this unequal treatment of these trademark registrations.

The amendment of Section 8 (6) causes an extra burden on the applicant to register the mark. Previously, it was already difficult to overcome distinctiveness issues as “foreign country names” and “foreign country abbreviations” were considered “geographical names”. Yet, additionally, new Section 8 (6) requires the applicant to find a competent authority to authorize him to use such elements. In practice, the applicant

needs to overcome both grounds. If the applicant can overcome one ground and cannot overcome another, the mark is refused registration.

5. Conclusion and Recommendations

5.1 Conclusions

It is understandable from a conservative point of view that no one should have exclusive rights over the use of a country name and/or country abbreviation as a trademark as no one should be able to exclude others from using the name and abbreviation of their country. At the same time, in the context of business, country names and country abbreviations can effectively assist the whole mark function as they can clearly refer to the country of origin, nationality or any special connections to that country, helping consumers who see the mark to recognize it and imagine about certain characteristics of the country in connection with the goods or services. The names of countries and/or their abbreviations are now widely used in most business sectors. Thus, with some reasonable conditions, marks containing foreign country names and/or foreign country abbreviations should be allowed registration. However, currently registering a mark consisting of a foreign country name and/or foreign country abbreviation is still uncertain since the second amendment of the Act in year 2000, and unfortunately this problem was not resolved even when the Thai Trademark Act was amended in 2559 (2016).

The core of this thesis has been studying the problems arising from Section 8 (6) of the current Thai Trademark Act, specifically the prohibition of trademarks consisting of foreign country names and/or foreign country abbreviations, who is a competent authority and what does the permission from the competent authority look like, and how the freedom of choice for Thai authorities and the inconsistency resulting from such freedom when considering whether a mark consisting of foreign country name and/or foreign country abbreviation should be rejected on prohibition grounds

under Section 8 (6) or other grounds. The implementation of Article 6ter of Paris Convention in the United Kingdom, the United States and Singapore does not prohibit marks consisting of foreign country names and foreign country abbreviations, so these selected countries do not have problems with defining the words foreign country name and foreign country abbreviation, as well they do not have problems in defining who is an authorized person, and the form of authorization required in order to overcome prohibition rejections. Although marks of this type in the selected countries do not have this prohibition problem, marks still cannot be registered smoothly as foreign country names and foreign country abbreviations still fall under the umbrella of “geographical names” which cannot be registered unless the applicant can prove distinctiveness through use or accepts the disclaimer requirement in cases where the foreign country name or a foreign country abbreviation are a minor element of the mark.

Though the implementation is obviously smooth in all the selected developed countries, Section 8 (6) of Thai Trademark Act still further extends to the terms “foreign country names” and “foreign country abbreviations”. According to the study, it is obvious that the implementation goes too far beyond the purpose of Article 6ter of the Paris Convention *which was “to provide a degree of legal protection to armorial bearings, flags and other State emblems as well as official signs and hallmarks indicating control and warranty adopted by States that are members of the Paris Union. The protection was extended to armorial bearings, flags, other emblems, abbreviations and names of international intergovernmental organizations, of which at least one member State is a*

member of the Paris Union.”³⁴ As we can see from the purpose of the Convention, the protection of foreign country names and foreign country abbreviations is not described in the Article. In addition, the author found that the responsible authorities have a difficult time dealing with the overextended provision in Section 8 (6) as the authorities cannot find solid terminology defining “foreign country name” and “foreign country abbreviation” reflected from Supreme Court’s Judgment No. 5402/2551 “SOUTH AFRICAN AIRWAYS” above that the discretion of the authority was extended to words in relation to the nation e.g. nationality. The vague terms result in inconsistent discretion of the authorities in considering whether the mark should be rejected on prohibition grounds under Section 8 (6) or non-distinctiveness grounds under Section 7 Paragraph 2 (2). Without clear practice, both provisions remain open for the authorities to use at their discretion, as they can freely reject the mark on either one of the two possible grounds or both grounds altogether.

5.2 Recommendations

In order to promote trademark registrations consisting of foreign country names and foreign country abbreviations, and to bring about consistency in the decisions rendered by the Thai authorities, the author proposes the following amendment of the Thai Trademark Act B.E. 2534 to successfully implement Article 6ter of Paris Convention into Section 8 (6) of the Act:

Section 8 “Trademarks having or consisting of any of the following characteristics shall not be registrable:

³⁴ Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, The Protection of Country Names Against Registration and Use as Trademarks (WIPO/Strad/INF/7, 2015).

(6) national emblems and flags of foreign countries, emblems and flags of international organizations, emblems of head of foreign countries, official emblems and quality control and certification of foreign countries or international organizations, names and abbreviations of ~~foreign countries~~ or international organizations, unless permission is given by the competent officer of the foreign country or international organization;”

The main objective of this amendment is only to re-implement Article 6ter of Paris Convention into Section 8 (6) of the Thai Trademark Act to meet the purposes of the Article. The author believes that any obstacles to registration caused by the over-extended part of Article 6ter without reasonable legislative answer, like this prohibition of foreign country names and foreign country abbreviations is not acceptable.

Note that choosing to omit the words “foreign countries” and “or” simply removes rejection of marks consisting of such words by the current Section 8 (6). The author believes that other provisions, aside from Section 8 (6), are sufficient enough to deal with this matter, they are as follows:

- Grounds of distinctiveness as names and abbreviations of foreign countries are geographical names detailed in Section 7.
- For cases where the names and abbreviations of a foreign country appear in the mark with doubt as to whether the mark misleads the public as to the place of origin of the goods/services, the authority may instruct to reject the mark on the grounds of prohibition under Section 8(13) of the current Trademark Act together with Clause 2(2) of the Ministerial Notification No. 5 B.E. 2543 (2000) stating that “trademarks, service marks, certification marks and collective marks which has the following characteristics shall not be

registered (2) marks and descriptions which cause confusion or mislead to type of goods or services or confuse or mislead with regard to place of origin or ownership of goods or services.” In addition, the consideration of whether confusion might occur should rely on public perception, not solely rely on the discretion of the authority.

The best outcome of this solution is to avoid inconsistency resulting from individual authorities exercising their discretion when considering whether a mark should be rejected on grounds of distinctiveness or on the grounds of prohibition since there will be only distinctiveness grounds left for the authority to consider. In addition, this solution makes it unnecessary to accurately define the terms or interpret the definitions of names and abbreviations of foreign countries as they will not be available in Section 8 (6). In this regard, the author suggests that Thailand should omit the words “foreign countries” and “or” from Section 8 (6) of the current Thai Trademark Act.

Bibliography

Books

Hemrachata C, *Laksana Khong Kodmhai Sapsin Thang Panya Phuentarn Kwam Roo Thuapai Likasit Sithibat Kruangmai-Karn-Kar Kwamrub Thang Karn Kar Semi-conductor Chip Phunpued Mai [General Characteristics of Trademark: General Knowledge of Copyrights, Patents, Trademark, Trade Secret, Semiconductor Chip, New Plants]* (4th edn, Nititham Publishing House 2002) 280 (ไชยยศ เหมรัชตะ, ลักษณะของกฎหมายทรัพย์สินทางปัญญาพื้นฐานความรู้ทั่วไป ลิขสิทธิ์ สิทธิบัตร เครื่องหมายการค้า ความลับทางการค้า เซมิคอนดักเตอร์ชิป พันธุ์พืชใหม่ (พิมพ์ครั้งที่ 4, นิติธรรม 2545) 280

Pinyosinwat J and Butr-indr B, *Prawatsart Lae Naewkid Kiewkub Sapsin Thang Panya [History and Concepts of Intellectual Property]* (2nd edn, Faculty of Law Thammasat University 2018) 176-177 (จุมพล ภิญโญสินวัฒน์ และ ภูมิินทร์ บุตรอินทร์, ประวัติศาสตร์และแนวคิดเกี่ยวกับทรัพย์สินทางปัญญา (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2561)) 176-177

Tingsamitr W, *Kham Athibai Kodmhai Kruangmhai Karn Kar [Trademark Law]* (Bangkok, Nititham Publishing House 2002) 10-11 (วิส ดิงสมิตร, คำอธิบายกฎหมายเครื่องหมายการค้า (2545) 10-11

Interview

Interview with Nathapong Tongkaew, Partner / Attorney at Law with 14 years of Experience in Intellectual Property Practice, Domnern Somgiat & Boonma Law Office Ltd. (Bangkok, Thailand, 14 March 2019)

Interview with Siriwan Tantispupaphol, Trademark Registrar with 25 years of Experience in Intellectual Property Practice, Department of Intellectual Property (Bangkok, Thailand, 21 March 2019)

Laws and Legislations

Decision of the Council for TRIPS, document IP/C/7.

Legislative Assembly Report of Group 1 No. 2 (79/2541) 53/2541 concerning Draft Trademark Act (No. ...) B.E. ... (1998) 9

Singapore Trademark Act (Chapter 332, Revised Edition 2005)

Singapore Treaty on the Law of Trademarks

15 U.S.C. §1052 Trademarks Registrable on the Principal Register; Concurrent Registration

Others

See *In re Charles S. Loeb Pipes, Inc.*, 190 USPQ 238, 241 (TTAB 1975)

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Fifteenth Session, Geneva, November 28 to December 2, 2005 - art 6ter of the Paris Convention: Legal and Administrative Aspects (WIPO/SCT/15-3 REV. 10, 2005)

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, The Protection of Country Names Against Registration and Use as Trademarks (WIPO/Strad/INF/7, 2015).

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Protection of Country Names Against Registration and Use as Trademarks: Practices, Approaches and Possible Areas of Convergence – Comments by Members (WIPO/ SCT/37/3 REV. 8, 2017)

Trademark Applications

Thai Trademark Application No. 827146 in Class 14

Thai Trademark Application No. 755947 Registration No. Kor345801 in Class 3

Thai Trademark Application No. 756304 Registration No. Kor336308 in Class 19

Thai Trademark Application No. 969365 Registration No. Kor419544 in Class 9

Thai Trademark Application No. 170109731 Registration No. 181127791 in Class 3

Websites and Blogs

Intellectual Property Office of Singapore, 'Other Grounds for Refusal of Registration' (*IPOS*, June 2017) <https://www.ipos.gov.sg/docs/default-source/resources-library/trade-marks/infopacks/tm_work-manual_11-other-grounds-of-refusal_jun2017.pdf> accessed 7 April 2019

Kreshchenko O, 'Protection of Official Names of States and Prevention of their Registration and Use as Trademarks' (*IPWatchdog*, 12 July 2016) <<https://www.ipwatchdog.com/2016/07/12/official-names-states-trademarks/id=70718/>> accessed 5 October 2018

Weitzman D, 'Significance of Disclaimers in U.S. Trademark Law' (*Ladas*, 9 October 2014) <<https://ladas.com/education-center/significance-disclaimers-u-s-trademark-law/>> accessed 5 October 2018

World Intellectual Property Organization, 'Article 6ter' (*WIPO*) <<https://www.wipo.int/article6ter/en/>> accessed 20 July 2019

World Intellectual Property Organization, 'Trademark Law Treaty (TLT)' (WIPO) <<https://www.wipo.int/treaties/en/ip/tlt/>> accessed 31 March 2019

THIRD-PARTY FUNDING IN DISPUTE RESOLUTION PROCEEDINGS*

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Abstract

Third-Party Funding (“TPF”) is the funding of claims by commercial bodies in return for a share of the proceeds. TPF is rapidly used around the world and is a crucial mechanism of enabling meritorious claimants who are financially incapable of affording litigation expenses to gain access to justice.

Despite the fast-changing global trend of TPF in other jurisdictions such as Australia, the United Kingdom and Singapore. However, Thai Law still lacks a clear position; thus, stances regarding this matter remained unclear. This article thus aims to discuss whether the use of TPF should be allowed in the Thai legal system and if so, to what extent.

In responding to the questions stated above, this article applies a comparative study to examine the legal approaches, problems, and solutions concerning TPF from leading jurisdictions, i.e., Australia, the United Kingdom, and Singapore. Besides, the historical background of the Thai judicial approaches on this matter will be examined.

After conducting historically and comparatively analysis, this article found that the prohibition of the involvement of unrelated third-parties in other’s suit was prior developed to protect the purity of the judicial system

* This article is summarized and rearranged from the thesis “Third-Party Funding in Dispute Resolution Proceedings” The Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

from the abuse of the process. However, the current justice system has become more transparent. In the author's opinion an old justification may not be appropriate for the current situation.

For that reason, this article concludes that a TPF contract that encourages access to justice which does not abuse the process should not be prohibited. However, the legislative should be amended to allow the use of TPF and to eliminate any uncertainties that could arise. This article suggests that Thailand should amend the Thai Arbitration Act to grant TPF of arbitral proceedings in, at least, international arbitration as the pioneering approach. Subsequently, the availability of TPF should expand to domestic arbitration before eventually amending the Civil Procedure Code to allow the use of TPF for domestic litigation. Furthermore, the author suggests Thailand to initially implement subordinate legislation, such as ministerial regulations to specify the manner of permissible TPF, as these bodies of law are flexible to amend or adjust.

Keywords: Third-Party Funding, Litigation, Arbitration, Dispute Resolution Proceedings

1. Introduction

Third - Party Funding (“TPF”) is considered as a crucial mechanism of enabling meritorious claimants who are financially incapable of affording litigation expenses to gain access to justice.¹ It enables such claimants to pursue cases they might otherwise be unable to do so, such as class action cases, where the legal cost is too high. In recent decades, the practice of TPF is increasingly acceptable in various jurisdictions such as Australia, the United Kingdom, and Singapore as a crucial means to facilitate access to justice.

Despite such recent expansions of the use of TPF in other countries such as Australia, the United Kingdom, and Singapore, Thai law lacks a clear, direct written rule and stance on whether the funding of claims in return for benefit by third party in dispute resolution proceedings is prohibited. As a result, Thai Courts have long been reluctant to enforce a contract permitting a lawyer to benefit from the result of its client’s dispute on the ground that it contravenes public morals.

With the fast-changing global legal landscape on TPF, it is questionable whether the long-standing judicial position of invalidating contract which permits the third party to benefit from the judgment is still valid, and whether mere sharing of any proceeds as a result of dispute resolution proceedings without any abuse of process can constitute a breach of public policy.

¹ Thibault De Boule, “Third-Party Funding” in *International Commercial Arbitration*’ (Master of Laws thesis, Ghent University 2013) 18

2. Definition of Third-Party Funding

Despite the rapid growth of TPF, its exact definition, however, remains vague. In principle, for a TPF arrangement to come into existence, one of the disputing parties will request financing for their legal representation from an unrelated third party.² Typically, the funder generally consents to pay legal fees for one party (usually the claimant's), covering costs for lawyers, professionals, and/or outside counsel, as well as any other additional expenses which may be relevant or necessary in the civil litigation.³ The funds provided are non-recourse loan, where the financier will repaid only when the claim is successful.⁴

To sum up, TPF is an arrangement where a disinterested third party furnishes monetary assistance to a claimant in return for a profit on a non-recourse basis. If the case is successful, the finance provider is entitled to recover its capital invested. Conversely, if the case is unsuccessful, the funder would not be entitled to any reimbursement.

² Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95(4) *Minnesota Law Review*, U Iowa Legal Studies Research Paper, 1268, 1275 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053> accessed 2 December 2018

³ Dominik Horodyski and Maria Kierska, 'Third-Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement' (2017) 19(4) *Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellonskiego* 63, 70 <https://www.researchgate.net/publication/323476599_Third_Party_Funding_in_International_Arbitration-Legal_Problems_and_Global_Trends_with_a_Focus_on_Disclosure_Requirement> accessed 2 December 2018

⁴ Tripp Haston and Fritz Spainhour, 'Toward Disclosure of Third-Party Litigation Funding in Class Actions' (2017) *Westlaw Journal Class Action* <<https://www.bradley.com/insights/publications/2017/04/toward-disclosure-of-third-party-litigation-funding-in-class-actions>> accessed 2 December 2018

3. Traditional Policy Restrictions on the Third-Party Funding Maintenance and Champerty

Historically, the participation of a third party in legal representation was completely forbidden by the common doctrine of the maintenance and champerty:

Maintenance refers to “the act of a disinterested party to promote, encourage, or maintain a lawsuit.”⁵

Champerty refers to “a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds.”⁶

The prohibition ensured parties could properly vindicate their rights without fear of special favours being exchanged to benefit any specific party.

4. Third-Party Funding in Foreign Countries⁷

4.1 Third-Party Funding in Australia

TPF was firmly established and proliferated in Australia. By mid-1990s, TPF developed from a supportive legal instrument of insolvency

⁵ Leslie Basil Curzon, *Dictionary of Law* (6th edn, Longman 2002) 260

⁶ Black Henry Campbell, *Black’s Law Dictionary* (6th edn, West Publishing 1990) 231

⁷ In this article, the author focused on legal approaches of the leading jurisdiction, such as Australia, the United Kingdom, and Singapore. Firstly, the author uses Australia as a potential source of thought because it is said to be the home to Third-Party Funding as it was firmly established and proliferated in Australia. Secondly, the United Kingdom is the origins of the concepts of maintenance and champerty, which restricts an unrelated third party from supporting the litigation of others; the author chose this jurisdiction to analyse how the Third-Party Funding has developed from strictly prohibited to widely accepted. Lastly, the author uses Singapore as a potential source of idea because the Third-Party Funding industry in Singapore is properly regulated when compared to other jurisdictions such as Australia and the United Kingdom.

claim into a prosperous legal funder of class action in the service sector.⁸ Moreover, it has been applied in a broad area of civil and commercial cases, including but not limited to claims such as shareholder and investor, product liability, tort, consumer, environmental, and employment.⁹

4.2 Third-Party Funding in United Kingdom

Despite the origins of the concepts of maintenance and champerty, the use of TPF is currently widely accepted in United Kingdom. A critical change introduced was the implementation of the Jackson reform. Lord Justice Jackson was nominated and assigned the duties to examine costs in various fields of civil litigation, because there were concerns about high and disproportionate costs related thereto.¹⁰ Lord Justice Jackson clearly stated that he desired the maximization of alternative options available to fund litigation.¹¹

4.3 Third-Party Funding in Singapore

The watershed moment for TPF in Singapore emerged in 2017. The Singapore Parliament on 10 January 2017 passed the Civil Law (Amendment) Bill (Bill No. 38/2016) (Bill) and the Civil Law (Third-Party Funding) Regulations 2017 (the Funding Regulations). The Bill abolishes the common law torts of maintenance and champerty.¹²

⁸ Christopher Hodges, John Peysner and Angus Nurse, 'Research Report of Litigation Funding: Status and Issues' (2012) Research Report, Oxford and Lincoln Law School, 48 <https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf> accessed 25 January 2019

⁹ Jason Geisker and Jenny Tallis, 'The Third-Party Litigation Funding Law Review 2nd Edition: Australia' (*Claims Funding Australia*, 16 November 2018) <https://claimsfundingaus.com.au/news/third_party-litigation-funding-law-review-2nd-edition> accessed 20 January 2019

¹⁰ Hodges (n 8)

¹¹ *ibid*

¹² Civil Law (Amendment) Bill No. 38/2016 (Singapore) Clause 2 new sections 5A(1)

Although no longer considered as a tort or crime, TPF Agreements remain against public policy and, thus, unenforceable, unless it was entered into by qualifying Third-Party Funders in prescribed proceedings.¹³ To sum up, the enforceability of the TPF Agreements in Singapore requires (1) the funding to be provided by **Qualifying Third-Party Funder**¹⁴ (2) solely with respect to **Prescribed Proceedings**.¹⁵

5. Third-Party Funding in Thailand

Thai courts have had to encounter the issue of involvement by non-related third parties in other's suit almost 100 years ago. The first case can be traced back to B.E.2467 (1924) prior to the codification of the Thai Civil and Commercial Code. At that time, the Thai Supreme Court applied the English law principles i.e., maintenance and champerty, to rescind the agreement whereby allowing a person to instigate the other person to enter into a dispute, with the purpose to obtain benefit therefrom.¹⁶

In the annotation of the Supreme Court Judgment No. 250/2478 Professor Seni Pramoj remarked that If the same issue arises now, Thai court

¹³ Indraneel Rajah, 'Third Party Funding—Reinforcing Singapore as a Premier International Dispute Resolution Center' (Ministry of Law, Singapore 2017) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf>> accessed 25 January 2019

¹⁴ Pursuant to Civil Law (Third-Party Funding) Regulations 2017,

In order for an unrelated third party to be satisfied Qualifying Third-Party Funder eligible to fund dispute resolution proceedings, it shall:

1. persevere the principal business of funding claims, whether domestically or internationally; and

2. have a minimum amount of 5 million Singaporean dollars in paid-up share capital or managed assets.

¹⁵ Pursuant to Civil Law (Third-Party Funding) Regulations 2017,

Prescribed proceedings in which TPF can be used is limited to international arbitration proceedings and court proceedings arising from or out of or in any way connected with international arbitration proceedings

¹⁶ Supreme Court Decision No. 510/2467 (Thailand)

should not adopt the English law principle. This is because whether a contract is enforceable as a matter of Thai law is governed by Section 113 (“currently section 150”).¹⁷

In the annotation of the Supreme Court Judgment No. 552/2525 Professor Jitti Tingsaphat remarked that Thai law prohibits taking a share in the proceeds from the client's litigation. This is opposed to the lawyer's ethics and applies to any persons other than lawyers. This principle derives from the English common law of champerty and maintenance.¹⁸

5.1 Support or Assistance From Unrelated Third Parties in Another Person's Suit

5.1.1 Current Thai Judicial Attitude and Approach

Despite no explicit laws are prohibiting a disinterested third-party to become involved in others' lawsuit, Thai courts have dealt with this issue for almost a decade. In such cases, if the third party has an interest or relationship with the disputed parties such as being their siblings or relatives, Thai courts tend to permit and enforce the contract.

Conversely, if it appears to the courts that a contract was made by a disinterested third party offering to pay court fees and other costs associated with litigation for another person to enter into a dispute in exchange for the receipt of certain benefits therefrom, the courts would deny enforcing such arrangement, as it is illegal and contrary to public policy.

Henceforth, In the Thai legal perspective, Public policy is of greater importance than freedom of contract on the grounds that public safety is

¹⁷ Supreme Court Decision No. 250/2478 (Thailand)

¹⁸ Supreme Court Decision No. 552/2525 (Thailand)

considered to be the highest law.¹⁹ In case where the object of a juristic act was against a public policy, such an act is void.²⁰

As a result, when the contract is deemed void, third parties who offered to pay all court-related expenses is not entitled to pursue remedies against the other parties. Specifically, he can neither file a lawsuit against the other party nor claim restitution due to the fact that the objective of the contract is contrary to the law or good morals pursuant to Section 411 of the Civil and Commercial Code.²¹

5.1.2 Analysis

In prohibiting the involvement of unrelated third parties, Thai courts were influenced by the common law notions of champerty and maintenance. On the issue of TPF, Thai court tends to follow their long-standing judicial position to invalidate a contract in permitting a third party to support and benefit from the outcome of a dispute because the contract contravenes public order and good morals.

In the author's opinion, judicial attitude should be shifted to accept the involvement of TPF, because public order or public morals of the people can change, depending on the historical time period and societal norms. The past reason for prohibiting the involvement of unrelated third parties in dispute resolution proceedings is now out of date.

Professor Dr. Ukrit Mongkolnavin explained that the concept of public policy or good morals often changes as time passes and social climate changes, varying from country to country. This concept is also governed by both written and unwritten laws. As it is impossible to have

¹⁹ Chaiyos Haemarachata, *Kodmai Whaa Duay Nitikham* [The Law on Juristic Acts] (4th edn, Chulalongkorn University Press 2005), 163 (ไชยยศ เหมะรัชตะ, *กฎหมายว่าด้วยนิติกรรม* (พิมพ์ครั้งที่ 4, สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2548) 163

²⁰ Thai Civil and Commercial Code, s 150

²¹ *ibid*, Thai Civil and Commercial Code,

Section 411: A person who has made an act of performance, the purpose of which is contrary to legal prohibition or good morals, cannot claim restitution.

strict laws concerning public policy or good morals, most countries tend to make laws on public policy or good morals flexible, authorizing courts to use their discretion to determine which actions are in contradiction to public policy and/or good morals on a case-by-case basis. Although critics have argued that such an approach is unethical and comparable to a system of judge-made laws, written laws are often rigid and unresponsive to social change. Flexibility is necessary to adapt to the changing needs and circumstances, thus, the abstract nature of laws on public policy or good morals is the core characteristic of legal application and enforcement, where the benefits outweigh the drawbacks.²²

Historically, prohibitions on the involvement of unrelated third parties were justified as it protects the integrity of the legal procedure and process from outside influences. However, it has become widely accepted that the current justice system has become more stable. The emergence of a better monitoring system and other laws to control the behaviour of the judicial profession means that such prohibition is no longer necessary. In the author's opinion, past justifications for prohibiting the involvement of unrelated third parties are out of date. Therefore, judicial attitudes should be shifted to accept TPF's Participation in dispute resolution proceedings.

Lastly, the judiciary should bear the responsibility to strengthen access to justice, which is the basis of the existence of courts and the Thai Arbitration Institute. Thus, in the author's opinion, the agreement in which increasing people's access to justice without abuse of process should not be considered contrary to public policy.

²² Aukrit Mongkolnawin, 'Khwaam Sa-ngob Riab Roi Lae Silatham Undee Khong Prachachon' [The Public Order and Good Moral of Citizen] (1975) 32(1) Bot Bundit, Law Journal of the Thai Bar, 15 (อุกฤษ มงคลนาวิน 'ความสงบเรียบร้อยและศีลธรรมอันดีของประชาชน' (2518) 32(1) บทบัญญัติ นิตยสารของเนติบัณฑิตยสภา) 15

5.2 Taking a Share of the Proceeds of Another Person's Suit

5.2.1 Current Thai Judicial Attitude and Approach

In terms of taking shares in the proceeds of another's litigation, Thai courts have a long-standing position not to enforce an agreement that allows an unrelated third party to obtain a portion of the judgment of another's litigation or acquire a direct monetary interest in the final result of the lawsuit. The reason is that such an agreement instigates persons to be in dispute. Therefore, the contractual agreement is void, as it contradicts to public order and good morals according to Section 150 of the Civil and Commercial Code.

5.2.2 Analysis

The historical prohibition on sharing part of the proceeds of another person's litigation might no longer be applicable. Under the enactment of the Act Amending the Civil Procedure Code (No. 26) concerning class actions in the year B.E. 2558, Thai courts may award remuneration to the plaintiff's lawyer up to thirty percent of the total amount of damages awarded in the dispute. This is the first time Thai written law permits lawyers to take benefits relating to the outcome of the case. The rationale behind the law is due to the nature of class action suits, where each injured person suffers different amounts of damages. Therefore, it is challenging to fixate the amount the lawyer is entitled to receive at the beginning of the case without knowing whether the injured persons will receive compensation from the class action suit.

6 Benefits of Third-Party Funding

6.1 Access to Justice

TPF can play a significant role to help fill the gap of state-provided legal aid, which only assists vulnerable individuals. The availability of TPF

enables claimant incapable of bearing the financial burdens of litigation to proceed with their claims and have access to the justice system.

6.2 Mitigation of Risk

TPF provides opportunities to mitigate and manage the risks of litigation by shifting liability for costs to the Third-Party Funder. Thus, TPF Agreement turn potential risks into an asset which can be bargained for.

6.3 Second Opinion from Potential Third-Party Funders

TPF helps reduce the number of groundless cases brought to courts or arbitral tribunals. Before financing potential claims, a Third-Party Funder would naturally analyse the probability of success of the respective applications and the possibility of recovery and returned profits. A Third-Party Funder is unlikely to provide monetary assistance if he does not consider the prospects of success to be favourable. Third-Party Funder's review can be seeking a second opinion of the merits of a case and the strategic management thereof.

6.4 Encouragement of International Arbitration in Thailand

The implementation of TPF would enhance the competitiveness of Thai arbitral institutions with other arbitral institutions based in other jurisdictions. Additionally, the change will substantially improve the arbitration environment in Thailand such that Thailand may be recognized as an "arbitration-friendly" jurisdiction by foreign investors.

6.5 Support Class Actions

Pursuing class actions requires a significant amount of monetary assistance since the initiation of a class action suit, i.e., gathering potential class members, finding evidence linked to the case, and paying other advance costs. Plaintiffs are required to advance legal expenses in prosecuting the class action. As a result, potential representative plaintiffs may not want to be at risk of such amount in a class-action suit. TPF could

be a vital tool to provide all class members monetary assistance and enable a group of meritorious claimants to pursue the class action claim.

7 Legal Issues Arising From the Implication of Third-Party Funders

7.1 Conflicts of Interest

In dispute resolution proceedings, justice is administered by judges and arbitrators. For judges and arbitrators to secure their impartiality while performing their duties, their maintenance of independence is of utmost significance. In particular to the arbitral proceedings, claims to allege a lack of independence and impartiality of the arbitral tribunal are often used to challenge the arbitral award regardless of whether such decision rendered is viewed as right or wrong. Given these circumstances, the relationship between arbitrators and financier of TPF could create significant concerns about independence and impartiality.²³ This would be self-evident, for example, if the arbitrator worked in a law firm funded by a third party, or if an arbitrator is in a case where the claimant is funded by the same Third-Party Funder that provides financing for an unrelated party in an unrelated dispute, both of which creates doubt about his or her impartiality and independence.²⁴

7.2 Confidentiality and Privilege

Typically, a Third-Party Funder is not a party in the dispute resolution proceedings. As such, their involvement in dispute resolution proceedings may give rise to the issue of whether any information deemed confidential for purposes of the proceedings may be shared with them. To obtain TPF, potentially sensitive information may need to be provided to the potential Third-Party Funder. It is, therefore, important to ensure that

²³ Aren Goldsmith and Lorenzo Melchionda, 'Everything You Ever Wanted to Know (But Were Afraid to Ask) - Part Two' (2012) *International Business Law Journal*, 221, 225

²⁴ Duarte Henriques 'Arbitrating Disputes in Third-Party Funding: A Parallel with Arbitration in the Financing Sector' (2018) <<https://ssrn.com/abstract=3285723>> accessed 10 June 2019

the other disputing party is not then able to obtain disclosure of the confidential information on the basis that privilege has been waived. The problem which arises from TPF is that providing confidential information and documents to third-party investors could result in a breach of privilege and confidentiality.

7.3 Undue Control Over the Dispute Resolution Proceeding

Once finance is a subject of dispute, the investor has a direct monetary interest in the final result. As such, risk may arise where the funder may exercise an undue control over the conduct of proceedings. For instance, a funder might pressure a funded party to agree on some condition which is not in the funded party's best interest. Further, if the funded party fail to comply with such request, the funder may withdraw the monetary assistance leaving the funded party unable to continue the conduct of the proceedings.

8 Conclusion and Proposed Solutions

After conducting historically and comparatively analysis, the author concludes that a TPF contract, which strengthens access to justice and does not abuse the process, should be permitted. Additionally, the author suggests for the following means to be implemented in order to approach to the use of TPF in Thailand:

8.1 Judicial Attitude

Judicial attitudes should be shifted to recognize TPF as an acceptable means of strengthening access to justice and mitigating risks associated with pursuing litigation or arbitration.

The first and foremost reason is that the judiciary bears the responsibility to improve access to justice, due to the existence of courts and arbitral institutions. A TPF Agreement is an acceptable means of facilitating people's access to justice and should not be considered contrary to public policy. In particular, the role of TPF can help fill the gaps of the

Justice Fund or other legal aid organizations, which only assists vulnerable individuals.

Additionally, previous justifications for prohibiting the involvement of unrelated third parties is now out of date. Historically, the prohibition was designed to prevent an abuse of process and corruption in the legal proceedings. However, these concerns are currently addressed by various forms of law and regulation.

To ensure uniformity in the judiciary system in the judges' exercise of their discretion, it suggests that the President of the Supreme Court may provide the judges with the guidelines as to how to deal with TPF' issues, by issuing the President of the Supreme Court's guidelines.²⁵

8.2 Legislative Approach

Thailand should consider amending the Thai Arbitration Act to grant TPF of arbitral proceedings in, at least, international arbitration as the pioneering approach. Subsequently, the availability of TPF should be expanded to domestic arbitration before eventually amending the Civil Procedure Code to allow the use of TPF for domestic litigation. The amendments should make it clear that TPF Agreements are permitted and no longer contrary to public order or good morals. The Amendment should also make clear the type of TPF being permitted under the Amendment, namely, the TPF investment. For the avoidance of doubt, this does not include all types of dispute resolution tools involving third parties such as contingent fees and conditional fees.

Additionally, it would be advisable for Thailand to initially implement subordinate legislation, such as ministerial regulations, to specify the manner of TPF permissible, as subordinate law is much more flexible in terms of amendment and adjustment. Additionally, the proposed legislation

²⁵ Act Promulgating the Law for the Organization of the Courts of Justice B.E. 2543 (2000) s 5

should address the issues of a qualified funder, a duty of disclosure, conflicts of interest.

8.3 Non-Disclosure Agreement

In the process of obtaining or maintaining TPF, the potential funded party may need to provide the funder with some sensitive information and record relating to the cases in order to ensure the confidentiality of proprietary information or sensitive documents that may be exchanged between funder and funded party before receiving any information, the relevant party shall enter into a non-disclosure agreement.

8.4 Proposed Terms and Conditions of Third-Party Funding Agreement

To avoid any potential practical problems, it is also suggested that a TPF Agreement shall consist of the following:

1. Confidentiality and legal privilege requiring the Third-Party Funder to refrain from disclosing certain sensitive and confidential information;
2. Scope of funding provided; and
3. Conditions of termination of the agreement by a Third-Party Funder.

8.5 Role of Professional Associations

The Lawyers' Council of Thailand as an essential professional organization should play a proactive role in providing expert advice or guidance to lawyers when faced with TPF Agreements to have an awareness of their roles and responsibilities to relevant parties.

8.6 Establishment of Third-Party Funder Association

The author further suggests that a Third-party Funder association be established. In this regard, the prospective funder who wishes to embark on its business in Thailand shall be required to be enlisted as a member of the Association and strictly comply with the Association's code of conduct.

This allows the Association to regulate the TPF industry and guarantee that the funders acquiesce to the proper standard of practice and avoid undue control over the conduct of the proceedings.

Bibliography

Books

Campbell B, *Black's Law Dictionary* (6th edn, West Publishing 1990)

Curzon L, *Dictionary of Law* (6th edn, Longman 2002)

Haemarachata C, *Kodmai Whaa Duay Nitikham* [The Law on Juristic Acts] (4th edn, Chulalongkorn University Press 2005) (ไชยยศ เหมะรัชตะ, *กฎหมายว่าด้วยนิติกรรม* (พิมพ์ครั้งที่ 4, สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2548)

Journal Articles

Goldsmith A and Melchionda L, 'Everything You Ever Wanted to Know (But Were Afraid to Ask) - Part Two' (2012) *International Business Law Journal*

Haston T and Spainhour F, 'Toward Disclosure of Third-Party Litigation Funding in Class Actions' (2017) *Westlaw Journal Class Action* <<https://www.bradley.com/insights/publications/2017/04/toward-disclosure-of-third-party-litigation-funding-in-class-actions>> accessed 2 December 2018

Mongkolnawin A, 'Khwam Sa-ngob Riab Roi Lae Silatham Undee Khong Prachachon' [The Public Order and Good Moral of Citizen] (1975) 32(1) *Bot Bundit, Law Journal of the Thai Bar* (อุกฤษ มงคลนาวิน 'ความสงบเรียบร้อยและศีลธรรมอันดีของประชาชน' (2518) 32(1) บทบัญญัติ นิตยสารของเนติบัณฑิตยสภา)

Research Papers

Hodges C, Peysner J and Nurse A, 'Research Report of Litigation Funding: Status and Issues' (2012) Research Report, Oxford and Lincoln Law School <https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf> accessed 25 January 2019

Horodyski D and Kierska M, 'Third-Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement' (2017) 19(4) *Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellonskiego*

<https://www.researchgate.net/publication/323476599_Third_Party_Funding_in_International_Arbitration-Legal_Problems_and_Global_Trends_with_a_Focus_on_Disclosure_Requirement> accessed 2 December 2018

Steinitz M, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95(4) *Minnesota Law Review*, U Iowa Legal Studies Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053> accessed 2 December 2018

Thesis

Boulle T, '“Third-Party Funding” in International Commercial Arbitration' (Master of Laws thesis, Ghent University 2013)

Laws and Regulation

Thai Laws

Act Promulgating the Law for the Organization of the Courts of Justice B.E. 2543 (2000)

Thai Civil and Commercial Code

Singapore Laws and Regulations

Civil Law (Amendment) Bill No. 38/2016 (Singapore) Clause 2 new sections 5A(1)

Civil Law (Third-Party Funding) Regulations 2017

Thai Supreme Court Cases

Supreme Court Decision No. 510/2467

Supreme Court Decision No. 250/2478

Supreme Court Decision No. 552/2525

Websites and Blogs

Geisker J and Tallis J, 'The Third-Party Litigation Funding Law Review 2nd Edition: Australia' (*Claims Funding Australia*, 16 November 2018) <https://claimsfundingaus.com.au/news/third_party-litigation-funding-law-review-2nd-edition> accessed 20 January 2019

Henriques D, 'Arbitrating Disputes in Third-Party Funding: A Parallel with Arbitration in the Financing Sector' (2018) <<https://ssrn.com/abstract=3285723>> accessed 10 June 2019

Rajah I, 'Third Party Funding–Reinforcing Singapore as a Premier International Dispute Resolution Center' (Ministry of Law, Singapore 2017) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf>> accessed 25 January 2019

LEGAL PROBLEMS ON LAW CONCERNING THE UTILIZATION OF
IMMOVABLE PROPERTY RIGHTS: A STUDY ON THE ENTITLEMENT
OVER IMMOVABLE PROPERTY ACT B.E.2562^{*}

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Abstract

To encourage and support the investments in Thailand and boost its economy, hire of immovable property is essential for the investors for both commercial and residential purposes. However, hire of immovable property in Thailand is very restrictive under Civil and Commercial Code (“the CCC”) and the Lease of Immovable Property for Commercial and Industrial Purpose Act B.E.2542 (1999) (“The Lease of Immovable Property Act”). In other words, these two laws contain provisions that limit the utilization of immovable property. For example, the objective of utilizing the immovable property places too many restrictions on the tenant’s rights. As a result, the government of Thailand through the Ministry of Finance has introduced the Entitlement over Immovable Property Act B.E.2562 (2019) (“the Entitlement Act”), so called in Thai “Sub-Ing-Sithi”. The Entitlement Act provides a new option for the investors to utilize the immovable property by giving more rights to the holder of the Entitlement. It is expected that this law will help

^{*} This article is summarized and rearranged from the thesis “Legal Problems on Law Concerning the Utilization of Immovable Property Rights: A Study on The Entitlement over Immovable Property Act B.E.2562” The Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

support and encourage investments by attracting more Thai and foreign investors to carry on business in Thailand.

Although the main purpose of the Entitlement Act is to provide more opportunities supportive of business sections, the provisions thereunder seem not to fully reflect its objective. There are inefficiency provisions which impede and affect the utilization of immovable property. This research points out the problems that might occur from this law through conducting comparative analysis of leasehold laws in other countries, U.K., U.S. and French which those countries have similar principle with this Act. In addition, the author also analyzes the hindrances that might happen to the application of this law.

From the comparative analysis, this article proposes the essential points to revise, modify or add some provisions as well as to find the solutions to make this Act more suitable and efficient to be executed and provide the benefits to the owners and the holder of Entitlement including relevant parties.

Keywords: Hiring an Immovable Property, Lease Immovable Property, Leasehold, the Entitlement

1. Introduction

At present, investors from several countries come to invest in Thailand and possess immovable property for both residential and commercial purposes. However, utilizing the rights over the immovable property is still restricted by some laws, especially those regarding hire of immovable property. In order to increase the opportunity for both foreign and local investors to utilize the rights on the immovable property as well as to promote the investments in Thailand, the government of Thailand has introduced the Entitlement Act¹. This law was drafted under the principle of hire of immovable property, but the Entitlement thereunder is regarded as the new class of asset which gives the Entitlement holder's the rights on the registered property similar to the ownership. As a consequence, the holder can rent, sell, assign, mortgage and inherit the property with the maximum period of thirty years.² This new asset will help support the investment on immovable property and mega projects in Thailand. Moreover, it was designed to eliminate the limitations in the provisions regarding hire of immovable property under the CCC as well as the Lease of Immovable Property Act, which has restriction on the utilization.³

Although the Entitlement Act provides the rights to the holder of Entitlement as if having the ownership, according to the public hearing conference held prior to this Act's enactment, several legal experts and many relevant agencies such as Department of Lands, The Thai Real Estate Association and Housing Business Association expressed their concerns over this law. To clarify, they viewed that there remained some unclear

¹ Chandler MHM Limited, 'Update: Bill on a New Entitlement over Immovable Property (Sub-Ing-Sithi) in Thailand' (*ChandlerMHM*, 2019) <<https://www.chandlermhm.com/bill-on-new-entitlement-over-immovable-property>> accessed 23 June 2019

² Office of the Permanent Secretary, Ministry of Finance, 'the Draft of the Entitlement over Immovable Property Act B.E...'

³ Office of the Council of State, 'the Analysis of Substantial Point in the draft of Entitlement over Immovable Property Act B.E...'

provisions and certain of them provided insufficient rights to the holder of Entitlement. Furthermore, the Act contained no provision that protected the relevant parties which might cause this law to be inefficient and discourage the users from utilizing it in some situations. In this regard, the details of these problems are as follows:

1. The nature of right on the Entitlement is unclear as to whether it is the right in rem or in personam. This gives rise to legal uncertainty over the holder's Entitlement on the immovable property.

2. There is no clarification of the objectives and opportunities including the reasons why the investors should rely on this law. The investors should be able to acquire information concerning advantages and disadvantages that they might receive or bear under the Entitlement Act as well as other similar laws.

3. A period of Entitlement on property is not long enough and may result in drawbacks to the property rather than benefits.

4. Provisions that require consent from mortgagee, security receiver or the right's holder before registration of the Entitlement are too restrictive.

5. In relation to Mortgage of Entitlement, the Entitlement Act does not provide any legal measure to protect the mortgagees in case that the Entitlement disappears.

6. There is difficulty applying mortgage provisions under the CCC to mortgage of the Entitlement.

2. Utilization of Immovable Property Right and Leasehold in Thailand

Property right in Thai laws is the right over the property in which such property is the subject of the right. Under Thai laws, the types of property rights, how to establish and terminate these rights, including their scopes are specified in the CCC, of which details are provided below:

2.1 Utilization of Immovable Property Rights

A person can utilize the right over immovable property in many categories. Some are defined as rights in which person who own them can claim to the public. To illustrate, these categories of rights are ownership, servitude, superficies, etc. On the other hand, some rights are defined as personal right which person can claim only to the parties under the agreement they enter into. To this end, most of the rights over immovable property are specified in the CCC as follows:

- 1.) Ownership is the right to use and dispose of it and acquires its interests. The owner has the right to follow and recover his right from any person not entitled to detain it, and has the right to prevent unlawful interference with it.⁴
- 2.) Possession is the right showing the fact of occupier possessing the immovable property with intention to possess for himself.
- 3.) Co-ownership is 2 persons or more owning the same property and the law presumes that the owners have equal shares in the property.⁵
- 4.) Servitude is a kind of property right in which an owner of immovable property called ‘dominant property’ has the right to do something for his benefit on another immovable property called ‘servient’. The owner of servient is bound to suffer certain

⁴ Thai Civil and Commercial Code, s 1336

⁵ *ibid*, Thai Civil and Commercial Code, s 1357

act affecting his property or to refrain from exercising certain rights inherent in his ownership.⁶

- 5.) Habitation is the right to occupy as dwelling place in a building of others without paying rent.⁷
- 6.) Superficies is the right to own land, buildings, structures or plantations of the others, both upon and below the surface. The right is created by the owner of land.⁸
- 7.) Usufruct is the right of a person to possess, use and enjoy of immovable property, including the right to manage such property.⁹
- 8.) Charge on immovable Property is entitling the beneficiary to a periodical performance out of such property or to a specified use and enjoyment.¹⁰
- 9.) Leasehold is a contract in which a landlord agrees to rent his/her immovable property to another person, called tenant to use or benefit in such immovable property for a limited period of time and a tenant agrees to pay rent in return.
- 10.) Mortgage is a contract where by a person, called the mortgagor, assigns a property to another person, called the mortgagee, as security for the performance of an obligation, without delivering the property to the mortgagee.¹¹
- 11.) Business Security is the means for businessperson to use the value asset as security for loan in which those assets are not

⁶ Wiriya Namsiripongpun, *Kham Athibai Pramuan Kodmai Pangpanit Baap-Si Wa Duay Sapsin [Civil and Commercial Code: Property Law]* (5th edn, Duen Tula 2012) 305 (วิริยะ นามศิริพงศ์พันธุ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์บรรพ 4 ว่าด้วยทรัพย์สิน (พิมพ์ครั้งที่ 5, โรงพิมพ์เดือนตุลา 2555)) 305

⁷ Thai Civil and Commercial Code (n 4) s 1402

⁸ *ibid*, Thai Civil and Commercial Code, s 1410

⁹ *ibid*, Thai Civil and Commercial Code, s 1417

¹⁰ *ibid*, Thai Civil and Commercial Code, s 1429

¹¹ *ibid*, Thai Civil and Commercial Code, s 702

normally accepted by financial institution such as inventory, raw material, intellectual property, etc.¹²

2.2 Leasehold

Under Thai laws, leasehold is regarded as personal right that both parties have the right to demand another party to perform any act as they agreed. Thus, the qualification of tenants is the essence of the contract where tenant cannot sublease, assign, and mortgage the property. In addition, if tenants die, the lease contract shall also be ended.

Furthermore, leasehold is not prescribed only in the CCC, but also in the Lease of Immovable Property Act. The latter was enacted to boost the investments in real estate business as the business was slowing down and lacking liquidity, giving rise to the halts of construction and business operations. The Lease of Immovable Property Act is the lease of immovable property for the purposes of commerce and industry, of which the period can be more than thirty years but not exceeding fifty years, subject to extension for another fifty years.¹³ Under this law, the leasehold can be used as collateral by way of mortgaging. In this regard, the leasehold and duty in the lease agreement can be inherited to heirs. Moreover, tenants

¹² Business Security Registration Office, Department of Business Development (DBD), ‘Rean Roo Pai Duay Gun... Kub Kodmhai Lak Prakan Thang Durakij’ [‘Learning Together with Business Security Law’] (22 September 2015) (สำนักงานทะเบียนหลักประกันทางธุรกิจ, กรมพัฒนาธุรกิจการค้า ‘เรียนรูไปด้วยกัน...กับกฎหมายหลักประกันทางธุรกิจ’ (22 กันยายน 2558)) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj35uKbqo3mAhWD7HMBHS6gADwOFjAAegQIAhAC&url=https%3A%2F%2Fwww.dbd.go.th%2Fchiangrai%2Fewt_dl_link.php%3Fnid%3D1787&usg=AOvVaw1P6T5wfFwxwSP6gLu3Pq30> accessed 12 January 2019

¹³ The Lease of Immovable Property for Commercial and Industrial Purposes Act B.E.2542 (1999) s 3

can sublease or assign a whole or a part of the leasehold to the third party unless otherwise specified in the contract.¹⁴

3. Leasehold in Foreign Countries

The concept of provisions under the Entitlement Act is similar to the concept of Emphyteusis, which was a particular type of leasehold during Roman era. Emphyteusis was the contract where land is leased to the tenant in perpetuity or in long period under the condition that the tenant shall improve the property by cultivating, building or otherwise. With this, the tenant shall have full right to use land and other immovable property on such land including the right to gain interests thereof. Under this condition, the tenant shall also pay rent in return and when the period of lease ends, the building or other assets on land shall be vested to the landlord.¹⁵

With regard to civil law system, for example, in France, the type of leasehold that is most similar to the Entitlement is the long leasehold, which can be subdivided into two categories. The first is Bail Emphyteotique prescribed in Code rural et de la peche maritime (The Agriculture and Fishing Code), the object of which is for agriculture. The other type is Bail a construction prescribed in Code de la construction et de l’habitation (The construction and residence Code), where the tenant undertakes to build any constructions in land including taking care of it for the whole period of lease. Both types of these long leaseholds in France are considered property right,¹⁶ and the duration of the leases ranges from 18 years to 99

¹⁴ *ibid*, The Lease of Immovable Property Act B.E.2542 (1999) s 6-7

¹⁵ Civil Law Center, Faculty of Law - Thammasat University, ‘Sub-Ing-Sithi: Pun Har Thang Thidsadee Lae Thang Pratibut’ [‘The Entitlement: Problems in Theory and in Practice’] (Legal Seminar, Bangkok, 21 June 2019)

¹⁶ Office of the Council of State, the Analysis of Substantial Point in the draft of Leasehold Act B.E...., 4 (คณะกรรมการกฤษฎีกา, บันทึกวิเคราะห์สรุปสาระสำคัญของร่างพระราชบัญญัติทรัพย์สินอสังหาริมทรัพย์ พ.ศ....) 4

years, up to the parties' agreement.¹⁷ Moreover, the tenant can also sublease and assign the property to third party, including use the property as security for repayment.

As for the common law system, there is no specific leasehold principles, which are identical to those in the Entitlement Act, However, the countries with common law system like the United Kingdom ("UK") and the United States ("US") provide the tenant with the right similar thereto for a specified period of time. With such right, tenants can also sublease or assign the property to third person unless landlord prohibits to do so with a reasonable ground. Moreover, both the UK and the US also permit tenants to use leasehold as security. In this regard, they have adopted the laws to protect leasehold mortgagee in case leasehold disappears due to tenants' fault. Nonetheless, both countries do not have provisions prescribing a specific period of lease. Thus, duration of lease is in general agreed by an agreement between landlord and tenant. To this end, both parties may agree on a long-term lease which can be as long as 999 years, but the standard period of leasehold allowed under the UK law is about 125 years.¹⁸ In sum, leaseholds in common law system are mostly regarded as the property right.

¹⁷ Henry Dyson, *French Property and Inheritance Law - Principles and Practice* (1st edn, OUP 2003) 173

¹⁸ William Calvert, 'BUILDING BRICKS What is a leasehold, what does it mean when buying a house and how is it different to a freehold?' (*The Sun*, 20 April 2018) <<https://www.thesun.co.uk/money/6101788/leasehold-freehold-difference-explained/>> accessed 12 January 2019

4. The Entitlement over Immovable Property Act B.E. 2562

The Entitlement Act was drafted in accordance with the principle of the hire of property law but in a more flexible way. Its objective is to provide another option for a person to utilize the immovable property, and regard it as a new asset which is intended not to represent any property right or contractual right like those in hiring property. Moreover, this law aims to boost domestic investments, especially in the real estate sector which has great influences over the growth of Thai economy.

The Act has defined the word “Entitlement over Immovable Property” so called “Sub-Ing-Sithi”¹⁹ in Thai, as the property relying on the utilization of rights on immovable property²⁰ where such rights are valuable and transferrable. There are two parties related to the Entitlement. The first is an owner who owns a title deed of land or land with building, including condominium with title deed. Another party is the holder of the Entitlement.

The owner who needs to utilize and increase the value of the property can under this law register the property as the Entitlement with the Department of Land for a period of not over thirty years. However, before registration, if the property is mortgaged or bound under the Business Security Act, or a third party holds certain rights registered on the property, the owner has to first obtain consent from the relevant parties in order to protect those rights. After registering, the official shall issue a certification of the Entitlement to the owner. The registration of the Entitlement can be unilaterally completed. Any persons interested in the registered property may ask the owner to sell or transfer the property and become the holder of the Entitlement, giving them the rights, duties, obligations and responsibilities as if being the owner.

¹⁹ Pra Rajcha Banyad Sub-Ing-Sithi Por Sor 2562 [The Entitlement over Immovable Property Act B.E. 2562 (2019)] (พระราชบัญญัติ ทรัพย์อิงสิทธิ พ.ศ. 2562)

²⁰ *ibid*, The Entitlement over Immovable Property Act B.E. 2562 (2019) s 3

Entitlement shall be automatically terminated when the Entitlement period ends. The owner cannot terminate the Entitlement before the expiration of such period, except in the case where the owner of property is the holder of the Entitlement. After termination, the holder of the Entitlement shall return the registered property to the owner in the condition as it is at the time of returning unless agreed otherwise by the owner and the holder.

5. Problems Regarding the Entitlement over Immovable Property Act B.E. 2562 (2019) and Recommendations

The author has studied the Entitlement Act in comparison with foreign laws and found that the Entitlement Act still has some inefficient provisions, which are not supportive of the user of the Entitlement and not pursuant to the Act's intention. The analyses on these problems and the recommendations thereof are as follows:

5.1 The Nature of Right on the Entitlement

According to the Entitlement Act, it defines the Entitlement as the property relying on the utilization of rights on immovable property. Moreover, the holder of Entitlement has the rights, duties, obligations, and responsibilities over the Entitlement property the same as the owner does, except only the right to obstruct any illegal interference, follow and recover the possession from the others. Compared with other property rights specified in the CCC, the Entitlement is similar to those detailed as follows;

1.) Ownership: the right of the holder of the Entitlement is almost the same as the ownership except only that the Entitlement's holder does not have the right to follow and recover the property from any person as well as the right to prevent unlawful interference, which still belong to the owner.

2.) Superficies: the Entitlement is rather similar to this right because the person who holds the superficies has the right to use and acquire

benefits from buildings or structures of others both upon and below the surface and it can be inherited to the heir. However, the scope of the Entitlement covers more of immovable property than superficies in that the Entitlement covers the whole of the land while superficies covers only building or the structure thereon²¹.

3.) Usufruct: the Entitlement is also similar to usufruct, but the person who holds usufruct shall manage the property in accordance with objective of possession as agreed with the owner. Nonetheless, usufruct cannot be inherited while the Entitlement can.

In this regard, according to the meaning of the Entitlement, it can be assumed that the Entitlement is a type of property right created by a specific law as mentioned in Section 1298 of the CCC.²² However, the Entitlement seems to be the mixture of several categories of property rights under the CCC. To clarify, the Entitlement Act provides that the holder can assign or mortgage the property to third party, which supports the concept that the holder of Entitlement can enforce and claim the Entitlement to the public, not only the parties of the contract creating Entitlement.

In connection with foreign laws, the principle of the Entitlement under the Entitlement Act is most similar to Emphyteusis, which is a type of long-term lease defined as a property right. Thus, it can be inferred that the Entitlement should be considered the property right as well.

With the reason in the previous paragraph, the author opines that in order to protect the right of the Entitlement's holder, and avoid the inconsistent interpretation of the law, especially when any of disputes

²¹ Kittisak Prokati, 'Sub-Ing-Sithi: Pun Har Thang Thidsadee Lae Thang Pratibut' ['The Entitlement: Problems in Theory and in Practice'] (Legal Seminar, Civil Law Center - Faculty of Law, Thammasat University, Bangkok, 21 June 2019) 7 (กิตติศักดิ์ ปรกติ, 'ทรัพย์สิน อิงสิทธิ: ปัญหาทางทฤษฎีและทางปฏิบัติ' (เสวนานิติวิชาการ, ศูนย์กฎหมายแพ่ง คณະนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, กรุงเทพฯ, 21 มิถุนายน 2562)) 7

²² Thai Civil and Commercial Code (n 11) s 1298

Property Rights may be created only by the virtue of this Code or other laws.

occur, the Entitlement Act should identify the Entitlement as the property right by amending Section 3 of the Entitlement Act as follows:

“Entitlement” means the property relying on the utilization of rights on immovable property as specified in this Act and shall be regarded as the property right”

5.2 Application of the Entitlement Act

Leaseholds under the Lease of Immovable Property Act and the CCC are very restrictive and not supportive of the investments. The Lease of Immovable Property Act limits the purpose of lease only to commerce and industry, the categories of which are subject to determination by the government sector. Similarly, leasehold under the CCC focuses on qualification of tenants where sublease, assignment and mortgage of leasehold by the tenants are prohibited, and the leasehold shall be ended if the tenants pass away. For these reasons, the Entitlement Act seems more attractive to the investors, who wish to utilize the immovable property for a long period.

The Entitlement Act might be a good option for investors or person who expects to have the rights on land as ownership. However, it might also be disadvantageous if the investors have too many choices of laws to select in order to utilize the immovable property for their best benefits. Compared with other countries, the rights of a tenant over immovable property are included in the hire of immovable property provisions. Thereby, the parties of the lease agreement can agree on the objectives of lease, the tenants' right and even the use of leasehold as security in terms and conditions of the agreement.

After the introduction of the Entitlement Act, the author has analyzed which group of investors may gain good opportunities and benefits

by relying on the Act to conduct their commercial activities, and the results are as follows:

1. Foreign investors who will invest and stay in Thailand for a long period will benefit from the Entitlement Act. As the Thai Land Act prohibits the foreigner to own the immovable property, except condominium in Thailand, the foreigners who have their demand to own the land in Thailand may instead rely on the Entitlement Act.
2. Both Thai and foreign investors who need to own the immovable property as if being the owner may also rely on the Entitlement Act to utilize the property without any interruptions by the owner and other parties. The Entitlement Act provides the holder with the rights more flexible for utilization. Also, the Entitlement is very similar to a property right where it is certified to be claimed to the public.

However, the Entitlement Act is not suitable for the investors wishing to invest in a large project on immovable property for a term of thirty years and without any plans to assign the right to hold such property. The same applies to any person wishing to use the leasehold as security against the repayment. This is because there remain other laws on which the investors can rely with less expense than required under the Entitlement Act.

5.3 Problem on the Duration of the Entitlement

The period of thirty years provided in the Entitlement Act is not proper for the objective of this law because this asset provides the rights similar to ownership, and it is also related to many parties. To clarify, the reasons behind this are as follows:

- 1.) If the period of using the Entitlement is the same as prescribed in the CCC, which provides the maximum period of thirty years, some owners of the property might not want to register for the Entitlement because the registration thereunder might not be worth the increased obligations.

2.) Since the holder of Entitlement can sell, rent, and assign the Entitlement to a third party who also wishes to use the property for a long period, the period specified in this law may not be sufficient to utilize the property in case of many parties involved.

3.) If the Entitlement is used as collateral to guarantee the repayments of debt, the short period of Entitlement can give rise the situation where banks do not accept the Entitlement as collateral. This is because the banks might be unconfident whether the collateral asset will remain until the debt is paid in full.

4.) The purposes of the Entitlement Act are to facilitate and support the business sectors by increasing the value of immovable property and also to boost investment by supporting the entrepreneurs. As a result, if the period of the Entitlement is longer, it will help encourage much more investors to invest on larger projects through relying on the Entitlement. In this regard, the author views that the period of using Entitlement should be at least fifty years, the same as provided in the Lease of Immovable Property Act. Besides, the extension of the period will be beneficial for the growth of Thai economy as well.

5.4 Problem on the Prior Obligation of the Entitlement

The Entitlement Act prescribes that if the immovable property is mortgaged or bound under the Business Security Act or bound with any other rights, the registration shall be completed only when a mortgagee, a business receiver or holder of right gives written consent to the owner of such property.

This prior obligation is problematic because the mortgagee, security receiver or right holder might not be willing to give such consent as it may result in the decrease of the property value guaranteeing the debt, and thereby such debt might not get paid in full. Importantly, this is a critical issue as most of immovable properties located in urban areas of Thailand are being used as security against loans, so it will be a rare case to find a

registration for the Entitlement without requirement of consent. Apparently, this obstacle may cause this law to be both impracticable and ineffective.

In order to solve this issue, the Section regarding consent should be repealed or amended to require only a notice informing the mortgagee, security receiver, or right holder.

5.5 Problem on Mortgage of Entitlement

According to the Entitlement Act, it allows the holder of Entitlement to use Entitlement as security against loans. The problem for using Entitlement as security is that in case the holder of Entitlement infringes the law or breaches terms and conditions as agreed, the owner has the right to terminate the Entitlement by himself. Hence, when the Entitlement is terminated, the mortgagee will be affected since there is no security left to use against the debt.

In the UK, certain laws such as the Property Act 1925 and Common Law Procedure Act 1852 were adopted to protect the mortgagee in the leasehold case. These laws specify the right of mortgagees to relieve the problem arising from breach of contract or non-payment of rent in the case where tenants do not perform such relief, which may cause landlords to terminate the contract or exercise the right of re-entry over the leased property.

Though the Entitlement Act provides that the holder of Entitlement may use the Entitlement as security through applying mortgage provisions in the CCC, there remain no provisions to protect mortgagees. Therefore, to make the Entitlement Act more effective in applying this mortgaging right and protecting the third parties, the author proposes to add the following provision as Section 12/1 of the Entitlement Act:

“In the case where the Entitlement is used as security, the owner shall not immediately terminate the Entitlement if the holder of the

Entitlement utilizes the property contrary to the law or the Entitlement agreement or compensation of using the Entitlement is in arrears. The owner shall within a reasonable time give a notice to the holder of the Entitlement specifying the particular breach and require the holder of the Entitlement to remedy the breach if it is capable, or require to make compensation in money for the breach; or require the holder of the Entitlement to pay such arrears, and for all actions the holder of the Entitlement fails to do so.

If the holder of Entitlement does not perform such reliefs, a mortgagee or a security receiver under the Business Security Act can instead perform such reliefs.

If the owner has already terminated the Entitlement without requiring the holder of the Entitlement to perform the relief under paragraph 1, the mortgagee is entitled to request the owner to grant the new Entitlement to the mortgagee with the same terms and conditions and in the remaining period of the original Entitlement within 30 days from the date of termination of the Entitlement by the owner, provided that the mortgagee proves with reasonable that the mortgagee cannot perform the relief under paragraph 1. In this regard, the expenses occurring from the new Entitlement shall be borne to the holder of the Entitlement.”

5.6 Problem on Applying the Mortgage Provisions under the CCC to the Mortgage of the Entitlement

The Entitlement Act prescribes that the mortgage provisions under the CCC shall apply in the case where the Entitlement is used as security. To this end, if the holder of the Entitlement cannot repay a loan, and mortgagee wants to perform enforcement of the security given by the holder, mortgagee shall go through the court's proceedings to have the mortgaged property seized and sold in public auction. However, this process usually takes long time and is difficult for those who lack the knowledge of legal procedures.

Nowadays, the Business Security Act, B.E.2558 provides that the properties permitted under this law such as right of claim, intellectual property and business can be used to secure the debt. However, this law does not require the court proceedings in order to enforce the security unless there is a dispute over the enforcement process, which is generally faster than the enforcement of mortgages under the CCC. The security receiver is entitled to enforce the security through the business security agreement by way of sale by auction or foreclosure.

Leasehold is the right of claim that can also be used as security. Although the Entitlement has similar features to the leasehold, which could also be used as security under this law, the Entitlement Act does not clearly identify the type of the Entitlement.

Consequently, to provide certainty on the status of the Entitlement, the author suggests that the Business Security Act, instead of the mortgage provisions under the CCC, should apply to the mortgages of the Entitlement. In this regard, the author proposes to amend paragraph 1 of Section 12 in the Entitlement Act as follows:

“The Entitlement can be assigned or used as security for a repayment under Business Security Act...”

Bibliography

Articles

Office of the Council of State, the Analysis of Substantial Point in the draft of Leasehold Act B.E.... (คณะกรรมการกฤษฎีกา, บันทึกวิเคราะห์สรุปลงสำคัญของร่างพระราชบัญญัติทรัพย์สินพิชิต พ.ศ....)

Office of the Permanent Secretary, Ministry of Finance, ‘the Draft of the Entitlement over Immovable Property Act B.E....’

Books

Dyson H, *French Property and Inheritance Law - Principles and Practice* (1st edn, OUP 2003)

Namsiripongpun W, *Kham Athibai Pramuan Kodmai Pangpanit Baap-Si Wa Duay Sapsin [Civil and Commercial Code: Property Law]* (5th edn, Duen Tula 2012) (วิริยะ นามศิริพงศ์พันธุ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์บรรพ 4 ว่าด้วยทรัพย์สิน (พิมพ์ครั้งที่ 5, โรงพิมพ์เดือนตุลา 2555))

Conference Papers

Prokati K, ‘Sub-Ing-Sithi: Pun Har Thang Thidsadee Lae Thang Pratibut’ [‘The Entitlement: Problems in Theory and in Practice’] (Legal Seminar, Civil Law Center - Faculty of Law, Thammasat University, Bangkok, 21 June 2019) (กิตติศักดิ์ ปรกติ, ‘ทรัพย์สินพิชิต: ปัญหาทางทฤษฎีและทางปฏิบัติ’ (เสวนานิติวิชาการ, ศูนย์กฎหมายแพ่ง คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, กรุงเทพฯ, 21 มิถุนายน 2562))

Laws and Legislations

Pra Rajcha Banyad Sub-Ing-Sithi Por Sor 2562 [The Entitlement over Immovable Property Act B.E. 2562 (2019)] (พระราชบัญญัติ ทรัพย์สินพิชิต พ.ศ. 2562)

Thai Civil and Commercial Code

The Lease of Immovable Property for Commercial and Industrial Purposes Act B.E.2542 (1999)

Other Materials

Civil Law Center, Faculty of Law - Thammasat University, ‘Sub-Ing-Sithi: Pun Har Thang Thidsadee Lae Thang Pratibut’ [‘The Entitlement: Problems in Theory and in Practice’] (Legal Seminar, Bangkok, 21 June 2019)

Websites and Blogs

Business Security Registration Office, Department of Business Development (DBD), ‘Rean Roo Pai Duay Gun... Kub Kodmhai Lak Prakan Thang Durakij’ [‘Learning Together with Business Security Law’] (22 September 2015) (สำนักงานทะเบียนหลักประกันทางธุรกิจ, กรมพัฒนาธุรกิจการค้า, ‘เรียนรู้ไปด้วยกัน...กับกฎหมายหลักประกันทางธุรกิจ’ (22 กันยายน 2558))

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj35uKbqo3mAhWD7HMBHS6gADwQFjAAegQIAhAC&url=https%3A%2F%2Fwww.dbd.go.th%2Fchiangrai%2Fewt_dl_link.php%3Fnid%3D1787&usg=AOvVaw1P6T5wfFwxwISP6gLu3Pq30> accessed 12 January 2019

Chandler MHM Limited, ‘Update: Bill on a New Entitlement over Immovable Property (Sub-Ing-Sithi) in Thailand’ (*Chandlermhm*, 2019) <<https://www.chandlermhm.com/bill-on-new-entitlement-over-immovable-property>> accessed 23 June 2019

Calvert W, ‘BUILDING BRICKS What is a leasehold, what does it mean when buying a house and how is it different to a freehold?’ (*The Sun*, 20 April 2018) <<https://www.thesun.co.uk/money/6101788/leasehold-freehold-difference-explained/>> accessed 12 January 2019

LEGAL CONTROL OF ADVERSE ECONOMIC IMPACTS FROM THE EEC
PROJECT: FOCUSING ON LAND PROBLEM*

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Abstract

The EEC project, Thailand's special economic zone needs to gain land from people by expropriation for developing the project. Both the Constitution B.E. 2560 and Immovable Property Expropriation and Acquisition Act B.E. 2562 require that 'just compensation' must be paid to the landowner in expropriation, yet the problem is the assessed compensation is contrary to the Constitution and causes unfairness to the landowner because compensation is always lower than the market price and does not reflect the real market values of the property. Also, the provision concerning list of person with the rights to get compensation is also not clear enough to provide fairness to the affected people. Besides, the principle of just compensation is not included in the guideline which sets the preliminary price for the expropriation. However, unlike Thai law, the United States, European Convention on Human Rights, and Malaysian expropriation laws mainly focus on the real market value and provide more protection to redress the damages by giving compensation for non-pecuniary damage in case of severe mental suffering, and compensation for

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loss of goodwill to compensate the business loss resulted from the expropriation. From the comparative study, as a huge project which can generate high income to the State and affect lots of people, this article proposes that EEC should focus more on the just compensation in order to establish fairness in the society. Besides, the removal of some unfair factors and the addition of some beneficial factors are also recommended.

Keywords: E.E.C. Project, Expropriation, Compensation

1. Introduction

According to the Eastern Special Development Zone Act B.E. 2561, or can be shortly called the EEC Act, it has brought several changes in law and structure into the selected provinces. The outstanding controversial issue among changes is the change of urban planning from an ordinary community into a welcoming hub for investment and business. Some areas in the selected provinces have to be changed in land use plan, such as from the community to the industrial area. From the change of land use, people who normally live there are inevitably lose their lands by the compulsory acquisition from the state, yet they will get paid back in terms of money for their losses of land.¹

The change of urban planning of the EEC project brings about the land expropriation of Thai people to support business and investment for not only local investment but also foreign one. Yet, the compensation still cannot satisfy such dispossessed people as it is not enough to redress their losses. In order to make the State's development sustainable, the author realizes the importance of development without leaving someone behind. The development in terms of economy should be done in a balance and justified, together with the protection of people's rights and quality of life. Therefore, the author would like to study the principles behind the factors and criteria of a just compensation for people in expropriation cases in order to balance and create fairness between the economic and business development from the Special Economic Zone and the protection of people's right.

2. Principles and Existing Laws in Thailand

Concerning Human Rights, the principle of equality is general but fundamental since it guarantees that people in equal circumstances are treated the same way under the law and practice, irrespective of discrimination such as race, color, gender, religion, age, disability or

¹ The Immovable Property Expropriation and Acquisition Act B.E. 2562 (2019) s 40

nationality.² One of the Human Rights that human being shall enjoy is the economic right, since it guarantees people to meet their conditions and their needs, such as right to education, right to housing, or the right to work.³ However, such rights are all connected to access to land, since land is a crucial condition that human rights mainly need. Land is the limited natural resource and that could bring about problems in landlessness and inequality among people.⁴ As a limited resource, when the government needs to do compulsory land acquisition, the government should develop the whole society to establish balance between public and private interest.⁵ Moreover, to consider the compensation for expropriation, the principle of land valuation assessment for land expropriation differs from the principle for the land in the open market's principle. In open market, the price of goods will be 'market value' which satisfies both the willing buyer and the willing seller, but for the expropriation, landlords are not voluntary to sell the land, so the compensation should redress people more by including special value in considering the compensation, such as market values, severance damage, injurious affection, consequential damage, and betterment.⁶

² Icelandic Human Rights Centre, 'The Right to Equality and Non-Discrimination' (*Humanrights*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>> accessed 12 July 2019

³ National Economic & Social Rights Initiative, 'Economic and Social Rights' (*NESRI*) <<https://www.nesri.org/human-rights/economic-and-social-rights>> accessed 11 June 2019

⁴ Elisabeth Wickeri and Anil Kalhan, 'Land Rights Issues in International Human Rights Law' (2010) 4(10) Institute for Human Rights and Business

⁵ Phan Trung Hien, 'Striking the Right Balance between the Public and Private Interests in Compulsory Acquisition of Land in Vietnam' (2015) Chiang Mai University Conference Paper No. 39

⁶ Subhaporn Sittikorn, 'Property owner satisfaction with compensation for expropriation of residential property: A case study of Ram Intra-Ad Narong expressway' (Housing Development thesis, Chulalongkorn University 1997)

In Thai law, there are two legislations concerning such problem of compensation for expropriation as follows:

2.1 Constitution of the Kingdom of Thailand B.E. 2560

The core of the compensation and expropriation in the constitution is in Section 37 in the first paragraph of the Constitution. It clearly explains that in expropriation of immovable property, it should be done only for the purpose of public utility, and fair compensation shall be paid in due time. The constitution also shows that the protection in Human rights and rule of law are guaranteed under Thai law. Due to the fact that the Constitution is the highest law in the State, as a result, other legislations cannot be made contrary and related legislations should be made accordingly.

2.2 Immovable Property Expropriation and Acquisition Act B.E. 2562

This Act describes in details of expropriation process, including compensation and factors to be considered.

Factors in consideration for compensation are mainly mentioned in Section 20 of the Act, including this following issues:

1. Market price of the expropriated land
2. Appraisal price of the land which the government has set for the collection of land and building tax
3. Appraisal price of the land for the transaction and juristic act fee
4. Nature and location of the land
5. Rationale and purpose of expropriation⁷

However, the research found that there are problems happened in practical term of valuation assessment because the appraisal value set by the committee is quite low and less than the market price in open market, and that will cause injustice for people whose land are expropriated since they will get paid lower than the price that they will get from selling in

⁷ The Immovable Property Expropriation and Acquisition Act B.E. 2562 (2019) s 20

open market. The difference between appraisal price set by the government and the market price in open market are shown in the following table.

Area	Appraisal price from Treasury Department			Market value from the Agency for Real Estate Affairs		
	2555	2559	% increase Per year	2555	2559	% increase Per year
Silom	850,000	1,000,000	4.1	1,100,000	1,600,000	9.8
Siam	700,000	900,000	6.5	1,400,000	1,900,000	11.1
Sathorn	700,000	750,000	1.7	1,000,000	1,400,000	8.7
Yaowarat	700,000	700,000	0	850,000	1,200,000	7.1
Sukhumvit	500,000	650,000	6.8	1,000,000	1,850,000	16.6
Asoke	400,000	550,000	8.3	800,000	1,000,000	5.7
Chareonkru	400,000	500,000	5.7	700,000	1,000,000	9.3
Thonglor	350,000	420,000	4.7	600,000	1,100,000	16.4
Ratchada	350,000	400,000	3.4	400,000	600,000	10.7

Source: Kittikom Pojanee, ‘The appraisal value vs the real value’ <www.ddproperty.com/คู่มือซื้อขาย/ราคาประเมิน-vs-ราคาขายจริง-ต้องรู้ก่อนตั้งราคาขายที่ดิน-8573> accessed 13 August 2019

The compensation concerning such factors shall be paid to the owner of expropriated land, owner or a tenement or other structure existing on the land, owner of a perennial plant located on the land, a lessee or sub-lessee of the land, person who lose benefit of using roads, installing water pipes or other similar items through expropriated land, and owner who resides or perform commerce or lawful business on expropriated land and gets damages from being removed.⁸ However, the provision only broadly mentions list of persons who are entitled to the compensation, but there is no clear explanation whether such compensation shall be paid to only one person in each subsection or can be distributed to many different each persons from different subsections in Section 40 of the Act. If it can be

⁸ The Immovable Property Act B.E. 2562 (n 1)

paid only to one person from only one subsection, it means if there is more than one person who is affected by expropriation, not every person shall be paid and some might be left unfair without getting compensation.

3. Foreign Laws

In the United States of America, the expropriation is known as 'Eminent Domain' and it is implied by the Fifth Amendment clause covering compensation. When the power of eminent domain is exercised, it can be done only by giving compensation to the party whose property is taken or whose use and enjoyment is interfered with. A full and adequate compensation, but not excessive, shall be paid.⁹ Just compensation is set by using the market price, for the willing seller and willing buyer, as a criteria. Just compensation is also measured by reference to the uses which the property is suitable for, with regard to the existing business, the desires of the community or reasonably expected in the immediate future, but imaginary uses of its proprietor are excluded. Besides, for the damage which is resulted on the business from expropriation can also be redressed, such as the loss of profit or the loss of goodwill of the business.¹⁰

For the European Convention on Human Rights and the European Court on Human Rights, the right to property is mentioned in Article 1 of the Protocol No.1. The European Convention on Human Rights guarantees the right to peaceful enjoyment of possessions in all states party to the Convention. If the Court finds a violation of the right, just satisfaction can be awarded, including payment of compensation.¹¹ One of the distinctive parts in legal principles made by the European Court of Human Rights is that the Court gives protection to the right of the property not only the

⁹ Will Kenton, 'Expropriation' (*Investopedia*, 2 May 2019)

<<https://www.investopedia.com/terms/e/expropriation.asp>> accessed 1 July 2019

¹⁰ American Jurisprudence (2 edn, Vol. 27, New York: Lawyers Cooperative Publishing 1966) 83-86

¹¹ Barbra Fontana, 'Damage Awards for Human Rights Violations in the European and Inter-American Courts of Human Rights' (1991) 31(4/6) Santa Clara L. Rev. 1127

compensation for the financial damage, but also for non-pecuniary damage from the expropriation. However, the non-pecuniary can be paid only in certain cases under Court's discretion, such as severe mental suffering for over ten years.¹²

In Malaysia, right of an individual property is guaranteed in the Constitution as well as the government's right to acquire land for adequate compensation. Land acquisition can be done only for public purpose, and in order to determine whether it is public purpose or not, it is necessary to consider that the acquisition serves general interest of the community or not.¹³ The precedent court decision explained that compensation is the amount of money which the owner would have got if he sold the land in an open market, including other losses resulted from the consequence of land acquisition, in order to place the dispossessed owner in the same position with neither worse nor better situation.¹⁴

4. Conclusion and Suggestions

In conclusion, the expropriation process brings problems, conflicts, and dissatisfaction to people in the expropriated area. While expropriation by the government forces people to leave their hometowns and properties, the compensation which people get in exchange with their sacrifice is still not considered as a just compensation, which the land or immovable property's owners are entitled to get compensated. The Constitution of the Kingdom of Thailand and Immovable Property Expropriation and Acquisition Act are the legislations concerning such problem of compensation, yet some provisions still seem unclear and unjust that can bring about

¹² Bailii 'European Court of Human Rights; Mazelie v France - 5356/04 [2010] ECHR 1446' (Bailii, 15 September 2010)

<<https://www.bailii.org/eu/cases/ECHR/2010/1446.html>> accessed 9 August 2019

¹³ *S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204

¹⁴ Anuar Alias and M D Nasir Daud, 'Payment of Adequate Compensation for Land Acquisition in Malaysia' (2006) 12(3) Pacific Rim Property Research Journal

problems of unjust compensation and inequality in the society. Unjust compensation which will be granted to the dispossessed owner is lower than real value of the immovable property due to the fact that the provisions concerning factors in considering compensation cause problems in practical term. Some factors are not included in certain cases of court decision, while some factors lower the overall assessed price of compensation.

Therefore, the author would like to suggest as follows. Firstly, remove the appraisal price for paying tax and fee from the legal criteria and factors to consider the compensation from expropriation in Section 20 of the Immovable Property Expropriation and Acquisition Act B.E. 2562, because they do not reflect the market value in reality and they also pull down the compensation to be more unjust. Secondly, the author suggests that the purpose of expropriation, in this context is the EEC context, Section 20 subsection 5 should be the main factor in the process to consider the compensation from expropriation, due to the fact that EEC is such a giant project that can induce huge amount of investment fund from foreign investment to the State. Such benefits should firstly be distributed to affected people in the EEC area since they sacrificed themselves for the project and they are negatively affected. Sharing benefits conforms to the principle of balance of interests and also help reduce the gap between the rich and the poor that causes inequality in the society. Thirdly, persons with the right to compensation according to Section 40 of the Immovable Property Expropriation and Acquisition Act B.E. 2562 should be identified more clearly in the provision itself that persons who are entitled to get compensated can be more than one person which their rights originated from different subsection at the same time, in order to adjust Section 40 of the Act to be conform to Section 37 of the Constitution B.E. 2560. Fourthly, the consideration of the Thai Supreme Administrative Court in expropriation cases and the committee who set the compensation should mainly consider Section 37 of the Constitution about the just compensation. Fifth, the author would like to suggest the addition of goodwill and non-pecuniary

damage to be included in the factors for the consideration of compensation, since the author found it is interesting from the research in foreign laws. The addition of suggested factors might make the law become more effective in paying just compensation to redress people's losses from expropriation.

Bibliography

Case

S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204

Conference Paper

Hien P, 'Striking the Right Balance between the Public and Private Interests in Compulsory Acquisition of Land in Vietnam' (2015) Chiang Mai University Conference Paper No. 39

Journal Articles

Alias A and Daud M, 'Payment of Adequate Compensation for Land Acquisition in Malaysia' (2006) 12(3) Pacific Rim Property Research Journal

Fontana B, 'Damage Awards for Human Rights Violations in the European and Inter-American Courts of Human Rights' (1991) 31(4/6) Santa Clara L. Rev. 1127

Wickeri E and Kalhan A, 'Land Rights Issues in International Human Rights Law' (2010) 4(10) Institute for Human Rights and Business

Laws

The Immovable Property Expropriation and Acquisition Act B.E. 2562 (2019)

Thesis

Sittikorn S, 'Property owner satisfaction with compensation for expropriation of residential property: A case study of Ram Intra-Ad Narong expressway' (Housing Development thesis, Chulalongkorn University 1997)

Websites and Blogs

Bailii 'European Court of Human Rights; Mazelie v France - 5356/04 [2010] ECHR 1446' (*Bailii*, 15 September 2010)

<<https://www.bailii.org/eu/cases/ECHR/2010/1446.html>> accessed 9 August 2019

Icelandic Human Rights Centre, 'The Right to Equality and Non-Discrimination' (*Humanrights*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>> accessed 12 July 2019

Kenton W, 'Expropriation' (*Investopedia*, 2 May 2019) <<https://www.investopedia.com/terms/e/expropriation.asp>> accessed 1 July 2019

National Economic & Social Rights Initiative, 'Economic and Social Rights' (*NESRI*) <<https://www.nesri.org/human-rights/economic-and-social-rights>> accessed 11 June 2019

Other Material

American Jurisprudence (2 edn, Vol. 27, New York: Lawyers Cooperative Publishing 1966)

GOVERNING LAW AND JURISDICTION CLAUSE¹ IN TRANSNATIONAL CONTRACT DISPUTES IN INDONESIAN COURT

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Abstract

In today's business world, the odds that one's company or self becomes involved in a dispute containing international repercussions are higher than before. Typically, businesses are initiated with a contract, and if such contract contains foreign or international elements, then it is known as the international contract, and shall be handled quite differently compared to its national counterparts. Some international contracts contain a governing law and jurisdiction clause in the event of dispute for the sake of legal certainty. The determination of governing law and jurisdiction is connected to the principle of freedom of the parties alongside *pacta sunt servanda*. Article 1388 of the Indonesian Civil Code recognizes both principles, intending judges and third parties to honor a legally signed and executed agreement as one would honor law. However, in practice, deviations are bound to happen. This paper attempts to discuss the principle of Private International Law in Indonesia, specifically how the

¹ The term 'governing law and jurisdiction clause' refers to the clause(s) in which the parties in an agreement express the law that will apply in case of a dispute (hence the term 'governing law'), and which court of a country would take jurisdiction over, or have the right to hear, any disputes that may arise from the agreement (hence the term 'governing jurisdiction')

* This article is the author's personal view and does not reflect the firm's opinion.

governing law and jurisdiction clause in transnational business contracts involving one or more Indonesian party is regarded in Indonesian Courts.

Keywords: Private International Law, Conflict of Laws, International Business Transactions, Choice of Law, Choice of Forum

1. Overview

Globalization plays a significant role in pushing relations between countries to improve in a rapid pace. Not a single country in the world is capable of surviving all by itself, without any alliance with other countries, either directly or indirectly. Such partnerships arise because of, among others, the uneven distribution of natural resources and industrial development in the world. Aside from countries, international partnership may also arise due to reasons such as expanding one's business in different parts of the world, or advancing an otherwise underdeveloped field of business.²

Transactions that have crossed state boundaries carried out by economic actors are known as international business transactions.³ One of the most common economic actors are companies, and the contract arising from them is commonly dubbed as transnational company contract. Companies and other economic actors will be associated with national laws from two or more countries, depending on the business transaction.⁴ International business transactions also lead to the need for rules that protect the interests of foreign parties.⁵ Such transnational transactions are governed by a field of law commonly known as Private International Law or Conflict of Laws.

While people, goods, services, money, ideas, and many other things readily cross borders, the transnational legal system, if such a system can be said to exist, is highly decentralized. Legal authority is still organized primarily by national territory, and law differs considerably across nations, reflecting nations diverse policies and values about how to govern human

² Mochtar Kusumaatmadja and ETTY R. AGOES, *Pengantar Hukum Internasional* (PT Alumni 2003) 12

³ Rafiqul Islam, *International Trade Law* (LBC Information Services 1999) 1

⁴ Hikmahanto Juwana, *Transaksi Bisnis Internasional dan Hukum Kepailitan* (Majalah Hukum Nasional 2002) 77

⁵ Joseph Henry Beale, *A Treatise on the Conflict of Laws* (1st edn, Harvard University Press 1916) 5

activity.⁶ As a result, cases often arise due to parties disagreeing over which law applies in the dispute of a contract without a preemptive clause regarding the governing law and jurisdiction. This proves that the existence of a clause in which the parties agreed on which state law to use is crucial.⁷

This statement is in accordance with the Preamble of International Institute for the Unification of Private Law (hereinafter referred to as “UNIDROIT”)’s Principles of International Commercial Contracts, published in 1994, which stated that:

“...The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate.

“...The situation may be different if the parties agree to submit disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law.”

Preselection of governing law and jurisdiction provide reasonable predictability of the law that will be applied in the event of a dispute. In modern-day drafting, rights and obligations are typically specified within the written agreement, yet, the need for a choice of law clause still persists. The chosen law will determine their validity and effect and the forum selected by the parties will ensure that their choice of law is upheld and applied. Forum as used here includes Courts and arbitral tribunals or processes even

⁶ Christopher A. Whytock, ‘Conflict of Laws, Global Governance, and Transnational Legal Order’ (2016) Vol.1 Journal of International, Transnational, and Comparative Law, 117

⁷ Chairul Anwar, *Hukum Perdagangan Internasional* (Novindo Pustaka Mandiri 1999) 93

though the arbitration clause is in effect a specialized kind of choice of forum clause.⁸

However, even if the parties have agreed on a governing law and jurisdiction, the potential for disputes over the authority to adjudicate still remains. This paper attempts to address the application of governing law and jurisdiction clause in a transnational transaction involving one or more parties from Indonesia, and is equipped with an analysis of case decisions as comparison.

2. The Definition of Private International Law

The Private International Law or Conflict of Laws is a branch of legal science which seeks to determine the application of law when a dispute involves two or more systems of law.⁹ Some might argue that both “Private International Law” and “Conflict of Laws” do not accurately describe its own purpose, but they have become too widely accepted to be replaced even in favor of some other scientifically accurate term.¹⁰

Cheshire, an English scholar, stated that Private International Law comes into operation whenever the Court is faced with a claim that contains a foreign element and functions only when this element is present. It is the part of law which comes into play when the issue before the Court

⁸ *Scherk v. Alberto-Culver Co.*, [1974] 417 U.S. 506, 519

⁹ Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (The Macmillan Co. 1937) 1

¹⁰ *ibid*,

In the United States, the term is more commonly known as “Conflict of Laws”, while “Private International Law” is somewhat of a less popular alternative. Several English authors, such as Phillimore, Foote, Westlake, and Chesire used the term “Private International Law” without alternating with “Conflict of Laws”, as opposed to American authors such as Wharton, Minorm and Beale who employed “Private International Law” as an alternative. Among French authors, the term *Droit international privé* is a comprehensive term, whereas *Conflits de lois* is used to describe the vast problems in which the application of foreign law is indicated for reasons other than the status of a person or a party.

affects some fact, event, or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system.¹¹

Stevenson defined Private International Law as a field of study consisting of norms to be applied in international¹² cases to determine the judicial jurisdiction¹³ of a State, the choice of the particular system or systems of law to be applied in reaching a judicial decision, and the effect to be given to a foreign judgement.¹⁴ This is in line with Whytock's definition of Conflict of Laws: as a body of law that governs multijurisdictional legal problems,¹⁵ typically with three branches: jurisdiction, choice of law, and recognition and enforcement of foreign judgements. Jurisdictional rules determine the authority of Courts to adjudicate disputes arising out of transnational activities; choice-of-law rules determine which nation's laws apply to transnational activity; and recognition-and-enforcement rules

¹¹ Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu* (3rd edn, PT. Citra Aditya Bakti 2001) 6

¹² John R. Stevenson, *The Relationship of Private International Law to Public International Law* (Columbia Law Review 1952) 561

Stevenson used "international" in the broadest sense of the word, meaning to include all cases in which some important elements are foreign to the forum, such as the nationality of the parties, the place where the contract was made and entered, or the location of the object. It is also noted that private international law should probably be limited to situations in which international – as opposed to interstate jurisdiction – choice of law, or foreign judgement questions are present. However, the limitation does not apply to problems involving the law of a state and some foreign country, or even the law of two states from different countries.

¹³ *ibid*, 562

"Judicial jurisdiction" means the power of a State to empower one of its governmental instrumentalities to hear a particular dispute and give judgement in the premises.

¹⁴ *ibid*

¹⁵ Christopher Whytock (n 6) 119

govern whether a nation will recognize and enforce another nation's Courts.¹⁶

Sudargo Gautama also provides a summary on four scopes of Private International Law, namely:

- a. Private International Law as *rechtstoepassingsrecht*: this opinion is adopted by the Dutch legal framework. In this concept, Private International Law is limited only to the issue of conflict of laws (Sudargo Gautama was more inclined to use "choice of law")¹⁷ because no actual dispute regarding legal systems exists, but merely a question of which legal system would work the best for the current predicament? The issues discussed are only related to the question of the choice of law between legal systems that happen to intersect due to the existence of a foreign element, and do not concern matters like the competence of judges or citizenship issues, even though they are included in other States' definition of Private International Law. Hence the term *rechtstoepassingsrecht*.
- b. Private International Law that consists of choice of law and choice of jurisdiction issues: this concept is a tad broader than the first one, and is adopted by the Anglo-Saxon legal framework. Private International Law is not limited to conflict of laws, but also involves the choice of jurisdiction and the competence of judges. In fact, English scholars agreed that instead, questions regarding *jurisdictie* must be solved first before moving on to the applicable law.¹⁸

¹⁶ Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, *Conflict of Laws* (5th edn, West Academic Publishing 2010) 1-4

¹⁷ Arthur K. Kuhn (n 9)

Paraphrased from Kuhn, "a choice between two or more systems of law."

¹⁸ Sudargo Gautama, 'Apa Saja yang Termasuk Hukum Perdata Internasional?' (1997) 7(2) *Jurnal Hukum dan Pembangunan Universitas Indonesia* <<http://jhp.ui.ac.id/index.php/home/article/view/652/580>> accessed on 30 July 2019

- c. Private International Law that consists of choice of law, choice of jurisdiction, and *condition des etrangers* issues: the third conception is widely accepted among Latin countries, such as Italy, Spain, and Southern America, and is related to choice of law, choice of jurisdiction and status or nationality of foreigners/aliens. The issues discussed within its scope are, among others, whether foreigners are allowed to work in a country, certain restrictions on land ownership to aliens, limitation in trade practice, industry, *et cetera*.
- d. Private International Law that consists of choice of law, choice of jurisdiction, *condition des etrangers* and nationality issues: this is the broadest concept out of all, with the same content as the previous concept but with an addition of nationality issue, such as the how one gains and losses their nationality. This concept, among others, is widely practiced in France. Sudargo Gautama also sees this concept as the most ideal scope of Private International Law.

Most of the definitions above suit Sudargo Gautama's second scope of Private International Law, which mostly discuss about choice of law and choice of jurisdiction.

3. The Governing Law and Jurisdiction of Transnational Contracts

A contract or an agreement is a consensus between 2 (two) or more people that contains rights and obligations that are reciprocated and recognized under the law, or which implementation is recognized as a legal obligation. Based on such definition, the essential things that define a contract are consensus and the rights and obligations to perform something (contractual rights and obligations).

In Private International Law, contracts are among the source of conflicts. It is essential to note that Private International Law only applies to contracts containing international/foreign elements, which will be referred to as Transnational Contracts for the purpose of this paper.

The common misconception regarding governing law and jurisdiction is that both are often seen as one identical problem or even mixed up, but

are actually two separate issues.¹⁹ Choosing a governing law means that the forum overseeing the case with international/foreign element shall employ the chosen law in the judgement process²⁰ while choosing a jurisdiction means appointing a judicial institution or other institution that will adjudicate the parties' dispute shall it arises in the future.²¹

3.1 Definition of Governing Law and Jurisdiction

The jurisdiction of a forum in Private International Law means the power and authority of a forum to examine and adjudicate a problem that is presented to it regarding a case involving at least one relevant element of foreign law. To carry out internationally recognized jurisdiction, a forum must have certain links with the agreement and parties. Typically, a transnational contract contains the jurisdiction clause, also known as choice of forum, in which a forum is agreed on by the parties to oversee any dispute arising from the contract.

A choice of forum can be exclusive or non-exclusive. An exclusive jurisdiction clause means that only the Court(s) in a jurisdiction is considered competent to judge the case; it limits disputes to the Courts of one jurisdiction, thus offering greater protection since it is less likely for another country to accept the case if faced with an exclusive choice of forum clause. Non-exclusive jurisdiction clause, on the other hand, means the disputes shall be heard in the Courts of a particular jurisdiction but without

¹⁹ Jay Lawrence, 'Extraterritoriality, Conflict of Law, and the Regulation of Transnational Business' (1988) *Texas International Law Journal*, 154

Just because a State's national law becomes the governing law on a dispute does not necessarily mean their court has jurisdiction over it, and vice versa.

²⁰ Sudargo Gautama, *Hukum Perdata Internasional; Hukum yang Hidup*, (Alumni 1983) 52

²¹ *ibid*, 53

prejudice to the right of one or other parties to take such dispute to the Courts of other jurisdiction if it is deemed appropriate.²²

Meanwhile, there are several theories regarding what is the governing law in a contract. Just like the choice of forum, typically parties chose what law should govern the contract, and it is usually stated inside of the contract. If the choice of law is clearly stated, then it shall be applied, but if no governing law clause exists, then other theories can be used. Some suggest that the governing law should depend on where the contract is signed and entered (the *lex loci contractus* theory);²³ where the contract is executed (the *lex loci solutionis* theory);²⁴ what is the most relevant legal system to the contract (the proper law of the contract theory); or depending on which party has the most significant contribution (the most characteristic connection theory).²⁵ Ultimately, the governing law and jurisdiction clause, which depend on the parties' agreement, follow how the appointed judges choose to handle the dispute.

3.2 Examining Private International Law Disputes Arising from Transnational Contracts

Sunaryati Hartono, an Indonesian scholar, provides four stages in examining Private International Law disputes.²⁶

In the first stage, one must determine whether a dispute incorporates Private International Law elements or not. When a dispute

²² Dave Lau, 'Non-Exclusive Jurisdiction Clauses – effect in Hong Kong Law' (*Lexology*, Hongkong, White & Case LLP, 7 January 2009) 2
<<https://www.lexology.com/library/detail.aspx?g=fdbc7539-eb57-458e-be94-aed610654823>> accessed 25 October 2019

²³ Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid III Bagian II* (8th edn, Alumni 2002) 12

²⁴ *ibid*, 16

²⁵ *ibid*, 32

²⁶ Sunaryati Hartono, *Pokok-Pokok Hukum Perdata Internasional* (Putra A. Bardin 2001) 13-14

arises, there are legal issues in the form of a set of legal facts. In order to be recognized as a Private International Law matter, the legal facts, circumstances or factors of a dispute must contain foreign elements— they shall create a relation between two or more legal systems, and are commonly called “distinguishing link points”.²⁷ Consequently, Private International Law shall apply, and the parties must decide which jurisdiction is authorized to adjudicate the dispute. This is where the choice of forum clause is enforced.

Secondly, the parties shall determine the legal issue of said dispute. The qualification of facts follows the law of the forum or *lex fori*.²⁸ If a case is submitted in Indonesia, then the qualification of facts shall follow the law used by Indonesian Courts; for example, a failure to perform certain obligations in a contract shall be categorized as a breach of contract as regulated in the Indonesian Civil Code.

The third attempt is to find out the governing law or *lex causae*. In practice, sometimes the governing law is also the law of the forum. Other times it may be determined by where the contract was signed, or where the contract is executed, and other factors. The choice of law clause is enforced in this stage.

The fourth and final stage is adjudicating the dispute in accordance with the governing law. However, the governing law may not be used in two occasions: (i) if the judicial process based on *lex causae* threatens to disrupt public order and (ii) if no provision in *lex causae* regulates the prevailing matter. In either case, *lex fori* shall apply instead.

4. Indonesian Court Authority

²⁷ Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (Binacipta 1987)

²⁸ Bayu Seto, (n 11) 10

Lex fori is the legal system from the jurisdiction where the legal issues are submitted as cases. In other words, lex fori is the law of the forum where the case is adjudicated.

In determining whether an Indonesian Court has the authority to adjudicate a dispute or not, then one must first look at the Indonesian civil procedural law. The relevant procedural codes in this matter are the *Het Herziene Indonesisch Reglement* (the Revised Indonesian Regulation; hereinafter referred to as HIR), *Reglement op de Rechtsvordering* (Rules of Procedure; hereinafter referred to as RV).

HIR is the procedural law that applies in Indonesia today, but it does not regulate the proceeding of cases containing foreign elements. However, Article 118 HIR contains provisions regarding the procedure for commencing litigation in first degree hearing in District Court:

- (1) The civil lawsuit in first degree hearing is the jurisdiction of the District Court, and shall be submitted with a letter of claim (lawsuit) signed by the plaintiff, or by their representative, in accordance with article 123, to the Chairman of the District Court in where the defendant lives or resides, or if his residence is not known, to the Chairman of the District Court in his actual place of residence.
- (2) If there is more than one defendant, and they do not live in the same jurisdiction of the same District Court, the lawsuit is filed with the Chairman of the District Court in one of the defendants' residences, chosen by the plaintiff. If the defendant is a principal debtor and a holder thereof, without prejudice to the provisions of Article 6 paragraph (2) of "The Judicial and Prosecution Regulation in Indonesia", the lawsuit is filed with the Chairman of the District Court in the principal debtor or one of the principal debtors' residence.
- (3) If neither the defendant's address nor actual residence is known, or if the person is not known, the lawsuit is filed with the Chairman of the District Court in the plaintiff or one of the plaintiffs' residence, or if the lawsuit concerns immovable goods, to the District Court within where the property is located.
- (4) If a place of residence is selected with a deed, the plaintiff may, if they wish, file the lawsuit to the Chairman of the District Court whose jurisdiction is within the elected residence.

Article 118 paragraph (1) and (2) of HIR stipulates that a lawsuit shall be filed to the District Court is in the defendant's address or actual domicile, a principle universally known as *Actor Sequitor Forum Rei*. The exception to this principle is then stated in paragraph (3), which stipulates that if the defendant's address or himself is unknown, then the lawsuit can be filed in the plaintiff's District Court or where the immovable goods reside instead, and in paragraph (4) where the plaintiff can file the lawsuit to a whole different Court as elected in a deed or contract.

Article 118 paragraph (3) of HIR makes it possible for the foreign defendants, who does not have a known place of residence, be sued before the forum of the District Court of the plaintiff's residence (*forum actoris*). Meanwhile Article 118 paragraph (4) acknowledges the parties' freedom to choose a jurisdiction. For example, even though the defendant lives in London and the plaintiff lives in Bogor, they may agree to choose the Central Jakarta District Court as the forum.

Thus, the status between foreign legal subjects and the subject of Indonesian law is not differentiated before the Court, because foreign parties can also sue the Indonesian side before an Indonesian Court, as long as the subject of the foreign country is related with Indonesian legal subjects. The opposite of this is found in Article 100 RV, which states that foreign parties can be sued before an Indonesian Court, if they have trade contracts with Indonesian legal subjects. Article 100 RV adheres to the principle of protection of the interests of the subjects of Indonesian law by extending the authority of the Court to accept claims against foreign parties.

5. Indonesian Court Decisions on Governing Law and Jurisdiction Clause: Inconsistency in Landmark Decisions

When analyzing how Indonesian Courts see governing law and jurisdiction clause, two cases come to mind: *Mitomo Shoji v. Bali Energi, et. al.* and *PT. Pelayaran Manalagi v. PT. Asuransi Harta Aman Pratama, Tbk.* Both cases involved the execution of a contract, with existing choice of law and choice of forum overseas, but the lawsuits were filed in the District

Court of Central Jakarta. The Mitomo Shoji case have yet to be declared *inkracht* since an appeal to the Supreme Court is still possible. However, the case may become a notable example to see how the judges in Indonesia perceive or treat the governing law and jurisdiction clause in a contract.

First, Interlocutory Decision No. 359/Pdt.G/2011/PN.Jkt.Pst. and Decision No. 186/PDT/2014/PT.DKI, respectively, are the District Court and High Court decision regarding the dispute between Mitomo Shoji (Plaintiff) against Aim Holding (Defendant 1), Koji Matsumo (Defendant 2), Matsuo Watabe (Defendant 3) and Bali Energi Ltd. (Defendant 4). The dispute concerning implementation of a contract made by and among the Plaintiff (as the investor) with Defendant 1 and Defendant 2 (as shareholders in Defendant 4) and Defendant 3 (as guarantor). The Contract, dated 27th of October 2010, contains provisions regarding the financing of Defendant 4, the planned sale of 70% of the shares, and distribution of profit from the sale of shares between the parties.

In regards to the governing law and jurisdiction clause in this case, the parties have agreed and subjected themselves to the District Court of Tokyo and Japanese Law should any dispute in connection with the implementation of the contract arise. This was shown in Article 11 of the contract, which stated that:

“11. The First Party and the Second Party shall agree that the governing law in regards to this matter shall be Japanese law unless other circumstances arise, and also agree that the court competent jurisdiction shall be Tokyo District Court.

The First Party AIM Holding Co., Ltd.

Representative Director Shu Hirano

The Second Party Koji Matsumoto

39-16, Oyama-cho, Shibuya-ku, Tokyo

The Third Party Watabe Matsuo

1-5-14-301, Jinnan, Shibuya-ku, Tokyo

Abovementioned articles from 1 through 11 are all confirmed and approved.”

Despite the abovementioned clause, the Plaintiff still decided to file his lawsuit to the District Court of Central Jakarta. The Defendants argued that the Plaintiff deliberately involved Defendant 4, who happens to be located in Indonesia, into the lawsuit to deviate from the appropriate Court, which is the District Court of Tokyo.

The judges in the District Court of Central Jakarta decided that since the Defendants reside in different addresses, the Article 188 paragraph (2) HIR became applicable. The aforementioned Article stated that:

- (1) If there is more than one defendant, and they do not live in the same jurisdiction of the same District Court, the lawsuit is filed with the Chairman of the District Court in one of the defendants' residences, chosen by the plaintiff. If the defendant is a principal debtor and a holder thereof, without prejudice to the provisions of Article 6 paragraph (2) of "The Judicial and Prosecution Regulation in Indonesia", the lawsuit is filed with the Chairman of the District Court in the principal debtor or one of the principal debtors' residence.

The judges found that since Bali Energi Ltd. is located in the 4th Floor of STC Senayan Building, Suite 71, Jl. Asia Afrika, Central Jakarta, the District Court of Central Jakarta had the necessary jurisdiction to adjudicate the matter. In the interlocutory decision, it was declared that the District Court of Central Jakarta is appropriately suited to hear the dispute, thus the parties shall proceed to the hearing of the merits of the case. Defendant 4 later brought the interlocutory decision to the High Court of Jakarta. However, in Decision No. 186/PDT/2014/PT.DKI, the High Court reinforced the previous interlocutory decision, giving full jurisdiction to the District Court of Jakarta to judge the case regardless of the parties' choice of law and forum.

As comparison, let us revisit the second case: Supreme Court of Indonesia Decision No. 1935 K/Pdt/2012, which was preceded by 52/Pdt.G/2010/PN.Jkt.Pst and 297/PDT/2011/PT.DKI of the District Court and

High Court, respectively. The parties to this case were PT. Pelayaran Manalagi as the Plaintiff and PT. Asuransi Harta Aman Pratama, Tbk. as the Defendant. Both were Indonesian companies, bound to Marine Hull and Machinery Policy Insurance Agreement No. 03.08.05.10.827.00025, signed and enforced in Indonesia, with the Plaintiff as the Insuree and the Defendant as the Insurer. The object to this contract was a motor vessel called KM. Bayu Prima, registered in Indonesia, owned, and operated by the Plaintiff. One day, the vessel caught fire. To ensure the safety of everyone involved, the Harbormaster ordered the crew to leave and beached the vessel. In accordance with the Marine Hull and Machinery Policy, the Insuree filed a Notice of Abandonment, claiming the total loss suffered from the accident. However, the claim was declined due to several reasons. Later, the Plaintiff filed a lawsuit against the Defendant on the ground of unlawful declination of insurance claim.

In regards to governing law and jurisdiction, the insurance agreement contained a clause stating that “[the insurance] is subject to English law and practice”, but the lawsuit was filed in the District Court of Central Jakarta. Similar to the Japan case discussed above, the Defendant *a quo* argued that the District Court of Central Jakarta had no jurisdiction over the case since the parties had agreed to subject themselves to English law. The argument was rejected by the Court, stating that choice of law and choice of jurisdiction are two different issues, and that even though the insurance agreement was subject to English law, no choice of forum was present in the agreement. Since the Defendant resided in Central Jakarta, according to HIR the lawsuit became the District Court of Central Jakarta’s jurisdiction. Another significant fact is that the District Court Judges acknowledged the Private International Law aspects of the case, citing the Marine Insurance Act 1906 as part of the English Law which the parties have subjected themselves to.

The Defendant later filed an appeal to the High Court, and the District Court’s decision was later reinforced by the High Court of Jakarta.

However, the Indonesian Supreme Court decided otherwise. Article 1338 of the Indonesian Civil Code was used as the legal consideration, stating that: “All legally executed agreements shall bind the individuals²⁹ who have concluded them by law. They cannot be revoked otherwise than by mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith.” Since the insurance agreement was legally executed, the provisions in it should be respected, including the governing law and jurisdiction clause. The Supreme Court declared that the District Court of Central Jakarta had no jurisdiction over the case, and cancelled the preceding Court decisions.

In the *Mitomo Shoji v. Bali Energi, et. al.* case, although both parties have agreed to subject themselves to Japanese Law and chose the Tokyo District Law as the appropriate forum, the judges ignored that and simply cited Article 118 paragraph (2) HIR to rule themselves competent over the case. Meanwhile, in the *PT. Pelayaran Manalagi v. PT. Asuransi Harta Aman Pratama, Tbk.* case, the District Court and High Court judges have done the right thing by separating choice of law from the choice of forum issue, only to be jeopardized by the Supreme Court decision. From these examples, it is clear that how judges in the Indonesian Courts perceive governing law and jurisdiction clause may greatly differ between one judge and the another.

6. Conclusion

Due to the presence of foreign elements or facts in disputes involving international business contracts, judges must first determine whether the forum has jurisdictional competence to adjudicate such dispute. In determining the jurisdiction, judges shall adhere to the rules and principles of Private International Law as part of the *lex fori* system, on which States determine whether a Court has competency to claim

²⁹ Subekti, *Pokok-Pokok Hukum Perdata* (P.T. Intermedia 2010) 19–21

The term ‘individual’ in Indonesian law refers to two legal subjects, namely a person (*natuurlijkpersoon*) and a legal entity (*rechtspersoon*).

jurisdiction over the case in question or not. After ensuring that a forum does have jurisdiction over the dispute, only the judges then determine which law shall apply to the case; making clear that choice of law and choice of forum are two different, albeit intertwining, issues.

As a civil law country, the difference between one Court decision and another is what to be expected. However, inconsistency is also a present problem. In both case studies presented above, judges gave no explanation on why they chose to acknowledge certain principles and ignore the others. In adjudicating civil cases that have foreign elements, judges shall adhere to the principles of international civil procedural law that are developed and used internationally by foreign Court judges.

Bibliography

Books

Anwar C, *Hukum Perdagangan Internasional* (Novindo Pustaka Mandiri 1999)

Beale J, *A Treatise on the Conflict of Laws* (1st edn, Harvard University Press 1916)

Gautama S, *Hukum Perdata Internasional; Hukum yang Hidup*, (Alumni 1983)

Gautama S, *Pengantar Hukum Perdata Internasional Indonesia* (Binacipta 1987)

Gautama S, *Hukum Perdata Internasional Indonesia, Jilid III Bagian II* (8th edn, Alumni 2002)

Hartono S, *Pokok-Pokok Hukum Perdata Internasional* (Putra A. Bardin 2001)

Hay P, Borchers P, Symeonides S, *Conflict of Laws* (5th edn, West Academic Publishing 2010)

Islam R, *International Trade Law* (LBC Information Services 1999)

Juwana H, *Transaksi Bisnis Internasional dan Hukum Kepailitan* (Majalah Hukum Nasional 2002)

Kuhn A, *Comparative Commentaries on Private International Law or Conflict of Laws* (The Macmillan Co. 1937)

Kusumaatmadja M and Agoes E, *Pengantar Hukum Internasional* (PT Alumni 2003)

Seto B, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu* (3rd edn, PT. Citra Aditya Bakti 2001)

Stevenson J, *The Relationship of Private International Law to Public International Law* (Columbia Law Review 1952)

Subekti, *Pokok-Pokok Hukum Perdata* (P.T. Intermedia 2010)

Case

Scherk v. Alberto-Culver Co., [1974] 417 U.S. 506, 519

Journals Articles

Gautama S, 'Apa Saja yang Termasuk Hukum Perdata Internasional?' (1997) 7(2) *Jurnal Hukum dan Pembangunan Universitas Indonesia* <<http://jhp.ui.ac.id/index.php/home/article/view/652/580>> accessed on 30 July 2019

Lawrence J, 'Extraterritoriality, Conflict of Law, and the Regulation of Transnational Business' (1988) *Texas International Law Journal*

Whytock C, 'Conflict of Laws, Global Governance, and Transnational Legal Order' (2016) Vol.1 *Journal of International, Transnational, and Comparative Law*

Websites and Blogs

Lau D, 'Non-Exclusive Jurisdiction Clauses – effect in Hong Kong Law' (*Lexology*, Hongkong, White & Case LLP, 7 January 2009) <<https://www.lexology.com/library/detail.aspx?g=fdbc7539-eb57-458e-be94-aed610654823>> accessed 25 October 2019

CONSUMER PROTECTION ON FACEBOOK LIVE SALES*

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Abstract

Online sales are activities through interactive channels of communication, connecting with users all around the world. The sales on the social network are widely popular as a device for communication with customers. In Thailand, one of the most prominent social networks among people is Facebook. To this end, We Are Social, the digital agency of the United Kingdom, has revealed that Thailand ranked 8th in term of Facebook use in 2018, and Bangkok, the capital of Thailand, ranked 1st in the category of city. In 2016, Facebook launched a live streaming function, called Facebook Live. This function is very powerful since the users can share their feeling, information, or merchandise in the form of live show through this function. As a result, Facebook Live has also effectively become a channel for commercial activities. This is suitable for lifestyles of Thai people, who live in big cities and use Facebook during their leisure.

The online activities make everything for people more convenient than in the past. This is because they do not need to deal with a traffic jam when going out for shopping etc. The method of selling via Facebook Live is simple. To clarify, the seller just turns on the live streaming

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function, allowing any Facebook users to watch his/her commercial activities. In this regard, the users who are interested in the products can immediately purchase such products during the live show.

The payment for products is mostly made by transferring directly to the sellers. Once the sellers receive a notice of payment, they will deliver an ordered product to the buyers via post or a logistics company.

However, in many occasions the buyers do not receive the goods they have ordered or the goods have a defect. Once such problems occur, it is difficult for the buyers to contact the seller in order to seek a refund or reimbursement since Facebook does not require any personal information of the user such as house registration number and identity card number in the process of registration.

These days, Thailand has two general laws aiming to protect a consumer, namely Consumer Protection Act 2522 and Direct Sales and Direct Marketing Act B.E. 2545 (3rd amended, B.E. 2560). Nonetheless, the scopes of protection under these two laws are insufficient to protect a consumer in the case of Facebook Live sales.

The author then has thus studied in order to solve this problem by bringing foreign laws namely: United Kingdom Laws and Singapore Laws for analyzing and comparing. In this respect, the author finds that the Thai existing consumer laws especially Direct Marketing Act B.E. 2545 (3rd amended, B.E. 2560) do not cover the protection of a consumer in the case of Facebook Live sales. Therefore, the amendments should be made.

Keywords: E-Commerce, Facebook Live Sales, Consumer Protection

1. Introduction

Online sales have become widespread in Thailand. The report from the Electronic Transaction Development Agency (Public Organization) of Thailand or ETDA indicated that the value of E-commerce in Thailand has risen every year since 2014.¹

ETDA further revealed that during 2015 – 2016, approximately 30 million of the Thai population are able to access the internet and 50% of those have experience in online shopping. The rate of this type of shopping growths increased to 19% in 2016.²

ETDA also disclosed that Thai people are fond of using online social media such as YouTube, Facebook, Twitter, Instagram, for communicating with others as well as sharing their stories, photos, and videos. More specifically, Thai people spend around 3 hours and 30 minutes a day using Facebook. As for YouTube, people use this channel to watch movie, video, live streaming of concerts or sports averagely for 2 hours and 35 minutes a day.³ Overall, Thailand ranked 1st in terms of internet users in such year.

Considering the social network, Thailand ranked 8th in terms of Facebook use in 2018. Bangkok, the capital of Thailand, ranked 1st in category of city.⁴

¹ Electronic Transactions Development Agency, 'Value of e-Commerce Survey in Thailand 2017' (ETDA, 27 September 2017) <<https://www.eta.or.th/publishing-detail/value-of-e-commerce-survey-2017.html>> accessed 25 September 2018

² Electronic Transactions Development Agency 'Thailand Internet User Profile 2017' (ETDA, 29 September 2017) <<https://www.eta.or.th/content/thailand-internet-user-profile-2017.html>> accessed 25 September 2018

³ Electronic Transactions Development Agency, 'Thailand Internet User Profile 2018' (ETDA, 25 July 2018) <<https://www.eta.or.th/content/eta-reveals-thailand-internet-user-profile-2018.html>> accessed 25 September 2018

⁴ Simon Kemp, 'We Are Social Ltd, Digital in 2018: World's Internet Users Pass the 4 Billion Mark' (We Are Social Ltd., 30 January 2018) <<https://wearesocial.com/uk/blog/2018/01/global-digital-report-2018>> accessed 26 September 2018

Continually, Facebook has developed many of its functions. In 2016, it launched a live streaming function, Facebook Live. Merchants use this live channel to sell items such as clothing and beauty accessories, etc. directly to their customers.⁵

During the live show, the seller usually displays the goods and provides brief information regarding the type of goods, brand, quality, size, and price. Any Facebook users can watch the show and purchase the products they are interested in during the show.

In general, the buyer will transfer the money to the seller's bank account. However, there is another channel providing payment system for ordered goods such as internet banking, mobile application, and prompt pay system, etc.

After receiving the notice of payment, the seller will deliver goods to the buyer mainly through the service of Thai Post Office or other shipping companies such as Kerry Express.⁶

Facebook Live sale is a type of E-Commerce. The purchasing process is concluded electronically and the payment transaction is via electronic channels. However, there are always several problems frequently occurring in the case of online sales including sales via Facebook Live.

EDTA has exposed that in Thailand, the number of consumer's complaints regarding online sales during 1st January 2018 to January 2019 rose to 17,558. To this end, the problems in relation to online sales can be categorized as follows:

1. The buyers are confused about the process of filing a complaint.
2. Consumer has concern over the creditability of the online seller.
3. The buyer does not receive the purchased goods.

⁵ Greg Swan, 'Facebook Live Video Shopping Being Tested In Thailand' (*Tinuiti*, 19 December 2018) <<https://www.cpcstrategy.com/blog/2018/12/facebook-live-video-shopping/>> accessed 28 June 2019

⁶ Kerry Express Thailand, 'Our Pride' (*Kerry*) <<https://th.kerryexpress.com/en/home/>> accessed 7 July 2019

4. The buyer receives the goods differently from the ordered.

When there is a problem as to Facebook online sales, it is difficult for the buyer to contact the Facebook Lives seller as Facebook does not require any personal information such as house registration, ID card number or even mobile phone number for the registration. In other words, anyone can create a Facebook account by using fake information.

Thailand currently has general laws intended to protect a consumer, namely Consumer Protection Act 2522 and Direct Sales and Direct Marketing Act B.E. 2545 (3rd amended, B.E. 2560).

The scope of the consumer protection under the Direct Sales and Direct Marketing Act B.E. 2545 (3rd amended 2560) covers consumers for distance selling and online sales only in such the cases as sales on the website.⁷

Thus, there is no protection for the consumers in the case of Facebook Live sales.

2. Overview of Facebook Live Sales

Facebook Live sales is considered to be E-Commerce in the category of Consumer to Consumer (C2C). It is also called Social Commerce due to that Facebook is a social network.

Any Facebook users can use their Facebook account to sell goods or provide services by relying only on the live streaming function. During the live shows, the sellers are able to displays the products and give their brief information regarding the goods.

⁷ Direct Sales and Direct Marketing Act, 3rd Amendment B.E. 2560 (2017)

“direct marketing” means marketing of goods or services in the manner of communication of information in order to directly offer goods or services to consumers who are at a distance, with the aim of receiving a response by each customer to purchase the goods or services from such direct market operator, while sales of goods or services via the electronic commerce method, which is not deemed as marketing, shall be subject to rules and conditions prescribed in Ministerial Regulations”

Once interested in a product, the buyers can purchase such a product during the live show and make a payment through the channel informed by the seller. The purchased goods will be delivered to the buyers soon afterward.

3. Problems Relating to Consumer Protection for Facebook Live Sales under Thai Laws

3.1 Problems Regarding the Definition of “Direct Marketing” under Thai Laws

The definition of “direct marketing” has been defined under the Direct Sale and Direct Marketing Act B.E. 2545 (amended B.E 2560) as follows:

“Direct Marketing means marketing of goods or services in the manner of communication of information in order to directly offer goods or services to consumers who are at a distance, with the aim of receiving a response by each customer to purchase the goods or services from such direct market operator, while sales of goods or services via the electronic commerce method, which is not deemed as marketing, shall be subject to rules and conditions prescribed in Ministerial Regulations”

After interpreting the above definition, it seems that this definition aims to protect the consumer who has purchased the goods or services from direct marketing.

In this regard, the direct marketing is the type of marketing that market goods or services through communicating and offering goods or services directly to consumers who are at a distance, with the aim of receiving a response by each customer to purchase goods or services. The communication of information under this definition might be via the telephone, fax, or other devices that can be considered a distance communication.

When a consumer response to such an offer, the contract will be deemed executed immediately. The seller and the consumer are not able

to further negotiate. This means such contract is a completed sales contract.

However, according to the definition given under the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560), some type of online sales such as sale via the website “JD Central” or www.jd.co.th, is protected.

Facebook Live sales is considered one of the social commerce. Moreover, the operator and the consumer can negotiate during the sales. Therefore, the consumer who has purchased goods from Facebook Live sales is not protected under the definition “direct marketing” of the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560).⁸

3.2 Problems Regarding the Right to be Informed under Thai Laws

In Thailand, the right to be informed is stated in section 30⁹ and 31¹⁰ of the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560).

⁸ Pairoj Artraksa, *Kham Athibai Kodmhai Kai Trong Lae Talad Bab Trong [Direct Sales and Direct Marketing]* (Nititham Publishing House 2017) 148 (ไพโรจน์ อารักษ์ษา, *คำอธิบายกฎหมายขายตรงและตลาดแบบตรง (สำนักพิมพ์นิติธรรม 2560)*) 148

⁹ Direct Marketing Act 2017 (n 7) s 30

“An independent distributor, a direct sale agent or a direct marketing businessman shall have the duty in delivering to the consumer the document concerning the purchase and sell of goods or service.

The direct marketing operator is responsible for documenting the purchase of goods or services and delivering to consumers along with products or services.

The document concerning purchase and sell under paragraph one shall contain a Thai language statement that is perceptible, indicating the name of the purchaser and of the seller, the date of purchase and the date of delivery of the goods or service, including the right of consumer to terminate the contract. The right to terminate the contract shall be printed in the alphabets that are conspicuous compared to the general statements.”

¹⁰ *ibid*, s 31

By such law, a direct marketing operator needs to prepare and provide documentation regarding sales of goods or services. In addition, the operator has to submit such a document to the consumer along with the goods or services.

The details in the document must contain essential information such as the details of goods/services, the method of payment, the place and the method to deliver goods/services, the cancellation of the contract, warranty and refund in case of defect. In practice, most of the sellers on Facebook Live do not comply with the above prescriptions.

In the United Kingdom, the consumer law states that before the buyers place their order, the trader must inform the buyers of the information related to goods/services including such the rights of consumer as the right to know the detail of goods or services, the right to terminate the contract, the right to be reimbursed, etc. Besides, the trader must ensure that the consumers acknowledge all the details before placing their order as well.¹¹

“The Board shall have the power to specify details of a document concerning purchase and sell of goods or service that adopts the method of direct sale or direct marketing, with emphasis on price of goods or service that are subject to the consumer is protected and type of goods or service.

The document concerning purchase and sell under paragraph one shall contain at least the following particulars:

- (1) details under section 30;*
- (2) scheduled time, place and method of payment of debt;*
- (3) place and method of delivery of goods or service;*
- (4) method for termination of the contract;*
- (5) method for returning of goods;*
- (6) warranty on goods;*
- (7) replacement of goods in case of its defect.*

The announcement prescribing details of a document concerning purchase and sell shall be published in the Government Gazette.”

¹¹ The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, s 13

3.3 Problems Regarding the Cancellation of a Contract under Thai Laws

Under Thai laws, Section 33 of Direct Sale and Direct Marketing Act B.E. 2545 (amended B.E 2560) provides that the consumer has the right to terminate the contract by submitting a notice within 7 days from the date of receiving the goods.¹²

In this regard, the termination under Section 33 is different from the one under the Thai Civil and Commercial Code in that the buyer under Section 33 does not need to provide a reason for termination.

The termination without giving a reason is specified only in Direct Sale and Direct Marketing Act B.E. 2545 (amended B.E 2560).¹³

In practice, however, it is very difficult for the consumer to submit a notice to the operator of Facebook Live sales in Thailand because the operator does not provide their personal information to the consumer. Thus, such problem should be solved by creating a special method of termination.

3.4 Problems Regarding the Reimbursement under Thai Laws

According to Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560), the seller has to reimburse the full amount to the

¹² Direct Marketing Act 2017 (n 7) s 33

In purchasing of goods or service from a direct sale or from a sale through direct marketing, a consumer shall have the right to terminate the contract by giving written notice of his intention to the direct sale businessman or the direct marketing businessman within seven days from the date of receipt of goods or service.

For the direct sale business, consumer may notify his intention to the relevant independent distributor or the relevant direct sale agent.

The provisions of paragraph one shall not apply to types, prices or kinds of goods or service prescribed in the Royal Decree.

¹³ Daraporn Thirawat, *Sanya Pu Boripok [Consumer Contract]* (Textbook and Teaching Material, Faculty of Law, Thammasat University 2016) 170 (ดาราพร ธีระวัฒน์, *สัญญาผู้บริโภค* (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2559)) 170

consumer within 15 days from the date of receiving the notice of termination of the contract from the buyer.¹⁴

In such case, if the seller receives the notice but refuses to refund the consumer, the law provides that the seller shall pay to the consumer a penalty at the rate prescribed and announced by the law.¹⁵

However, even if the law states clearly regarding the penalty, it seems that the seller does not have any concerns as the penalty that might be imposed is usually too little due to the low price of goods sold. Additionally, in many cases, when such problems occur, some of the sellers delete their Facebook account. This gives rise to difficulties for the consumers to claim anything against the sellers.

4. Conclusion

According to the above analysis on the problems related to consumer protection in the case of Facebook Live sales, the study shows that under Thai laws, consumers are not protected.

The author then proposes to amend the definition of “direct marketing” under the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560) in order to provide protection for a consumer in the case of Facebook Live sales.

In addition, with regard to identifications of a seller, the Direct Sale

¹⁴ Direct Marketing Act 2017 (n 7) s 36

Where a consumer exercises his right to terminate the contract under section 33, the independent distributor, the direct sale agent, the direct sale businessman or the direct marketing businessman shall refund the total sum that is paid by the consumer to purchase the goods or service within the period of fifteen days from the date of receipt of the notice of intention to terminate the contract.

If any independent distributor, any direct sale agent, any direct sale businessman or any direct marketing businessman fails to refund the total amount and within the period under paragraph one, such independent distributor, direct sale agent, direct sale businessman or direct marketing businessman shall pay to the consumer a penalty at the rate prescribed and announced by the Board.

¹⁵ Ibid.

and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560) should be amended by adding a provision requiring those who want to sell products in Thailand through online channels such as Facebook Live to register with the officials in order to acquire a license for sales.

Those who do not register with the official before commencing their sales on the Facebook Live must be imposed a criminal punishment. The Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560) should then be amended by adding the punishment clause for that. However, in the case of the foreigners operating sales on Facebook Live, Thailand should enact a specific regulation to control.

Regarding the reimbursement problems, the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560) should be amended by providing that Facebook Live seller must provide a guarantee to the officials before commencing their sales via Facebook Live in order to protect consumers in the case of the reimbursement claims. In this regard, the process of providing guarantee should also be a part of registration.

From the above information, the author believes that Facebook Live sales is at present one of the most popular transactions in Thailand. Therefore, the Direct Sale and Direct Marketing Act B.E. 2545 (3rd amended B.E 2560) should be properly amended as pursuant to the author's proposal to protect the consumers.

In conclusion, while the popularity of Facebook Live sales has significantly increased, the amended Act will hopefully protect the consumers on Facebook Live sales once they face the problems. This will also make consumers more confident in making their decision to purchase the online goods or services, contributing to the better economy of Thailand.

Bibliography

Books and Book Articles

Artraksa P, *Kham Athibai Kodmhai Kai Trong Lae Talad Bab Trong* [Direct Sales and Direct Marketing] (Nititham Publishing House 2017) (ไพโรจน์ อัจรักษา, คำอธิบายกฎหมายขายตรงและตลาดแบบตรง (สำนักพิมพ์นิติธรรม 2560))

Thirawat D, *Sanya Pu Boripok* [Consumer Contract] (Textbook and Teaching Material, Faculty of Law, Thammasat University 2016) (ดาราดพร ธีระวัฒน์, สัญญาผู้บริโภค (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2559))

Laws and Regulations

Direct Sales and Direct Marketing Act, 3rd Amendment B.E. 2560 (2017)

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013

Websites and Blogs

Electronic Transactions Development Agency ‘Thailand Internet User Profile 2017’ (ETDA, 29 September 2017) <<https://www.eta.or.th/content/thailand-internet-user-profile-2017.html>> accessed 25 September 2018

Electronic Transactions Development Agency, ‘Thailand Internet User Profile 2018’ (ETDA, 25 July 2018) <<https://www.eta.or.th/content/eta-reveals-thailand-internet-user-profile-2018.html>> accessed 25 September 2018

Electronic Transactions Development Agency, ‘Value of e-Commerce Survey in Thailand 2017’ (ETDA, 27 September 2017) <<https://www.eta.or.th/publishing-detail/value-of-e-commerce-survey-2017.html>> accessed 25 September 2018

Kemp S, 'We Are Social Ltd, Digital in 2018: World's Internet Users Pass the 4 Billion Mark' (*We Are Social Ltd.*, 30 January 2018) <<https://wearesocial.com/uk/blog/2018/01/global-digital-report-2018>> accessed 26 September 2018

Kerry Express Thailand, 'Our Pride' (*Kerry*) <<https://th.kerryexpress.com/en/home/>> accessed 7 July 2019

Swan G, 'Facebook Live Video Shopping Being Tested in Thailand' (*Tinuiti*, 19 December 2018) <<https://www.cpcstrategy.com/blog/2018/12/facebook-live-video-shopping/>> accessed 28 June 2019

THE IMPOSITION OF TAX ON CRYPTOCURRENCIES*

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Abstract

In Thailand, the growth of cryptocurrencies has been increasing annually.¹ Tax is one of the issues which are concerned by government. Thus, taxpayers who acquire any gains derived from transferring cryptocurrencies shall have tax responsibilities due to the Emergency Decree amending the Revenue Code (No.19) B.E. 2561.

However, there are still some problems which are obstacle for imposition of income tax on cryptocurrencies.² As Section 40(4)(i) only focus on imposing tax from cryptocurrency transferring as investment. Moreover, the substance of this Decree is only briefly described. It lacks necessary information, the existent of peer-to-peer market which is a major problem for tax authorities to trace and investigate the transactions. Therefore, to collect revenue from cryptocurrency transactions effectively, Section 40(4)(i) should be revised and the Thai Revenue Department shall release a tax

* This article is summarized and rearranged from the thesis “The Imposition of Tax on Cryptocurrencies” The Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018

¹ Bank of Thailand, ‘Financial Stability Report’ (BOT, 2017)

<https://www.bot.or.th/English/FinancialInstitutions/Publications/FSR_Doc/FSR2017e.pdf> accessed 5 August 2018

² Pugadmin, ‘Seven Statements on Crypto Taxation in Thailand’ (Pugnatorius) <<https://pugnatorius.com/bitcoin-taxation/>> accessed 5 September 2018

notice, or guidance to explain the detail of imposing cryptocurrencies including finding of the measures to support trading of cryptocurrency in the tax system.

Keywords: Cryptocurrencies, Virtual Currencies, Imposition of Tax, Personal Income Tax

1. Introduction

The cryptocurrencies, are unregulated digital or virtual currencies, designed to work as a medium of exchange which apply cryptography, a method to store and transmit data in special form so the only person who can read need to have a secret key, to secure financial transactions, create new units, and verify the transfer of values. Cryptocurrency does not exist in physical form but it is used and accepted among the specific community,³ have been primarily used for product and service barter because one of its strong characteristics is a user nondisclosure, which is better than electronic transactions such as transferring money through bank accounts or using credit cards. A lot of major retailers and services providers accept cryptocurrencies for payment of goods and services. For example, Expedia, a reputable online agencies, allows users to pay for their bookings with Bitcoin and Microsoft also allow users to use Bitcoin to deposit funds to purchase games, movie, and applications available in Window and Xbox stores.⁴

Then, cryptocurrencies have been used as a medium for international money transfer because they are faster than ordinary ones since fees are lowers and the transaction can be completed via computers, laptops and smartphones. Moreover, recently, users have applied cryptocurrencies for their investment, holding them for speculation. They also have been developed to be funding tools by making Initial Coin Offering (ICO). Some fundraisers have issued digital tokens or new cryptocurrencies by which holders can change into other popular currencies later, instead of securities.

³ Organisation for Economic Co-operation and Development, 'Directorate for Financial and Enterprise Affairs Statistics and Data Directorate' (OECD, 2018) <[https://oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM%2FSDD%2FDAF\(2018\)1&docLanguage=En&fbclid=IwAR16LqjaEL0SWOTVESKfhzjxkndTntLwvXUyd8VOtO8TnOLRuXKHBBfOKDO](https://oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM%2FSDD%2FDAF(2018)1&docLanguage=En&fbclid=IwAR16LqjaEL0SWOTVESKfhzjxkndTntLwvXUyd8VOtO8TnOLRuXKHBBfOKDO)> accessed 8 December 2018

⁴ Moreau E, '20 Things You Can Spend Your Cryptocurrency On' (THE CRYPTOBASE, 2019) <<https://thecryptobase.io/20-things-to-buy-with-cryptocurrency/>> accessed 17 March 2019

The governments do have concerns regarding all of cryptocurrencies transactions especially concerns over tax issues because mining,⁵ trading, and exchanging cryptocurrencies usually make some benefits to users which raise the question about their tax consequences and challenge the Revenue Departments around the world to find ways to impose tax, record information, and inspect irregular transactions.

2. The Problems of Imposition of Tax on Cryptocurrencies in Thailand

2.1 Tax Law

The legal meaning of assessable income is under section 39 of the Revenue Code which covers income in cash, and any property or benefits which could be divided into 8 categories under section 40, all of which are subject to tax.

Section 40 (4) of the Revenue Code, the taxpayer receives this income from the investment such as stocks, bonds, debenture or others, which are also subject to tax. At present, after the Royal Decree of amending Revenue Code (No.19) B.E. 2561, there are 9 types of this income which is considered to be subject to tax.

The types which are interesting are; section 40(4)(b) the income which comes from dividends, the share of profits or any gains from

⁵ Noelle Acheson, 'How Bitcoin Mining Works' (CoinDesk, 2018)

<www.coindesk.com/information/how-bitcoin-mining-works> accessed 8 March 2018

“Mining is the process of verifying and adding Bitcoin transaction records to the blockchain since Bitcoin system is maintained by every participant, when a transaction is created, it will be turned into a block, and become part of blockchain when it is verified by the potential individuals, called miners who volunteer to verify the transaction such as to check the signature, to approve it is created by the account owner and applied to specific transaction, to prevent double Bitcoin spending for Bitcoin community.”

company or juristic partnership, 40(4)(g)⁶ capital gain from transferring partnership holding, the shares or other issued by company or other juristic person. In general, capital gain from transferring shares or bonds is subject to personal income tax as well as, withholding tax. However, if taxpayer transfers it to other person in the Thai stock exchanges, he/she does not bear the responsibility regarding personal income. Section 40 (4)(i) the income which is capital gain derives from transferring cryptocurrency,

While Section 40 (8) of the Revenue Code mentioned the income from business, commerce, agriculture, manufacturing, transport or any other activity not specified in (1) to (7).

In the case of cryptocurrency, there are many transactions not only holding and transferring cryptocurrency as investment in which the gain from such activity is considered as capital gain but also holding and transferring cryptocurrency as business, such as mining, and trading in the normal course of business.

Usually the personal income from business should be recognized as income under Section 40 (8) but due to the Emergency Decree Amending the Revenue Code (No.19) B.E. 2561 which states the specific income for cryptocurrencies transferring which incurred the benefit is under Section 40(4)(i) instead. It is not suitable enough for other taxpayers who are not related to cryptocurrency' investment because they have more burden than normal situation since different types of income result in different tax deduction rate which can alter the amount of taxable income. The income under Section 40 (4) cannot be deducted whereas in Section 40 (8), usually taxpayer can select which type he/she prefers to deduct; standard deduction for 60% or deduction for necessary and reasonable expenses.⁷

⁶ Thai Revenue Code B.E. 2481 (1938), s 40(4)(g)

“gains derived from transfer of partnership holdings or shares, debentures, bonds, or bills or debt instruments issued by a company or juristic partnership or by any other juristic person.”

⁷ Internal Revenue Code (IRC) 1986, s 46

Hence, for the suitability and effectiveness in imposing tax on cryptocurrencies, the Thai government should not only state and focus on imposing income tax on cryptocurrency transferring tax on investment without any concerns on the purpose, characteristic, or manner of transactions, thus the government should amend Section 40(4)(i) which cannot cover every disposing transactions relating to cryptocurrencies.

Section 40(4)(i) should be amended by adding specific purpose of transaction such as any benefits which are gain from holding or transferring cryptocurrencies but not include any benefit arising from holding or transferring cryptocurrencies derived from employment, business or others except investment.

Having suitable measures creates effective tax system, taxpayers do not have prejudice against tax payment, and government would receive more revenue.

2.2 Tax Policy

2.2.1 The Lack of Necessary Information

The information in relation to taxation should be clear and specific with enough information,⁸ in particular, the amount to be taxed and how to calculate.

Since cryptocurrencies are new technology which has a complex system, taxation on cryptocurrencies is not easy because many people do not understand how to pay tax, and how to calculate income from cryptocurrency transactions. However, the imposition of tax on cryptocurrencies. in Thailand, since the Emergency Decree of amending Revenue Code (No.19) B.E. 2561 is effective, the Thai Revenue Department has not released any information to taxpayers who are involved with

“For the assessable income under Section 40(8), deduction of expenses shall be allowed in accordance with a Royal Decree.”

⁸ Frans Vanistendael, ‘Legal Framework for Taxation’ (IMF, 1998)

<https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch2.pdf> accessed 5 November 2018

cryptocurrency transactions, so it is difficult for taxpayers to comply with the law without any necessary information from Revenue Department because there are still some vague issues. Some taxpayers who acquire or dispose of the cryptocurrency are not aware of their responsibilities and fail to calculate their income from cryptocurrency transactions. This may also create an opportunity for taxpayers to evade taxation as well. Then government cannot collect such revenue as effectively as planned.

The necessary information related to the imposition of tax on cryptocurrency which should be clarified and explained by a tax notice or treatment from Revenue Department as soon as possible are; (1) the valuation of cryptocurrency, (2) basis issue, which answer how to value cryptocurrencies to adjust any gain or loss and calculating tax further. (3) mining cryptocurrency, which clarify how to tax mined cryptocurrencies, and (4) reporting requirement which shall be recorded for the benefits of tax aspects ant others.

(1) Value Issue

To calculate income from a transaction relating to cryptocurrency in foreign countries, taxpayers must convert the price of cryptocurrency to the price of fiat currency. For instance, the United States using the fair market value of cryptocurrency at the time of receipt to convert its value into U.S dollars.⁹

Moreover, as cryptocurrencies are not legal tender, they are accepted for trading by many cryptocurrency exchanges instead, but each exchanges has its own rate which leads to tax calculation problem. This situation differs from fiat currencies which have standard exchange rates issued by the central banks of each country. Thus, in Australian tax

⁹ International Revenue Service, 'Notice 2014-21' (*IRS.gov*, 2014)
<<https://www.irs.gov/pub/irs-drop/n-14-21.pdf>> accessed 22 April 2018

treatment allows users to value cryptocurrency in Australian dollar by applying exchanges rate from the reputable online exchange.¹⁰

But the Thai Revenue Code does not regulate exactly how the cryptocurrency should be valued. Though, the Emergency Decree on the Digital Asset Business B.E. 2561 Section 8 stated that in the case of calculating the price of digital assets in Thai baht, the basis and procedure which is declared by the Securities and Exchange Commission must be followed. However, since the date the Emergency Decree on the Digital Asset Business B.E. 2561 has become effective, the Commission has not had any case in calculating the value of digital asset in Thai baht notice, so taxpayers in Thailand are lack of the information of how to convert cryptocurrency to Thai baht to calculate their income especially gain or loss further. It would have the effect on gain or loss calculation.

Thus, the Revenue Department shall regulate the fair market value¹¹ of cryptocurrency in Thai baht at the time of transaction, and identify the reputable online exchanges which taxpayer can apply the fair market value to determine his cryptocurrency value.

There are many online exchanges which are approved by the Securities and Exchange Commission such as bx.in.th, bitkub.com, coinasset.co.th, so the Revenue Department can specify one or more online exchanges and allow taxpayers to apply the rate as fair market value of cryptocurrency when he makes transactions.

¹⁰ Australian Taxation Office, 'Tax treatment of crypto-currencies in Australia - specifically bitcoin' (ATO, 2018) <<https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>> accessed 14 August 2018

¹¹ International Revenue Service, 'Sales and other Dispositions of Assets - NoncapitalAssets' (Publication 544, IRS) <<https://www.irs.gov/pub/irs-prior/p544--2018.pdf>> accessed 22 April 2018

"the price which the property would change hands between the buyer and the seller when they have reasonable knowledge of all the important information with their own best benefit and free from pressure or forces to buy or sell."

The Revenue Department can establish its own cryptocurrency exchange for providing accurate exchange rate for cryptocurrency transaction. It does not benefit only for the cryptocurrency users to determine the value of coins but also for tax authorities to challenge the users' self-assessment in the case which value of cryptocurrency is under assessed.

(2) Basis Issue

Tracking basis of cryptocurrency is one of the important problems because the value of cryptocurrency depends on the demand and supply of its market, so the values have been extremely volatile. In the case that the taxpayers purchase different cryptocurrency, the track of cryptocurrency basis in each transaction is possible but if user purchases only one cryptocurrency such as Bitcoin at different times, from different sources and at different price, it becomes more difficult to determine the basis when he sells or uses the Bitcoin.

To answer this question, Thai Revenue Department shall specify accounting methods to determine the basis value of cryptocurrencies such as the first-in, first-out (FIFO), or last-in, first-out (LIFO), or specific identification method to compute any gains or loss.¹²

For First-in, First-out (FIFO), this method assumes that the goods first acquired are sold first, so when taxpayers sell some cryptocurrencies, the basis of first cryptocurrencies will be calculated.¹³

While, Last-in, First-out (LIFO), this method assumes the goods last acquired are sold first, it allows taxpayers to apply the value of last purchased products to calculate the basis.

¹² Robert Green, 'Accounting Method Impacts Crypto Income Taxes' (*Forbes*, 10 April 2018 <www.forbes.com/sites/greatspeculations/2018/04/10/accounting-method-impacts-crypto-income-taxes/#15168bd62b5c> accessed 25 January 2019

¹³ Marvin A. Chirelstein and Lawrence Zelenak, *Federal Income Taxation* (14th edn, Foundation Press 2018)

Moreover, specific identification is for the case that taxpayers can identify which cryptocurrency they want to sell.¹⁴

(3) Mining

In Thailand, there are no regulations relating to the mining, neither the Revenue Code, the Emergency Decree on Digital Asset Business B.E. 2561 nor the Emergency Decree amending the Revenue Code (No.19) B.E. 2561. Thus, taxpayers who mine cryptocurrency are lack of information regarding tax liability, while tax authorities have not decided how to impose tax in the case of mining cryptocurrency yet, it is still vague.

When an individual mines cryptocurrency successfully, he/she gets coin, the argued problem is whether mined cryptocurrency is considered as assessable income. There are two opinions; it will be assessable income since the date of receipt of mining and should be taxed, this contrasts with another view which says it is still not assessable income. However, the Revenue Department has not yet affirmed this matter directly.

In the United States, Section 61 of the Internal Revenue Code defines gross income is all income derived from whatever source.¹⁵ Mining cryptocurrencies is one of activities which generates income to taxpayers who mine virtual currencies.

In addition, according to the Notice 2014-21, miners who successfully mine cryptocurrencies must include fair market value of such cryptocurrencies at the date of receipt to his/her gross income. The type of

¹⁴ Jeff Vandrew, 'Capital gains on cryptocurrency: FIFO, LIFO, or Specific Identification?' (*Brave New Coin*, 7 November 2017) <<https://bravenewcoin.com/insights/capital-gains-on-cryptocurrency-fifo-lifo-or-specific-identification>> accessed 2 January 2019

¹⁵ Internal Revenue Code (IRC) 1986, s 61(a)

“except as otherwise provided in this subtitle gross income means all income from whatever source derived.”

income generate from mining can be determined as either self-employment or hobby depends on the characteristic of mining.¹⁶

From the view of the writer, the meaning of assessable income under Section 39¹⁷ of the Revenue Code does not only state the money but also include a property and other benefits. In addition, Section 3 of the Emergency Decree of Digital Asset Businesses B.E.2561 provides that the status of cryptocurrency is considered digital asset, thus the received cryptocurrency via mining, in which the miner acquires the property which its value can be calculated in Thai baht, is assessable income which subject to tax under the Revenue Code.

For the types of assessable income, since mining cryptocurrency is an activity, which is not specified in Section 40 (1) to (7), so the coin which is property derived from the mining process is considered income under Section 40 (8). It is not income as specified in section 40 (4) because the miners receive mined coin by processing cryptocurrencies transactions and verifying them on the Blockchain. Mining process does not produce any gains derived from transferring of cryptocurrency.

Furthermore, Personal Income Tax adopts cash basis which recognizes revenues and expenses at the time of receiving or paying cash. Assessable income under Section 39 which is money, or a property, or any benefits which has already been received has to be computed into gross income. In the case of a miner who has already acquired cryptocurrency and realizes its value at the time of receipt, it becomes, is vest as his property, and is not a right of claim which may arise in the future. Thus, the

¹⁶ Nika Antonikova, 'Real Taxes on Virtual Currencies: What Does the I.R.S. Say?' (2014) 34(3) Virginia Tax Review

¹⁷ Thai Revenue Code B.E. 2481 (1938), s 39

"Assessable income means income that is taxable under this Chapter. Such income also includes a property or any other benefit received which may be computed into a monetary value, any amount of tax paid by the payer of income or by any other person on behalf of a taxpayer and tax credit under Section 47 Bis."

value of his cryptocurrency will be included for the calculation of his personal income tax.

For transferring mined cryptocurrency, in the case of an individual who mines cryptocurrency not for commercial purpose and decides to sell it later has different tax consequence from an individual who runs a business of mining cryptocurrency for profits

The money, or other benefit which are received from transferring cryptocurrency can be considered as assessable income as specified in Section 40(4)(i). If an individual decides to use mined cryptocurrency as the means of payment to buy goods or services, or sell it to another person, and such transactions make the gain to the miner, 15% of the gain will be withheld.

For instance, A, an individual who uses his computer to mine cryptocurrency, he gets Bitcoin which the value of the receipt date is 10,000 baht per coin, his cryptocurrency is assessable income according to section 40(8), then next month, the value of Bitcoin increase from 10,000 baht to 15,000 baht, he decides sell it to B who is interested in an investment on cryptocurrency, from selling transaction, A receives 5,000 baht as his gain, it is benefit from transferring cryptocurrency according to Section 40(4)(i), from section 50 his gain will be subject to 15% withholding tax.

While if A mines cryptocurrency as business, then he sells his mined cryptocurrency to his customers, even though he receives the gain from transferring cryptocurrency, it should be considered as income from business as specified in Section 40(8) which can deduct from his expenses instead of 40(4).

The Revenue Department should state exactly how to tax cryptocurrency by determining mined cryptocurrency as assessable income and is subject to tax when successful mining and receiving cryptocurrency as income from section 40(8), and the miner is subject to tax again when he disposes such mined cryptocurrency and acquires money, property or any benefits in exchange. However which types of latter income would be taxed depends on the purposes of transferring.

(4) Reporting Requirement

In Thailand, taxpayers are not familiar with capital gain calculation¹⁸ which taxpayers have to back up accurately information.

Thus, the Revenue Department must force the cryptocurrency users; an individual who trade, invest, mine, or use cryptocurrency as means of payments for goods or services, including cryptocurrency exchanges included to record the information relating to cryptocurrency transaction.

For tax aspects, if a taxpayer records every detailed transaction involving cryptocurrency, they can use these records as their evidence to claim the tax officers when their assessment is overtaxed. On the other hands, tax officers can verify taxpayers whether their personal income tax filing is correct. The benefits of reporting information are not only for imposing cryptocurrency tax accurately and effectively but the government organization can also use this information to investigate and prevent criminal offences such as anti-money laundering, fraud, terrorism that will impact the stability of the country's financial system and economy.

To specify necessary information that has to be recorded as information for every transaction which involves cryptocurrency; the date of each transaction, value of the cryptocurrency in Thai baht at the time of transaction, the purpose of the transaction, the detail of the other party involved such as wallet addresses.¹⁹

For the approved online exchanges, not only above information which should be recorded but the Know Your Customer process (KYC) should also be implemented to identify information of customers, the exchanges shall require their customers to show identification before processing any transaction and record the details of transactions such as

¹⁸ Sherrings, 'Thailand Capital Gains Personal Tax' (*Sherrings*)
<<https://sherrings.com/capital-gains-personal-income-tax-thailand.html>> accessed 5 July 2019

¹⁹ PricewaterhouseCoopers, 'Cryptocurrency' (PWC, 2018)
<<https://www.pwc.com.au/tax/assets/cryptocurrency-tax-considerations-jun18.pdf>> accessed 14 August 2018

data transfer history, and another valuable data which involved with the transaction.

Apart from KYC, the approved online exchange should run the Customer Due Diligence (CDD) process with every customer in every time that a customer proceeds a transaction. They should have conditions or measures to testify and identify the customers.

Moreover, the Revenue Department should regulate cryptocurrency exchanges to keep the record within the specific period for the purpose of examination and send the information and data of their customer to the tax authorities or other government officers when asked for investigation.²⁰

2.2.2 Peer-to-Peer Trading

The peer to peer economy is a community of virtual marketplaces which connect individuals who want to sell and buy goods or services with one another through digital platforms.²¹ Such platforms are the technology which allow users to access their functions to create opportunities for advertising and marketing.

There are many types of platforms, for example, traveler accommodation platforms such as Airbnb, retail businesses platforms such as Amazon, Alibaba, or freelancing platforms which match the desire of freelancers to the jobs. The number of users on peer-to-peer market is rising, in 2016 there was report from Pew Research Center stating that 72 percent of American people have used at least one of 11 different shared and on demand services.²²

²⁰ Pratya Apaiyanukorn, 'Anti-money Laundering Against Virtual Currency in case of Using Bitcoin' (Master of Laws Program in Business Laws thesis, Thammasat University 2016)

²¹ Aqib Aslam and Alpa Shah, 'Taxation and the Peer-to-Peer Economy' (*IMF*, 8 August 2017) <<https://www.imf.org/en/Publications/WP/Issues/2017/08/08/Taxation-and-the-Peer-to-Peer-Economy-45157>> accessed 17 December 2018

²² *ibid*

Cryptocurrencies are one of the platforms which allow individuals to make transactions without the involvement of a central authority such as governments or banks. Cryptocurrencies, exchanges are not only place for trading but there are also online peer-to-peer trading marketplaces where cryptocurrency users such as Bitcoin users, can communicate with each other to buy or purchase items online and use debit or credit card to make payment.

For example, the Bitcoin users stated their wish lists for an online retailer, such as Amazon.com, they provide the discount they would like to receive on the goods in exchange of their Bitcoins, individuals who want to buy Bitcoin find the amount of Bitcoin which they want to purchase and accept to trade, they buy the goods on Amazon.com and request that goods to be delivered to Bitcoins' users' address, while Bitcoin users put the shared of Bitcoins in escrow with the marketplace, when the goods is delivered their address, they will notify the marketplace release their Bitcoin from escrow and send them to individual with a small fee to marketplace.

Thus, a Bitcoin will not has a standard price, it can be set up by the Bitcoin users who can record the price of Bitcoin below than the market price that impact to keep its fair market value and basis record. Individuals who purchase goods and pay the discount rate and fees in exchange of Bitcoins would be required to report the total cost incurred as their basis of received Bitcoins.

The Thai Revenue Department should realize the ability of taxpayer to purchase cryptocurrency through peer-to-peer markets, there is a high risk that taxpayers file the amount of taxable income incorrectly, or to not file this amount because it is quite tricky to the Revenue Department to trace and inspect such transactions because high technology must be applied which lead the administrative costs.

For example, in United States, there are estimations stating that 7% of population around the world who is the owner of Bitcoin and other

cryptocurrencies are American but the number of the filed tax return in relation to cryptocurrency is only 0.04%.²³

Therefore, to convince users of cryptocurrency for trading their coins in approved exchanges by the Securities and Exchanges Commission, the Revenue Department should provide a de minimis tax for taxpayers.

For example, cryptocurrency is consider as digital asset, it is in relation to Value Added Tax (VAT), a general indirect tax on consumption, when it is traded,²⁴ however if the Revenue Department wants to impose revenue from cryptocurrency transactions and check such transactions whether taxpayer file the amount of taxable income is correct, it should support taxpayers to trade and exchange their coins in approved exchanges by waving VAT to individuals to bring taxpayers into taxation system and governments will receive the expected revenue.

Furthermore, to reduce the tax burden on taxpayers in auditing and calculating income from cryptocurrency transactions, the Thai Revenue Department should propose a requirement for approved exchanges withhold tax before taxpayers receive the benefit. This method is easy and simple for tax administration because the private persons help collecting tax and decrease the burdens and expenses from government, and help the government to protect tax evasion. On the other hand, this method is useful for taxpayers whose tax is deducted because they can pay tax little by little, and it is not difficult to afford it.

Even if governments provide the VAT exemption for individuals and reduce the burden once they trade and exchange coins in specified system, however, governments should consider to extend the powers of the tax

²³ Helen Partz, 'US: Tax Filing Service Says Only 0.04% Of Customers Reported Crypto To IRS For 2017' (*Cointelegraph*, 15 February 2018) <<https://cointelegraph.com/news/us-tax-filing-service-says-only-004-of-customers-reported-crypto-to-irs-for-2017>> accessed 14 February 2019

²⁴ Julia Kagan, 'What Is a Value-Added Tax (VAT)?' (*Investopedia*, 28 June 2019) <<https://www.investopedia.com/terms/v/valueaddedtax.asp>> accessed 5 July 2019

authority to receive data from unapproved platforms, or in the case of approved exchanges, government should still exercise power to require the report of customers' transactions.

3. Conclusion

In conclusion, the Thai government has decided to issue new laws, the Emergency Decree Digital Asset Businesses B.E. 2561 and the Emergency Decree amending Revenue Code (No.19) B.E. 2561, to deal with cryptocurrencies transactions. For the stability of country and protecting investors and public, promulgating of both Emergency Decrees ensure the effectiveness of supervision and monitoring of the activities and business relating to digital assets. Moreover, in taxation, to collect the effectiveness of Personal Income Tax in relation to cryptocurrency transferrings, taxpayers in according to the Emergency Decree amending Revenue Code (No.19) B.E.2561 are subject to tax. However, there are urgent problems which should be adjusted, or vague issues which should be explained by government.

First, the impropriety of the provision which is not suitable to cover all cryptocurrencies transferring regardless of the purpose and characteristic of transaction. Then the lack of information which tax authorities should provide such as ways of income calculation, how to value cryptocurrencies in Thai baht, how to impose tax on mined cryptocurrency, and which information should be recorded, or kept, furthermore the existent of peer-to-peer market which taxpayers can avoid paying tax

While the use of cryptocurrencies is continuously increasing over time, government should be more active in improving itself to catch up with or be ahead of new technologies and bringing them into the existing legal and taxation system.

Bibliography

Article

Antonikova N, 'Real Taxes on Virtual Currencies: What Does the I.R.S. Say?' (2014) 34(3) Virginia Tax Review

Book

Chirelstein M and Zelenak L, *Federal Income Taxation* (14th edn, Foundation Press 2018)

International Law

Internal Revenue Code (IRC) 1986

Report

Bank of Thailand, 'Financial Stability Report' (BOT, 2017)
<https://www.bot.or.th/English/FinancialInstitutions/Publications/FSR_Doc/FSR2017e.pdf>

Thai Law

Thai Revenue Code B.E. 2481 (1938)

Thesis

Apaiyanukorn P, 'Anti-money Laundering Against Virtual Currency in case of Using Bitcoin' (Master of Laws Program in Business Laws Thesis, Thammasat University 2016)

Websites and Blogs

Acheson N, 'How bitcoin mining works' (*CoinDesk*, 2018)
<www.coindesk.com/information/how-bitcoin-mining-works> accessed 8 March 2018

Aslam A and Shah A, 'Taxation and the Peer-to-Peer Economy' (*IMF*, 8 August 2017)

<<https://www.imf.org/en/Publications/WP/Issues/2017/08/08/Taxation-and-the-Peer-to-Peer-Economy-45157>> accessed 17 December 2018

Australian Taxation Office, 'Tax treatment of crypto-currencies in Australia - specifically bitcoin' (ATO, 2018) <<https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>> accessed 14 August 2018

Green R, 'Accounting Method Impacts Crypto Income Taxes' (*Forbes*, 10 April 2018) <www.forbes.com/sites/greatspeculations/2018/04/10/accounting-method-impacts-crypto-income-taxes/#15168bd62b5c> accessed 25 January 2019

International Revenue Service, 'Notice 2014-21' (*IRS.gov*, 2014) <<https://www.irs.gov/pub/irs-drop/n-14-21.pdf>> accessed 22 April 2018

International Revenue Service, 'Sales and other Dispositions of Assets – NoncapitalAssets' (Publication 544, *IRS*) <<https://www.irs.gov/pub/irs-prior/p544--2018.pdf>> accessed 22 April 2018

Kagan J, 'What Is a Value-Added Tax (VAT)?' (*Investopedia*, 28 June 2019) <<https://www.investopedia.com/terms/v/valueaddedtax.asp>> accessed 5 July 2019

Moreau E, '20 Things You Can Spend Your Cryptocurrency On' (*THE CRYPTOBASE*, 2019) <<https://thecryptobase.io/20-things-to-buy-with-cryptocurrency/>> accessed 17 March 2019

Organisation for Economic Co-operation and Development, 'Directorate for Financial and Enterprise Affairs Statistics and Data Directorate' (*OECD*, 2018) <[https://oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM%2FSDDD%2FDAF\(2018\)1&docLanguage=En&fbclid=IwAR16LqjaEL0SWOTVESKf](https://oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM%2FSDDD%2FDAF(2018)1&docLanguage=En&fbclid=IwAR16LqjaEL0SWOTVESKf)>

[hzjxkndTNTLwvXUyd8VOtO8TnOlRuXKHBBfOKDO](https://www.kndt.com/news/2018/12/08/hzjxkndTNTLwvXUyd8VOtO8TnOlRuXKHBBfOKDO)> accessed 8 December 2018

Partz H, 'US: Tax Filing Service Says Only 0.04% Of Customers Reported Crypto to IRS For 2017' (*Cointelegraph*, 15 February 2018) <<https://cointelegraph.com/news/us-tax-filing-service-says-only-004-of-customers-reported-crypto-to-irs-for-2017>> accessed 14 February 2019

PricewaterhouseCoopers, 'Cryptocurrency' (PWC, 2018) <<https://www.pwc.com/au/tax/assets/cryptocurrency-tax-considerations-jun18.pdf>> accessed 14 August 2018

Pugadmin, 'Seven statements on crypto taxation in Thailand' (*Pugnatorius*) <<https://pugnatorius.com/bitcoin-taxation/>>

Sherrings, 'Thailand Capital Gains Personal Tax' (*Sherrings*) <<https://sherrings.com/capital-gains-personal-income-tax-thailand.html>> accessed 5 July 2019

Vandrew J, 'Capital gains on cryptocurrency: FIFO, LIFO, or Specific Identification?' (*Brave New Coin*, 7 November 2017) <<https://bravenewcoin.com/insights/capital-gains-on-cryptocurrency-fifo-lifo-or-specific-identification>> accessed 2 January 2019

Vanistendael Frans, 'Legal Framework for Taxation' (IMF, 1998) <<https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch2.pdf>> accessed 5 November 2018

**A COMPARATIVE STUDY OF THE PRECAUTIONARY PRINCIPLE IN FOOD
SAFETY LAWS AND REGULATIONS IN THE UNITED STATES OF AMERICA
AND THE EUROPEAN UNION^{*}**

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Abstract

The precautionary principle emerged as a tool in food safety risk regulation to help risk manager in making decisions regarding scientific uncertainty. However, the vagueness of the principle has resulted in a variety of different applications of the principle in different jurisdictions.

This article examines the application of the precautionary principle in international trade law, the European Union and the United States laws and regulations in the area of food safety by a comparative study. The approaches toward the precautionary principle in the field of food safety are found to be different in the European Union and the United States both in the laws and legislations, and the implementation of the competent authorities. From the comparative study, the article demonstrates that there are several factors influential to the different approaches as the law and safety are the concept reflecting each society. The main factors influencing different applications are the differences in public perception, legislative tradition and institutional structures. It is suggested that the US-EU divergent

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approaches on the application of the precautionary principle in food safety regulation can be viewed as a lesson for a national application of the precautionary principle in food safety that would have to take these factors into consideration of balancing different values of the society.

Keywords: Precautionary Principle, Food Safety, Food Safety Regulations, Food, Precaution

1. Introduction

Precaution or the notion to carefully do something in advance in order to prevent something unpleasant from happening is a common pattern of behavior expressed through old folk wisdom like “Better be safe than sorry”, which reflects an ordinary human nature seeking for a security. However, as the notion has been developed into a principle or the so-called precautionary principle (PP) as a tool to manage new and rapid emerging risks, it has generated conflicting opinions on the application of the principle.

There are a variety of areas that the PP is applied as a tool in risk management decision-making, including the food safety decision making. Food safety control system is complex and multidimensional, a decision on food safety would require a number of factors into consideration in balancing different values of each society.

In the international arena, the concept of PP is recognised in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), but the interpretation concerning the use of PP in the World Trade Organization arena is not conclusive so there remains divergent approaches in different jurisdictions, especially between the EU and the US. The Divergence between the EU and the US gains attention internationally as their implementations of the PP are influential to other jurisdictions as well. Countries primarily export to the US are adopting the US position, while countries that rely on the EU market are supporting the EU position.¹

Hence, this article attempts to examine the precautionary principle as applied in the EU and the US food safety system in order to identify the differences and factors relevant to such differences.

¹ Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010) 33

2. What is the Precautionary Principle

The concept of precautionary principle is often said to be rooted from the German concept of *Vorsorge* or *Vorsorgeprinzip* that was initially defined as a new standard of environmental protection² and later spread to several other specific area of protection, especially the health protection.

2.1 Definition of the Precautionary Principle

There is no generally accepted definition of the precautionary principle.³ Trouwborst described the PP in general international law to be reflected by the term *in dubio pro natura* or ‘erring on the side of environmental protection’.⁴ However, there are definitions that are frequently cited such as the definition provided by the Bergen Ministerial Declaration on Sustainable Development 1990,⁵ and the definition provided by the Rio Declaration on Environment and Development at the 1992.⁶

² Julien Cazala, ‘Food Safety and the Precautionary Principle: The Legitimate Moderation of Community Courts’ (2004) 10(5) European Law Journal, 539

³ Jonathan B. Wiener and Michael D. Rogers, ‘Comparing Precaution in the United States and Europe’ (2002) 5(4) Journal of Risk Research, 317-349

⁴ Arie Trouwborst, ‘The Precautionary Principle in General International Law: Combating the Babylonian Confusion’ (2007) 16(2) Review of European, Comparative & International Environmental Law, 188

⁵ The Bergen Ministerial Declaration on Sustainable development (1990), art 7 provides:

“In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

⁶ The Rio Declaration on Environment and Development (The 1992 United Nations Conference on Environment and Development) Principle 15 provides:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

These definitions are different in details that could imply the degree of precaution and discretion given to the decision makers.

2.2 Nature of the Precautionary Principle

The central idea of the PP evolved from the conception that it will be too late to wait for scientific certainty in order to create effective responses to potential adverse effects.⁷ An application of the PP would allow the competent authority to adopt a preventive measure, despite uncertainties of the risk, which is a step beyond the preventative principle that aims to prevent the adverse effect of a 'known risk'. Hence, the principle is also deemed as an acceptance to take a higher cost at the present in order to guard against possible adverse effect in the future the same way as an investment or an insurance.⁸ An apparent example of an application of the PP can be shown in the decisions concerning the use of genetically modified product that there are still scientific uncertainties about its long term effects on human health and the dosages linking to that effect. However, risk managers in various jurisdictions have made decisions to prevent the harm on the use of genetically modified product based on the scientific uncertainties, which is an application of the PP.

Generally, the core elements triggering the application of the PP can be extracted into three general elements, including probabilities of the harm which is the scientific uncertainties as to the consequences of an action; threat of harm which is the adverse effect caused by that action; and

⁷ Markus W. Gehring and Marie Claire Corderier Segger, 'Precaution in World Trade Law: The Precautionary Principle and its Implications for the World Trade Organization' Research Paper <<http://www.cisd.org/wp-content/uploads/2018/05/Precaution-in-World-Trade-Law-2003.pdf>> accessed 4 January 2019

⁸ Andrew Jordan and Timothy O'Riordan, 'The Precautionary Principle: A Legal and Policy History' in Marco Martuzzi and Joel A. Tickner (eds), *The Precautionary Principle: Protecting Public Health, the Environment and the Future of Our Children* (WHO 2004) 32 <http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf> accessed 26 November 2019

action before strong proof of harm that give the regulator to take action in order to avoid the potential adverse effects even the scientific evidence of harm is still uncertain.⁹ In several regulations concerning the application of the PP, these core elements are also complemented with several other detailed rules, guidelines and principles, for example, the proportionality principle, the non-discriminatory rules, and the provisional rules that the outcome of the application may vary greatly.¹⁰

3. The Precautionary Principle as Applied in Food Safety System

The concept of food safety has been developed since the ancient time,¹¹ and it is still evolving along with the development of food industry. Advanced technological innovation and globalisation introduce new food related risks to the society that are complex with the ability to travel broader and faster.¹² Therefore, the issue of food safety regulation in the current system of food trade is multidimensional, extranational and interdisciplinary social sector.¹³

There are several concepts used in controlling risk from food. The concept of risk analysis is generally recognized as one of the fundamental approaches behind the development of food safety control.¹⁴ It helps providing regulators with the essential information for effective decision-making by three elements or three processes, namely, risk assessment, risk management and risk communication, which are three

⁹ UNESCO and Comest, *The Precautionary Principle* (UNESCO 2005)

¹⁰ Markus Wagner, 'Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law' (2012) 20 *Cardozo Journal of International and Comparative Law*, 718

¹¹ Dario Bevilacqua, *Introduction to Global Food-safety Law and Regulation* (Europa Law Publishing 2015) 15

¹² *ibid* 12

¹³ *ibid* 7-8

¹⁴ Theofanis Christoforou, 'The Precautionary Principle and Democratizing Expertise: A European Legal Perspective' (2003) 30(3) *Science and Public Policy* 205-212

separate but integrated processes. In a risk analysis, the PP is deemed to be applicable in risk assessment and risk management.¹⁵

The complexity of the PP has increasingly heightened with challenging issues as a result of globalisation and technological innovations under several competing priorities and economic pressure. The application of the PP in food safety regulation, thus, has to comply with the nature of the food safety regulation.

3.1 The Precautionary Principle and The International Food Safety Regulations

The rise of the international food trade and the creation of global food chain call for the need to manage food safety on the international level. International food safety regulations imply both the need to protect human health and to promote trade liberalization which is functioned through two main bodies, which are the WTO and the Codex Alimentarius Commission (CAC).

The WTO's mechanism on food safety is the SPS Agreement, which establishes a framework of rules and disciplines to specifically direct the use of sanitary and phytosanitary (SPS) measures of the Member States to prevent disguised trade barriers in the form of sanitary measures.¹⁶ By this, the SPS Agreement also encourages Members to base their national standards with international standard provided by the 'relevant international organizations' such as the CAC,¹⁷ which publishes standards and Code of Practices based on scientific concepts.¹⁸

¹⁵ Akawat Laowonsiri, 'Application of the Precautionary Principle in the SPS Agreement', (2010) 14 Max Planck Yearbook of United Nations Law 576

¹⁶ Jaruprapa Rakpong, *WTO Laws: Interpretation and Analysis* (1st edn, Thammasat University 2017) (จารุประภา รักพงษ์, *กฎหมายแห่งองค์การการค้าโลก: การตีความและการวิเคราะห์ บทบัญญัติสำคัญ* (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ พิมพ์ครั้งที่ 1 2017))

¹⁷ The SPS Agreement, art 5.1 provides:

Rapid growth of new technologies highlights the significance of the PP in managing food-related risks. The CAC recognised precaution as “an inherent element of risk analysis”¹⁹, but do not explicitly codify the PP in its text, while the SPS Agreement embedded the concept of action before scientific sufficiency in Article 5.7,²⁰ which reflects the idea of PP. Under Article 5.7, the requirements for an adoption of a precautionary measure can be classified into two pre-conditions and two obligations. Pre-conditions

“Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal, or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

¹⁸ Decision of the 21st Session of the Commission in 1995 provides that “the food standards, guidelines and other recommendations of Codex Alimentarius shall be based on the principle of sound scientific analysis and evidence, involving a thorough review of all relevant information, in order that the standards assure the quality and safety of the food supply.”

¹⁹ Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius provides that:

“Precaution is an inherent element of risk analysis. Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health.”

Working Principles for Risk Analysis for Food Safety for Application by Governments (1st edn) provides that:

“Precaution is an inherent element of risk analysis. Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health.”

²⁰ The SPS Agreement, art 5.7 provides:

“In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

are insufficiency of scientific evidence and available pertinent information basis, while the two obligations are the obligation to seek for more information and the obligation to review the adopted measure within a reasonable period of time. These conditions are set to ensure the necessity of the adoption of the PP-based measure.²¹

Since the concept of PP as reflected under Article 5.7 of the SPS Agreement is quite vague, it is up to the interpretation of the adjudicator to decide whether an adopted measure is in accordance with the obligations under SPS Agreement or not. For example, the interpretation of the term “relevant scientific evidence is insufficient” that the degree of relevancy and insufficiency may vary in different cases.

3.2 The Precautionary Principle and The European Union Food Safety Laws and Regulations

The EU food safety control system is highly impacted from previous experience of food scares in the Community, especially the bovine spongiform encephalopathy (BSE) crisis. A reform on both the legislation and institutional structure across Europe took place as a consequence to ensure a satisfactory level of health protection in the community.²²

The reform explicitly introduced the application of the PP in EU law, both in the Treaty and the General Food Law. Article 7 of the Regulation 178/2002 or the General Food Law (GFL)²³ places the PP as a part of the risk

²¹ Fu Jiangyuan and Joanne Blennerhassett, ‘Is Article 5.7 of the SPS Agreement an Application of The Precautionary Principle?’ (2015) 10(2) *Frontiers of Law in China*, 276-82

²² Anna Szajkowska, ‘Regulating Food Law: Risk Analysis and The Precautionary Principle as General Principles of EU Food Law’ (Doctoral thesis, Wageningen University 2012) 53

²³ The Regulation 178/2002, art 7 provides:

“In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the

analysis methodology, specifically as a risk management tool to guide decision making process of the risk managers under situations of scientific uncertainty on the PP basis. In the implementation of the PP, the principle is recognised and supported under the new institutional structure, which separates the risk assessment body from the risk management body. In practice, it is reported that many provisional risk management measures were taken on the grounds of the PP,²⁴ however, the degree of precaution is varied in each case. For example, the principle is applied to genetically modified products in a very strong degree of precaution comparing to other products making the EU system concerning GM products one of the strictest in the world.²⁵

The EU Courts also play an important role regarding the interpretation of the PP in the EU food safety. Generally, the EU courts have affirmed the application of the PP as the general principle of EC law. However, the EU Treaty does not provide clear indication regarding the standard of review, so the EU courts have also implemented distinct level of intensity in their judicial review.²⁶ In the *Pfizer* decision, the Court held

high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.”

²⁴ Maria Christodoulou, ‘Study on the Evaluation of Regulation (EC) No 178/2002 (“the General Food Law Regulation”)’ (Final Report 2015) European Commission 109 <https://ec.europa.eu/food/sites/food/files/gfl_fitc_external_study_gen_part_gfl.pdf> accessed 26 November 2019

²⁵ *ibid*

²⁶ The European Risk Forum, ‘The Precautionary Principle Application and Way Forward’ (2011) The ERF Study, 41

that in balancing between the economic losses resulting from the adopted measure and the objective of the Community in protecting public health, the Court has to allow the competent authority to take such a decision on risk management and uphold the measure.²⁷

Therefore, it can be seen that the PP is highly supported in the EU through all the legislation in the Treaty and the GFL, the implementation of the principle by the risk assessment and risk management bodies and the judicial review of the implementation processes by the Court.

3.3 The Precautionary Principle and The United States Food Safety Law and Regulation

The initial rules concerning food matters in the US were in place primarily for the purpose of governing interstate commerce at the time of great expansion after the Civil war.²⁸ The issue of adulteration is later recognised, which led to the establishment of the Chemical Division of the United States Department of Agriculture to address specifically on the issue.²⁹ The space era technologies also have a part in designing food safety system in the US, as foods for astronaut's consumption have to be safe. However, the scientists and microbiologists at that time found problems concerning the assurance of food safety. Consequently, the monitoring of critical control points and strict record keeping procedures was introduced, which has later become the underlying concept of the HACCP in the US

<http://www.riskforum.eu/uploads/2/5/7/1/25710097/erf_pp_way_forward_booklet.pdf> accessed 26 November 2019

²⁷ *Pfizer Animal Health v. Council of the European Union* (2002) Case T-13/99, ECR II-3305

²⁸ Kevin J. Fandl, *Law and Public Policy* (Routledge 2019) 258

²⁹ Committee to Ensure Safe Food from Production to Consumption, *Ensuring Safe Food from Production to Consumption* (National Research Council, National Academy 1998)

food industry.³⁰ The US food safety system is also responsive to various scandals in the society, such as the food additives scandals that lead to three legislative amendments that aim to improve the ability to assure the safety of novel materials added to foods or used in the production of foods, including, the Pesticide Control Amendment of 1954, the Food Additives Amendment of 1958, and the Color Additives Amendments of 1960, and the series of E.coli outbreaks that lead to the enactment of the Food Safety Modernization Act (FSMA).

The exact term of PP is not explicitly mentioned in any of the US food safety laws and regulations. It is actually the element of the PP that is embedded in the detailed laws and regulations of the US in the form of precautionary approach in its risk management.³¹ The concept of foresight, prevention and authority to take action to prevent the probability of harm before it is proved have incorporated in the US food safety system and expressed through measures such as the establishment of the pre-market approval system.³²

The US food safety control system employs the multiple agency system that the main authorities are the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA). Responsibilities of the two agencies are separated on the basis of commodity lines. These independent agencies have the role in all the risk analysis processes, including the risk assessment, risk management and risk communication, as

³⁰ Jennifer Ross-Nazzal, ‘“From Farm to Fork”: How Space Food Standards Impacted the Food Industry and Changed Food Safety Standards’ (Societal Impact of Spaceflight) 220-236 <<https://www.history.nasa.gov/sp4801-chapter12.pdf>> accessed 26 November 2019

³¹ European Environment Agency, ‘Late Lessons from Early Warnings: The Precautionary Principle 1896-2000’ (2001) 22/2001 Environmental Issue Report, 12

³² Terra Bowling, ‘Facing Uncertainty: Local Government and the Precautionary Principle’ (National Sea Grant Law Center) <http://www.precaution.org/lib/local_govts_and_pp.081224.pdf> accessed 26 November 2019

they are deemed as the expert in that specific matters. The US food safety system also includes high participation by the private establishment to create their own safety plan under inspection of the agencies.

The Courts are mostly limited themselves to the procedural dimension of the food safety regulations as they are deferential to the agencies' expertise in the substantive decision.³³

In sum, there are various factors shaping the food safety system in the US. Though the US positions itself as opposing to the application of PP in the international arena, and terms related to PP or precaution are absent in the texts, the precautionary approach and attitude are reflected through its food safety control system, such as the enactment of FSMA that grants broad power to expertise agencies to oversee the food safety matters demonstrates the precautionary approach in the US food safety system.

4. Conclusion

The PP is a principle that is becoming increasingly important in the current global food safety system in order to protect public health as there are several new emerging risks that its safety cannot be concluded scientifically. Food safety system in each jurisdiction is shaped by a variety of factors in that society. The difference in the food safety laws and regulations concerning the PP is apparent in the US and the EU. As the PP is explicitly included in the laws and regulations at the Community level in the EU, including Article 191 of the Treaty on the Functioning of the European Union and the specific Regulations concerning food safety in Article 7 of the Regulation 178/2002. While the term PP is not explicitly referred to in any of the US federal food safety regulation. Another difference is found in the implementation of the PP. Apart from the explicit inclusion of the term PP in the laws and regulations, the application of the PP in the EU is also highly supported by the EU institutions, including the European Commission that have published the Communication of the

³³ Neal D. Fortin, *Food Regulation: Law, Science, Policy, and Practice* (Wiley 2017) 10

European Commission on the application of PP, which is like a guideline on the application of the PP. The Communication is also influential to decisions of the EU judicial bodies in considering cases. There are several cases that the Courts granted wide discretionary power to the competent authority in adopting a precautionary measure. On the other hand, as the PP is not explicitly stipulated in the US laws and regulations, but several duties are imposed on the competent authorities in protecting public health. However, the relevant authorities take a different approach. For example, the FDA determined that GM foods are not substantially different from those of non-GM foods, so they regulate the GM and the non-GM food on the same basis. The FDA sees the GM as harmless because there is no scientific proof that GM products are harmful. The US federal Courts are also quite restricted themselves to consider only on the procedural deficiency matter of the agency so the role in supporting the implementation of the PP is not evident.

It can be seen that the divergent application is a result of all the different historical background, legislative tradition, institutional structures in the EU and the US regime. Furthermore, even in the same regime the applications of the PP are varied among specific food products and specific dimensions. Hence, the concept of PP is linked with the concept of safety in a society that reflects various values of the society so each jurisdiction may apply the PP differently.

Bibliography

Books

Bevilacqua D, *Introduction to Global Food-safety Law and Regulation* (Europa Law Publishing 2015)

Committee to Ensure Safe Food from Production to Consumption, *Ensuring Safe Food from Production to Consumption* (National Research Council, National Academy 1998)

Fandl K, *Law and Public Policy* (Routledge 2019)

Fortin N, *Food Regulation: Law, Science, Policy, and Practice* (Wiley 2017)
10

Rakpong J, *WTO Laws: Interpretation and Analysis* (1st edn, Thammasat University 2017) (จารุประภา รักพงษ์, *กฎหมายแห่งองค์การการค้าโลก: การตีความและการวิเคราะห์บทบัญญัติสำคัญ* (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ พิมพ์ครั้งที่ 1 2017))

UNESCO and Comest, *The Precautionary Principle* (UNESCO 2005)

Zander J, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010)

Case

Pfizer Animal Health v. Council of the European Union (2002) Case T-13/99, ECR II-3305

Journal Articles

Cazala J, 'Food Safety and the Precautionary Principle: The Legitimate Moderation of Community Courts' (2004) 10(5) *European Law Journal*

Christoforou T, 'The Precautionary Principle and Democratizing Expertise: A European Legal Perspective' (2003) 30(3) *Science and Public Policy*

Jiangyuan F and Blennerhassett J, 'Is Article 5.7 of the SPS Agreement an Application of The Precautionary Principle?' (2015) 10(2) *Frontiers of Law in China*

Laowonsiri A, 'Application of the Precautionary Principle in the SPS Agreement', (2010) 14 *Max Planck Yearbook of United Nations Law*

Trouwborst A, 'The Precautionary Principle in General International Law: Combating the Babylonian Confusion' (2007) 16(2) *Review of European, Comparative & International Environmental Law*

Wagner M, 'Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law' (2012) 20 *Cardozo Journal of International and Comparative Law*

Wiener J and Rogers M, 'Comparing Precaution in the United States and Europe' (2002) 5(4) *Journal of Risk Research*

Laws and Regulations

Decision of the 21st Session of the Commission in 1995

The Bergen Ministerial Declaration on Sustainable development (1990)

The Regulation 178/2002

The Rio Declaration on Environment and Development (The 1992 United Nations Conference on Environment and Development)

The SPS Agreement

Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius

Working Principles for Risk Analysis for Food Safety for Application by Governments

Organization Reports

Christodoulou M, 'Study on the Evaluation of Regulation (EC) No 178/2002 ("the General Food Law Regulation")' (Final Report 2015) European Commission

European Environment Agency, 'Late Lessons from Early Warnings: The Precautionary Principle 1896-2000' (2001) 22/2001 Environmental Issue Report

Research Paper

Gehring M and Segger M, 'Precaution in World Trade Law: The Precautionary Principle and its Implications for the World Trade Organization' Research Paper <<http://www.cisd.org/wp-content/uploads/2018/05/Precaution-in-World-Trade-Law-2003.pdf>> accessed 4 January 2019

Thesis

Szajkowska A, 'Regulating Food Law: Risk Analysis and The Precautionary Principle as General Principles of EU Food Law' (Doctoral thesis, Wageningen University 2012)

Websites and Blogs

Bowling T, 'Facing Uncertainty: Local Government and the Precautionary Principle' (National Sea Grant Law Center) <http://www.precaution.org/lib/local_govts_and_pp.081224.pdf> accessed 26 November 2019

Jordan A and O’Riordan T, ‘The Precautionary Principle: A Legal and Policy History’ in Marco Martuzzi and Joel A. Tickner (eds), *The Precautionary Principle: Protecting Public Health, the Environment and the Future of Our Children* (WHO 2004) <http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf> accessed 26 November 2019

Ross-Nazzal J, ‘“From Farm to Fork”: How Space Food Standards Impacted the Food Industry and Changed Food Safety Standards’ (Societal Impact of Spaceflight) <<https://www.history.nasa.gov/sp4801-chapter12.pdf>> accessed 26 November 2019

The European Risk Forum, ‘The Precautionary Principle Application and Way Forward’ (2011) The ERF Study <http://www.riskforum.eu/uploads/2/5/7/1/25710097/erf_pp_way_forward_booklet_.pdf> accessed 26 November 2019

POTENTIAL LISTING REQUIREMENTS FOR STARTUPS*

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Abstract

This article explores the problems on the raising funds through a capital market and being a listed company in Stock Exchange of Thailand (“the SET”) as the existing regulations of permission for the offering the new securities to the public including the registration for becoming the listed company are stipulated for large companies merely. Although Market for Alternative Investment (“the MAI”), which is trading board of Stock Exchange of Thailand, encourage the small company to be a listed company, its regulations are intensive like SET.

Because of this problem, this article applies a comparative study to examine how other countries solve the problems as mentioned above. For example, United Kingdom established the Alternative Investment market (“the AIM”) and reduced the financial criteria for admission to the AIM such as registered capital, profits and free float. Furthermore, Korea New Exchange (“the KONEX”) of South Korea which was established under the concept of the AIM, also reduced the finance criteria. Both AIM and KONEX have the significant key successes which are a nominated adviser (“the

* This article is summarized and arranged from the thesis “Potential Listing Requirements for Startups” The Master of Laws Program in Business laws (English Program), Faculty of Law, Thammasat University 2018

Nomad”) who stays with the startups and support them for being a listed company.

In Thailand, under the Securities and Exchange Act B.E. 2535 (“the SEC Act”), the writer has found that the Act has allowed the relevant government authorities to stipulate the regulations for small companies to offer their shares to the public including the registration of becoming the listed company in the SET. Therefore, the writer has provided the recommendation of the proposed the listing requirements of startups in this article. For example, candidate company status, management structure, financial requirements, financial statements, minority shareholders and professional requirements.

Keywords: Capital Market, Startups, Stock Exchanges

1. Introduction

A capital market is a part of the financial market which acts as a middleman to facilitate and regulate the cash flow from people who have surplus capital to people who in need of capital. Companies which are able to raise funds through this market normally must have particular qualifications stipulated by government authorities. The qualifications are generally relevant to the company good governance, financial criteria and operation recording which are the most obstacles of small companies similar to startup companies. However, since a significant portion of jobs and economic growth in the United States had been generated by startup companies, some nations foresee the possibilities of an economy driven by startup companies. Thus, an idea of encouragement for the supply of equity capital to startup companies and building a startup ecosystem have been debated. Actually, the idea of encouragement for the supply of equity capital to smaller companies, which is similar to startups, has been debated after the Second World War as a small company hardly access to a public market where the listing requirement of stock exchange have been illustrated for large companies due to trading and financial record including a percentage of an equity in public hand.

Hence, this article will study the character of startups, the problem of going public of startups under Thai laws comparing with AIM and KONEX and the conclusion for the proposed listing requirements of startups. At present the term “startups” is frequently used to describe young ventures and enterprises which are typically newly emerged, fast-growing businesses involving technology or deploying advanced innovation. However, there is not yet a global legal definition of a startup. Hence, most countries illustrate a statutory definition of a startup with parameters such as revenue, age, growth, profitability or even stability.¹ For example, in the United States, the definition of a small business and startup under the Jumpstart Our Business

¹ DINESH JOTWANI, 'What Are Startups - A Legal Definition' (*Live Law*, 23 January 2016) <<http://www.livelaw.in/what-are-startups-a-legal-definition/>> accessed 18 April 2017

Startups Act is an emerging growth company which has a total annual gross revenue of less than one million dollars. To sum up, startup companies generally refer to a company with a new business model which has been designed to grow fast by providing the innovative products so that they can offer goods and services to provide a better purchase experience for consumers. Startups are not similar to Small and Medium Enterprises (“SMEs”) as the noticeable difference is businesses of startups which are generally related to the innovation and such innovation with their products will affect the value proposition of existing goods and services, and they can experience extreme growth without limitation from employees and locations. Generally, the sources of funds of startups is different from the general business because startups’ businesses are still the high risk or startups have not any assets to be a collateral.

As mentioned above, startups generally started their own business by using the source of funds below.² Moreover, proposed funds of startups are related closely to the growth of startups which is considered in each round of fundraising. However, please note that the description of each round may be different in each region.³

1.1 Bootstrap

Own investment or family’s funds is the normal first funding of a lot of startups.⁴ Startups who utilize this fund may be confront the problem to

² Paul Graham, ‘How to Fund a Startup’ (*Paul Graham*, November 2005) <www.paulgraham.com/startupfunding.html> accessed 30 November 2019

³ Thumbsup, ‘How Funding Rounds Differ Seed Series’ (*Thumbs Up*) <<https://www.thumbsup.in.th/how-funding-rounds-differ-seed-series>> accessed 30 November 2019

⁴ Narit Woraphongdi, *Roojak Dhurakij Startup [SET Your Startup Business]* (1edn, The Development Knowledge of Entrepreneur, Thailand Securities Institute 2017) 9 (ณฤทธิ์ วรพงษ์ดี, *รู้จักธุรกิจสตาร์ทอัพ* (ฝ่ายพัฒนาความรู้ผู้ประกอบการ, ศูนย์พัฒนาความรู้ตลาดทุน 2560)) 9

separate a personal life and a business.⁵ Generally, startups which still utilize this fund is under pre-seed round. It means that startups still have only ideas to produce the minimum viable product.

1.2 Angel Investors

Some defined an angel investor as a private investor who has a close relationship with a founder of a startup such as friends and family and some defined them as wealthy individuals. Normally, angel investors provide financial assistance to startups in the aggregate amount of 100,000 to 1 million dollars. In this regard, the startups use this fund for the cost of setting up a company, living expense of founders and researching a prototype product and call this round is the seed fund round.

1.3 Venture Capital

A venture capital (“VC”) can be any legal entity such as a company or equity fund which has objectives to invest in the targeted businesses as a long-term investment for three to five years.⁶ In this regard, VC will consider an overview of the targeted business and allocate financial aid in proportion based on a targeted company’s progress. Thus, a startup must have a product prototype and be able to estimate the customer’s demand before obtaining funds from VC.⁷ Moreover, VC may appoint a representative to be either a director or a shareholder of a startup to control the business direction and ensure their financial assistance will be used for deserving activities. Moreover, VC may desire an exit plan from a startup by offering its equity securities to the public⁸ so that VC obtains profits on selling their

⁵ Graham (n 2)

⁶ *ibid*

⁷ Thumbsup (n 3)

⁸ *ibid*

shares.⁹ In this round, it calls the series A round. Many successful startups obtain financial assistance from venture capital such as Dropbox, Twitter, Snapchat, Uber, and Instagram.

1.4 Crowdfunding

Crowdfunding is the practice of raising a minimal amount of money from a large number of people for a project or a venture via the internet where entrepreneurs have to present their products via an electronic funding portal and propose a target for financial assistance.¹⁰ This platform differs from the other types as it is a wide channel to convene investors and entrepreneurs. Some startups may use crowdfunding for raise fund at pre-seed round.

1.5 Incubators

An incubator is a company that supports a startup by providing services such as marketing or financing advice and coworking space including holding events for startups' roadshows. Moreover, they may help startups by finding the new source of funds from several investors in order to develop the products of startups and an incubator may become a shareholder of startups but some incubators may provide funds without any conditions.¹¹ In this regard, an incubator may provide source of fund to the startups at pre-seed round and seed funds.

⁹ Thailand Development Research Institute, 'What is a Venture Capital' (TDRI) <http://tdri.or.th/archives/download/reports/published/s43/q_16.pdf> accessed 30 July 2019

¹⁰ Tanya Prive, 'What Is Crowdfunding And How Does It Benefit The Economy' (*Forbes*, 27 November 2012) <www.forbes.com/sites/tanyaprive/2012/11/27/what-is-crowdfunding-and-how-does-it-benefit-the-economy/#137cbf9c4ed4> accessed 30 November 2019

¹¹ Narit Woraphongdi (n 4).

1.6 Loan

A loan is a primary source of funds for doing business. However, commercial banks may not have sufficient funds to provide loans to every startup, or they may stipulate requirements at high standards such as the amount of collateral or particular fixed assets. Therefore, the result may be that several startups cannot obtain funds.¹²

2. The Problem of Going Public of Startups under Thai Laws

Thai small-medium companies have a financial gap on raising funds with angel investors, venture capitals and Stock Exchange of Thailand (“SET”). The said financial gap is that Thai small-medium companies are not able to receive the additional funds when they had received the funds from angel investors. The venture capitals, which is the next round for larger startups, are not interest in Thai small-medium companies as they do not have the capabilities to generate the return investment. Moreover, the listing regulations of the Market for alternative investment are not illustrated in a small company like startups particularly in financial condition such as equity’s shareholder, register capital and operation recording and the costs of listing on MAI. Hence, considering a startup’s nature, it is still a small business which commences its business by using a small funds. Then, there may be a rare startup to meet current requirements to list on the SET and raise funds through the IPO process, although such company needs to raise a small funds. There are a record that a minimum of funds which raised through the MAI is at thirty million Baht.

Consequently, the existing requirements are inappropriate for startups either in terms of public company status, financial conditions and management structure. Hence, for desiring the proposed listing requirements, it must be considered what kind of startups should be

¹² Santi Kiranand, *Talat Thun Yuk Mai [Modern Capital Market: Thai Context]* (The Stock Exchange of Thailand 2016) 230 (สันติ กิระนันท์, *ตลาดทุนยุคใหม่* (ตลาดหลักทรัพย์แห่งประเทศไทย 2559)) 230

admitted and how to design the listing requirements which are suitable for a nature of startups.

2.1 Candidate Company Status

According to the Securities and Exchange Act B.E. 2535, a private company under the Thai Civil and Commercial Code cannot raise funds from the public unless there is an exemption or regulation specified by the Capital Market Supervisory Board under the Securities and Exchange Commission.¹³ However, there is not yet any regulation to allow a private company to offer its shares to the public unless the private company raises funds through the crowdfunding method. Also, the regulations of the initial public offering of the Securities and Exchange Commission (“the SEC”) and the general listing criteria of the SET stipulate that the applicant company must be a public company.¹⁴ Therefore, if startups currently are determined to list on an exchange, they are required to transform themselves from a private company into a public company. The basis for designing the list requirements for startups should consider their nature, which is a small company raising funds for the first time. Normally, startups which undertake their business with few founders in the early-stage normally set up a private company as it requires only three promoters and there are no minimum requirements on the number directors of the company.¹⁵

2.2 Management Structure

Under the Notification of the Capital Market Supervisory Board No. Tor Jor 39/2559, clause 17(3) (“The Notification No. Tor Jor 39”), a candidate company which intends to offer its shares to the public must have an audit

¹³ Securities and Exchange Act B.E. 2535 (1992), s 34

¹⁴ Notification of the Capital Market Supervisory Board No. Tor Jor. 39/2559 Application for Approval and Granting of Approval for Offering of Newly Issued Shares (Codefied) clause 5; Regulation of the Stock Exchange of Thailand Re: Listing of Ordinary Shares or Preferred Shares as Listed Securities B.E. 2558 (2015) (Bor.Jor.Ror.01-0) clause 4(1)

¹⁵ Thai Civil and Commercial Code, s 1097

committee and an independent director as they have obligations to verify the internal control policy and a financial statements of a listed company in regards to whether they are in accordance with the standard of the SEC or not. However, startups are still small companies and have little revenue, and each financial transaction is not complicated. An audit committee may not be necessary in terms of the financial statement. However, they are still required for checking an internal control policy of each startup as most of the business of startups is high risks and an internal policy should be prepared to prevent the potential risks.

2.3 Financial Requirements

Regulation of the Stock Exchange of Thailand Re: Listing of Ordinary Shares or Preferred Shares as Listed Securities B.E. 2558 (2015) (“Bor.Jor.Ror.01-0”), clause 6(b) and Regulation of the Stock Exchange of Thailand Re: Listing of Securities, Disclosure of Information, Reporting of Securities Holding and Delisting of Securities in the “Market for Alternative Investment (MAI)” B.E. 2558 (2015) (“TorMorRor 01-00”) clause 6, both regulation of SET have been stipulated for a candidate company who have an excellent financial performance with positive shareholder equity or have a capability to make profits to investors. Moreover, the candidate company can select either profits scheme or market capitalization scheme for listing on an exchange. An underlying reason that the laws stipulated high financial requirements is to provides an opportunity for excellent performance companies to sell their shares in an exchange. If the laws allow poor-performing corporations, it may cause damages to either investors or a nation since a stock market plays an important role in an economic¹⁶ However, the business nature of startups is that they are still in a loss position until they can find proper products for customers or new innovation. This factor is an significant barrier for startups to list on a current exchange. Although shareholder equity can result in a positive position by

¹⁶ Sidney M Robbins, *A Capital Market in Thailand* (Bank of Thailand 1970) 8

raising funds from the public at the IPO process, there is a problem attracting investors to buy shares if such startup has no history of products or operation records.

2.4 The Financial Statements

Under the Notification No. Tor Jor 39, clause 18 (2), the financial statements of a candidate company are required to be prepared in accordance with the Thai Financial Reporting Standard (“TFRS”) as Publicly Accountable Entities (“PAEs”). However, generally, a private company prepares its financial statements under TFRS as Non-Publicly Accountable Entities (“NPAEs”). Hence, it is required to have the financial statements adjusted from NPAEs to PAEs by auditors under the approval list of the SEC. That adjustment may affect the value of a company as there are more standards to comply with and the startup may not have enough money to pay the auditor’s fee. However, this research does not analyze the accounting standard.

2.5 Minority Shareholders

In principle, the free float are the listing requirement to ensure that there is enough shares for trading on a stock exchange and preventing one group of shareholders to control the direction of a company. This concept concerns that the number of shares which are held by the public are not enough to trade and a trading market cannot take place.

In the SET, a candidate company must have its float shares at not less than 1,000 shareholders by offering its shares to the public at least 20-25 percent of the paid-up capital. For the MAI, although its regulations are more relaxed than the SET, it is still required the same proportion of distribution of shares but only 300 shareholders as its float shares. Moreover, the float shares cannot offer to the public in the other scheme

such as a private placement scheme and right offering scheme.¹⁷ This factors relates to the performance of a company because if the company has a capability to gain profits, investors will interest to buy its shares by considering its operation recorded but a startup is a business to find a new innovation and still in loss position due to its experimentation of innovation and a few investors will understand their business plans and can wait for the profits in future although, there are high risks that such investment will not return to them. Moreover, normally, investors wish to gain profits from their investment as soon as possible.

2.6 Professional Requirements

In the principle, there are several professionals who involve in the process of initial public offering and registration of securities to an exchange. For example, the prospectus of a candidate company must be prepared by the financial advisors under an approval list of SEC. Moreover, there are an underwriter and auditors who are in the role of selling the candidate company' shares and prepare financial statements respectively. Thus, normally, a candidate company has an obligation to pay their service fees as its cost for raising funds through a capital market. It means that startups will have more costs, although they need some small funds for undertaking their business. For example, the record for minimum funds raised through the MAI is at thirty million Baht.

3. AIM & KONEX

Both stock markets were established in order to encourage the small companies which are similar to startups.¹⁸ The two concepts, which is the

¹⁷ Bor.Jor.Ror.01-00 (n 14), clause 4(3); Regulation of the Stock Exchange of Thailand Re: Listing of Securities, Disclosure of Information, Reporting of Securities Holding and Delisting of Securities in the "Market for Alternative Investment (MAI)" B.E. 2558 (2015) TorMorRor 01-00) clause 5(b)

¹⁸ Arcot and others, *From Local to Global, the Rise of AIM as a Stock Market for Growing Companies* (LSE 2007) 11-12; Korea Exchange, 'Background of Establishing the

root of foundation of both stock market, were that regulations must be stipulated for the nature and size of the small companies who will raise funds in the public at the first time. Second, the small companies needed experienced advisers who introduce them about public life and stay with them for providing support and advise them for disclosure obligations to the stock market.¹⁹

Thus, the criteria for admission to AIM has no financial requirements on a minimum registered capital, operation recorded and free float.²⁰ However, the requirement for three years of audited accounts is still required and in practice, although there is no requirement on free float, the investors will expect at least ten percent of the shares to be offered to the public.²¹ In addition, there is a certain requirement on an applicant company which is not independent and earning revenue for at least two years must reveal that its management agrees to retain the business and interest in their securities for one year from the admission to AIM.²² Lastly, the mandatory requirement of the applicant company is an appointment of Nominated adviser (“Nomad”) and AIM Company must retain the Nomad at all times.²³ The Nomad will consider that an applicant company is appropriateness to the AIM or not.²⁴ Moreover, AIM has guidance that the

KONEX' (*Global KRX*, 2015)

<<https://tglobal.krx.co.kr/contents/GLB/02/0201/0201010304/GLB0201010304T1.jsp>>

accessed 3 May 2019

¹⁹ London Stock Exchange Group, 'AIM's Foundation for the Future' (*London Stock Exchange Group*) <<https://www.lseg.com/markets-products-and-services/our-markets/london-stock-exchange/equities-markets/raising-equity-finance/aims-foundation-future>> accessed 2 June 2018

²⁰ Arcot and Others (n 18)

²¹ Arbutnot Securities, 'AIM Investors Survey 2010 A Dedicate Balance' <<https://www.lseg.com/sites/default/files/content/documents/AIM-investor-survey-2010.pdf>> accessed 30 November 2019

²² AIM Rules for Companies 2018, s 7

²³ *ibid*, s 1

²⁴ *ibid*, s 1 paragraph 2

AIM companies may follow the Quoted Companies Alliance which has the guidelines for smaller and growing companies. In this regard, the principle of the said code has stipulated that the company must ensure that there are enough independent directors and the remuneration of executive directors are suitable.

Similar to AIM, KONEX is not required the financial criteria but it is required to maintain the Nomad at all time during the candidate company is a KONEX company. This is because AIM is a model of KONEX. Nomads normally are boutique investment banks or other professional firms but it can also be an individual.²⁵ Nomads have an obligation for looking for a candidate company that has a capability to list on these stock exchange and they will support the candidate company in connection with the listing, and guide a candidate company in the public life.²⁶

4. Conclusion and Recommendation

In order to solve the problem of a financial gap and encourage Thai startups, the suitable listing requirements and the measurement which prevents the problems of startups on a lack of information should bring the two concepts from the AIM and KONEX as mentioned above for designing the listing requirements for startups. For the public offering, SEC may stipulate the limitation on the amount of fund which the startups will raise from the public including the number of persons like crowdfunding scheme and SET will be an authority to approve that offering. This can be done pursuant to SEC Act that provide the authorization to SEC and SET. Therefore, the proposed listing requirements can be summarized below.

Candidate company and management structure is a private company and one independence directors. Financial requirements should stipulate on a registered capital, sale revenue, amount of customers and

²⁵ Arcot and others (n 18) 25

²⁶ Aim Advisers Inc., 'AIM Nominated Adviser' (*AIM Advisers*, 2001-2017) <<http://www.aimadvisers.com/HowAIMworks-nominated-adviser.html>> accessed 5 August 2017

growth rate including an investment from venture capitals or incubators as it can guarantee that a candidate startup has a good performance in future. Furthermore, there should be the legal and financial due diligences report to guarantee the performance of startups. For the minority shareholders, it should stipulate the free float as it ensure that there are enough shares for trading on a stock exchange and preventing one group of shareholders control the direction of a company as mentioned above. Additionally, the SEC should stipulate that the startups must have no any veto from the minority shareholders for making a significant resolution.

For professional requirements, if the financial requirements will be amended, the professional requirements are still important such as the Nomad, legal advisers and accountant in order to guarantee the performance of startups like the AIM and the KONEX.

Besides, the relevant government authorities should together design the incentive for attracting the investors, a candidate company. A new stock market must have incentives schemes which are the essential device for a sustainable growth of stock exchange either tax incentive or non-tax incentives. In this regard, there should be the following incentive for attracting the investors to participate. For example, tax exemption on capital gain on share transfer transaction; in the case of the personal income tax, the loss of investment can be an expense for personal income tax calculation, tax exemption on dividend which distributes either in cash or stocks from the listed companies of new stock exchange, stamp duty exemption on share transfer transaction and corporate income tax exemption for the nominated adviser who participates in the new stock exchange. However, the listing requirements are only the minor part of stock exchange for startups. There are remaining issues to concern for further study. For example, ongoing-obligations which startups must disclose to the investors and exchange, the qualifications of Nomads and its readiness if Thailand deploy the Nomad system similar to the AIM and the KONEX.

Bibliography

Books and Articles

Arcot and others, *From Local to Global, the Rise of AIM as a Stock Market for Growing Companies* (LSE 2007)

Kiranand S, *Talat Thun Yuk Mai [Modern Capital Market: Thai Context]* (The Stock Exchange of Thailand 2016) 230 (สันติ กิระนันท์, *ตลาดทุนยุคใหม่* (ตลาดหลักทรัพย์แห่งประเทศไทย 2559))

Robbins S, *A Capital Market in Thailand* (Bank of Thailand 1970)

Woraphongdi N, *Roojak Dhurakij Startup [SET Your Startup Business]* (1edn, The Development Knowledge of Entrepreneur, Thailand Securities Institute 2017) 9 (ณฤทธิ วรพงษ์ดี, *รู้จักธุรกิจสตาร์ทอัพ* (ฝ่ายพัฒนาความรู้ผู้ประกอบการ, ศูนย์พัฒนาความรู้ตลาดทุน 2560))

Laws and Regulations

AIM Rules for Companies 2018

Notification of the Capital Market Supervisory Board No. Tor Jor. 39/2559 Application for Approval and Granting of Approval for Offering of Newly Issued Shares (Codefied)

Regulation of the Stock Exchange of Thailand Re: Listing of Ordinary Shares or Preferred Shares as Listed Securities B.E. 2558 (2015) (Bor.Jor.Ror.01-0)

Securities and Exchange Act B.E. 2535 (1992)

Thai Civil and Commercial Code

Websites and Blogs

Aim Advisers Inc., 'AIM Nominated Adviser' (*AIM Advisers*, 2001-2017) <<http://www.aimadvisers.com/HowAIMworks-nominated-adviser.html>> accessed 5 August 2017

Arbutnot Securities, 'AIM Investors Survey 2010 A Dedicate Balance' <<https://www.lseg.com/sites/default/files/content/documents/AIM-investor-survey-2010.pdf>> accessed 30 November 2019

Graham P, 'How to Fund a Startup' (*Paul Graham*, November 2005) <www.paulgraham.com/startupfunding.html> accessed 30 November 2019

JOTWANI D, 'What Are Startups - A Legal Definition' (*Live Law*, 23 January 2016) <<http://www.livelaw.in/what-are-startups-a-legal-definition/>> accessed 18 April 2017

Korea Exchange, 'Background of Establishing the KONEX' (*Global KRX*, 2015) <<https://tglobal.krx.co.kr/contents/GLB/02/0201/0201010304/GLB0201010304T1.jsp>> accessed 3 May 2019

London Stock Exchange Group, 'AIM's Foundation for the Future' (*London Stock Exchange Group*) <<https://www.lseg.com/markets-products-and-services/our-markets/london-stock-exchange/equities-markets/raising-equity-finance/aims-foundation-future>> accessed 2 June 2018

Prive T, 'What Is Crowdfunding And How Does It Benefit The Economy' (*Forbes*, 27 November 2012) <www.forbes.com/sites/tanyaprive/2012/11/27/what-is-crowdfunding-and-how-does-it-benefit-the-economy/#137cbf9c4ed4> accessed 30 November 2019

Thailand Development Research Institute, 'What is a Venture Capital' (*TDRI*)
<http://tdri.or.th/archives/download/reports/published/s43/q_16.pdf>
accessed 30 July 2019

Thumbsup, 'How Funding Rounds Differ Seed Series' (*Thumbs Up*)
<www.thumbsup.in.th/2014/06/how-funding-rounds-differ-seed-series/>
accessed 30 November 2019

ESTABLISHMENT OF ONE-STOP SERVICE ORGANIZATION FOR CONSUMER PROTECTION IN THAILAND^{*}

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Abstract

This article presents a new alternative for Thailand's consumer protection by establishing a new organization with the duties to receive consumer cases and send them to the relevant government agencies including follow up on the cases on behalf of the consumers within a reasonable time. These government agencies do not have enough personnel to support the consumers whose rights were violated, therefore, to help reducing their workloads and to produce more effective remedy process for the consumers, the author suggests an establishment of a new organization. Moreover, to reduce the amount of consumer cases, which are petty cases, the authority shall institute a new organization entitled to settle the consumer cases under the Office of the Consumer Protection Board. This organization would be an obvious remedy to the aforementioned limitations.

Keywords: Consumer Protection, Remedy, Alternative Dispute Resolution, Consumer Complaint

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1. Introduction

The problems of the consumer protection process in Thailand are the existence of several authorized organizations that supervise the different areas of consumer protection, depending on the category of goods and services. In Thailand, there are no regulations governing the standard of time required to process the remedies. In some cases, there are only minimal damages which do not require much time as the other cases. Another important reason is the weakness concerning the enforcement of consumer rights as well as there is no forum for consumers to voice their concerns, and no one provides them with the information and skills necessary to deal with the advertising. Many consumers, particularly the rural people, the poor, the less-educated, and the people who lack information and option when choosing products, must rely entirely on advertising.

Technology is influential to business operators nowadays because it can help them connecting with consumers via internet for the advertisement of their products or services. It would therefore be influential to consumers' behaviors when they have to decide to buy any goods or services. Moreover, business operators use high technology and science to produce their goods or services. In contrast, consumers still lack knowledge about the quality of the goods or services and do not see through business operators' marketing techniques. Furthermore, there is an inequality of bargaining power between the parties because consumers do not have the choice to choose. Whenever there is a dispute, consumers do not know which government agency is authorized to handle the case because there are several government agencies that supervise the different areas of the dispute. In addition, some agencies such as the Food and Drug Administration of Thailand has the duty to monitor and punish business operators but they do not have any legal measure to resolve the dispute, which would cause the consumers to take too much of the responsibility in the dispute.

In Thailand, there is an organization that has the responsibility for receiving consumer disputes and supporting the consumers in the

preparation of documents and resolving the dispute. It is the Office of the Consumer Protection Board of Thailand by virtue of Section 21 of the Consumer Protection Act B.E. 2522.¹

However, this office also has a limitation under Section 21 to settle the dispute because in the cases that there are specific laws governing any matters, these cases will be subject to the provisions of such laws. As mentioned above, there are some agencies authorized by law to settle the cases but these agencies do not have any legal measures to handle the consumer cases. From the example above, it shows that there are various regulations and authorized agencies which have the duties to supervise the different business areas. However, when the dispute arising from the infringement of consumer rights, there are some agencies authorized to remedy and support the consumers. Moreover, these agencies have the authority only to punish the business operators, but they do not have any legal authority to help the consumers who suffer damages. The consumers have to bring the cases to the Office of Consumer Protection Board, which is authorized by Section 21 of the Consumer Protection Act B.E. 2522.

To support consumers whose right are violated and help reducing the state agency's workload, and to produce more effective remedy process for the consumers, the author would like to study the improvement of the consumer protection law on how to support the consumer remedies. In Thailand, consumers have to file their claims directly with the authorized agencies and they also have different processes of remedy. Therefore, the author will study the consumer laws in Hong Kong and Australia to look for the principle in the process of receiving consumer complaint and further adopt it to develop a process of consumer complaint in Thailand.

2. Consumer Protection in Thailand

Section 46, Section 61 and Section 64 of the Constitution of the Kingdom of Thailand B.E. 2560 confirm the rights of consumers to receive

¹ Consumer Protection Act B.E. 2522 (1979)

the facts and information about the goods and to file complaints for compensation.² Moreover, consumers can protect their rights and the government must provide the consumers with the right to find a consumer protection organization, which is not operated by a government sector or official. The operator of the organization should be any person other than the government official and he/she should have an authority to consider and resolve the dispute with the government's support.

Moreover, the government regulated Consumer Protection Act, B.E. 2522, which aimed to protect the consumers. However, from our research, the author found that there is not only Consumer Protection Act in Thailand that aims to protect the consumer, but there are many other laws and regulations which are regulated to protect consumers as well.³ Such as the Food Act B.E. 2522, Condominium Act B.E. 2551, and Tourism Business and Guide Act B.E. 2551.

The Consumer Protection Act, B.E. 2522 is a general principle of consumer laws which is different from the other consumer laws that focusing on a specific area. Therefore, in the case where a specific law shall impose for any matter, such matter shall be subject to the provisions of that law. The provisions of this Act shall apply only insofar as it is not a repeat of or contrary to such provisions.⁴ There are exceptions in the application of the general principle as follows:

“(a) In case of necessity for the interest of consumers, if it appears that the authorized official under such law has still not proceeded or has not completed the proceeding thereof in accordance with the law concerned and has not issued orders relating to consumer protection in accordance with such law within ninety days from the date of the receipt of written notice from the ad hoc committees or the Board

² Constitution of the Kingdom of Thailand B.E. 2560 (2017)

³ Susom Supanit, *Khum Atibai Kodmai Khumkongpuboripok [Consumer Protection Law]* (Chula Press 2008) (สุขุม ศุภนิรันตย์, *คำอธิบายกฎหมายคุ้มครองผู้บริโภค* (สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2551))

⁴ Consumer Protection Act (n 1), s 21

(b) In the case where such law does not contain any provisions empowering the competent official to issue orders for the consumer protection, the ad hoc committees would have the power to issue orders in accordance with the provisions, except in the case where there is a provision of the competent official in such law.

As a conclusion, the legal measure under Consumer Protection Act, B.E. 2522 is a basic of consumer protection which intends to protect consumer about goods and service as the general provision where there is not a provision to govern.”⁵

3. Consumer Protection Organization in Thailand

There are several consumer laws and each law are authorized for applying by the organization in the different areas⁶. This is a reason for many various organizations in Thailand. Additionally, the consumer protection organizations in Thailand are classified into two types as follows:

First, the consumer protection organizations that have a general duty to protect consumers in Thailand. There is the Office of the Consumer Protection Board (OCPB) which has the main authority about consumer protection. The board can meditate the cases and file claim for compensation on behalf of the consumers to the court pursuant to Section 39 of the Consumer Protection Act B.E. 2522. However, it is also restricted by Section 21 of the Act to allow OCPB to handle only consumer disputes which are not governed by any specific laws.

Second, the consumer protection organizations that have specific duty to supervise the different areas such as the Food and Drug Association (FDA) which has duty to govern the matter concerning food and drug,

⁵ ibid

⁶ Office of the Consumer Protection Board of Thailand, ‘Consumers International’ (2019) <<https://www.consumersinternational.org/members/members/office-of-the-consumer-protection-board-of-thailand/>> accessed 14 July 2019

however, the FDA is not authorized by law to remedy the consumers,⁷ the National Broadcasting and Telecommunication Commission (NBTC) which has the duty to regulate telecommunication business,⁸ and the Office of the Insurance Commission (OIC) which has the duty to regulate insurance business.⁹ The two latter organizations have many channels to receive the complaints and the process of resolution outside the court. Moreover, Thailand also has the other consumer protection organizations, such as Damrongtham Center, which is a government agency under the Ministry of Interior and has the duty to receive complaints from the people with every area of legal problems.¹⁰

Although there are various government agencies in Thailand authorized by laws with the duties to regulate business operations in different areas, these agencies do not have their own mechanisms to settle the consumer disputes. Therefore, to claim for any compensation, consumers have to return to the Office of the Consumer Protection Board and as a result, it would be inconvenient for consumers who suffer damages. In Thailand, there is no organization authorized to receive all consumer cases and support the consumers in the remedy process outside the court by sending the dispute to the authorized agencies, following up the case in a reasonable time and providing updated feedback to the consumers. In addition, there are no laws prescribing the standard of time required to settle the case and the standard of resolution in the dispute process.

⁷ Food and Drug Association (FDA) Ministry of Public Health, 'Consumer Guidebook' (FDA, 2015) <<http://www.fda.moph.go.th/SharedDocuments/pdf>> accessed 1 April 2019

⁸ Order of Office of National Telecommunications Commission No. 8/2552

⁹ Office of Insurance Commission, 'Introduction' (OIC, 2019) <<https://oic.or.th/thconsumer/complaint1>> accessed 30 April 2019

¹⁰ Damrongtham, Ministry of Interior, 'Complaint Guide Book' (MOI, 2018) <<https://www.damrongdhama.moi.go.th>> accessed 3 May 2019

4. Consumer Protection in Foreign Countries

Should the consumers be protected in the international market? It is still a question because it would interfere with the marketing system. In the conservative economic theory, it is advised that market competition would happen when there is a good corporate governance from the state sector. However, if the market is completely competed within the marketing mechanism, the marketing system no longer needs the government's supervision.¹¹

The author has studied the Australian and Hong Kong Consumer Laws and found that in Australia, there is an Australian Competition & Consumer Commission (ACCC) which is empowered to receive complaints from consumers in all cases¹². It is established to provide a mechanism for market fairness.¹³ The organization has a duty to investigate complaints which are related to consumers. After receiving a complaint, if it is a small problem, the ACCC has the power to order the business operator to do or stop doing something such as sending a letter to inform the business operator that its action has violated the consumer's rights. Moreover, the ACCC can request the business operator to mediate with the complainant and if it can be settled, the case will not be brought to the court.¹⁴

In Hong Kong, there is a Consumer Dispute Resolution Centre (CDRC) funded by the government to ensure that the principles of fairness and

¹¹ Lain Ramsay, *Consumer Protection and Criminal Law: Law Theory and Policy in the UK* (Cambridge University Press 2001)

¹² Australian Government, '*The Australian Consumer Law - A framework Overview*' (2013) ISBN 978-0-642-74877-5

¹³ Australian Competition and Consumer Commission (ACCC), '*ACCC & AER Annual Report 2017-18*' (ACCC, 2017) <<https://www.accc.gov.au/accc-book/printer-friendly/78660>> accessed 11 February 2019

¹⁴ ACCC, '*About the ACCC (2010)*' (ACCC) <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>> accessed 11 February 2019

justice are observed in managing every case of dispute resolution.¹⁵ The centre proposes that the CDRC would provide preliminary legal advice to consumers and adopt the approach of "Mediation First, Arbitration Next" to the consumers and business operators. Moreover, the CDRC would provide a mechanism for resolving consumer disputes in a manner more efficient and cost-effective than litigation.¹⁶

In Australia and Hong Kong, there are organizations authorized to protect the consumers, which can receive every category of consumer cases. These countries classify the cases by the claim amount called "Small Claim Tribunal" which is an effective method to settle the consumer cases. However, in Thailand the consumer dispute is categorized by the type of consumer cases which is the reason why these cases are sent to the other authorized agencies. Sending the cases to the other authorized agencies take a long time to settle the consumer dispute due to the fact that there is a time-frame for resolution process. From our study, in Hong Kong, the average time to settle the minimal case under small claim is less than 40 days.¹⁷

5. Analysis of Legal Measure and Consumer Dispute Resolution Process in Thailand

From the facts in the above paragraphs, the problems can be separated into three types as follows:

¹⁵ Consumer Council (HK), 'Advocating for Establishing Consumer Dispute Resolution Centre' (Consumer Council, August 2016)

<https://www.consumer.org.hk/sites/consumer/files/competition_issues/20160831/summary_e.pdf> accessed 12 February 2019

¹⁶ Consumer Council (HK), 'The Role of Consumer Arbitration in the Alternative Dispute Resolution Regime for Consumer Protection' (Hong Kong K. Wah Centre, 2016)

¹⁷ The Judiciary (HK), 'Small Claims Tribunal' (2016)

<http://www.judiciary.gov.hk/en/crt_services/ppht/html/schtm> accessed 12 February 2019

5.1 The Variety of Consumer Protection Organization in Thailand and Consumer Protection Organization in Foreign Countries

On the part of consumer protection organization in the country, it appears that there are too many organizations that cause inconvenience to the consumers. Especially, the consumers who have suffered damages from buying goods or services from businesses. These consumers do not know how and which organization to file their complaint. They also file complaints to the organizations that have no authority to consider the cases resulting in the delay of remedy process for the consumers and as a result, the consumers are not compensated. Moreover, it does not have the same standard in considering the complaint and remedies process to redress consumers. In Hong Kong and Australia, there is only one state agency responsible for the consumer protection, which is why they do not face the same problems as mentioned above.

5.2 Problems of Classified Consumer Protection Organization and Different Process of Remedies

In Thailand, consumer cases are separated by the nature of damages. In the general consumer law, the amount of loss or quantity of claim is not considered. For example, if the dispute relates to food or drug, the consumers have to file a complaint with the FDA etc. In Australia and Hong Kong, they both classify the cases by the amount of loss.

5.3 Problems of Facilitation on Redressing Process for Consumer Protection

The author found that there are several consumer protection organizations in Thailand which have the duties to receive complaints from consumers. However, they can receive only the cases that are not governed by a specific provision of laws. The Consumer Protection Act B.E. 2522 allows the committee to punish business operators with criminal penalty by imposing fine and imprisonment. However, the law does not provide power to the committee to call for a replacement or repair of the product to

punish the business operators, which is the fundamental consumer rights. While in Australia, the ACCC is authorized to order the business operators who have violated the consumer's right to replace, repair or taking back the goods under the consumer guarantee principle.

6. Conclusion

In Thailand, there is a Consumer Protection Board to support consumers whose rights are violated, but this agency has insufficient personnel. Therefore, to help reducing the state agency's workload, and producing more effective remedy process for the consumers, the author suggests an establishment of a new organization which has the duties to receive consumer cases and send them to the authorized agencies and also follow up on the cases on behalf of the consumers in a reasonable time. Moreover, to reduce minimal consumer cases, the new organization shall be authorized to settle the consumer cases under the control of the Office of the Consumer Protection Board. This organization would be the obvious remedy to the aforementioned limitations. From researching the consumer protection organizations in foreign countries, the author found that there is no consumer protection organization in Thailand to receive all types of consumer case, to consult and support the consumers and to assist the consumers in sending the cases to the authorized agencies and helping in the follow up of the cases until they are settled. Therefore, it would be better if Thailand has a one-stop service consumer protection organization to support consumers in the remedy process. In part of coordination with the other agency that has an authorization in that specific area, the model of Damrongthamg Center, Ministry of Interior, shall be adopted. From our research, the author found that almost 98% of the cases handles by this organization was performed by coordination between the authorized organizations to follow up on the cases. It will help the Consumer Protection Board to focus on the regulation of the law for consumer protection.

Consequently, if there is a legal action concerning the granting of power to the Consumer Protection Committee to resolve the small claim disputes, the mediation will be performed in the same standard and clear criteria. The organization shall be provided with a direct responsibility for consumer protection in Thailand in the future. Moreover, it would be beneficial to both consumers and business operators as well as helping to reduce the consumer cases filing in the court. The consumers will also receive fast and appropriate remedies that most satisfy their own interest.

Bibliography

Articles

Australian Government, 'The Australian Consumer Law - A framework Overview' (2013) ISBN 978-0-642-74877-5

Consumer Council (HK), 'The Role of Consumer Arbitration in the Alternative Dispute Resolution Regime for Consumer Protection' (Hong Kong K. Wah Centre, 2016)

Books

Ramsay L, *Consumer Protection and Criminal Law: Law Theory and Policy in the UK* (Cambridge University Press 2001)

Supanit S, *Khum Atibai Kodmai Khumkongpuboripok [Consumer Protection Law]* (Chula Press 2008) (สุขุม ศุภนิตย์, *คำอธิบายกฎหมายคุ้มครองผู้บริโภค* (สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2551))

Laws and Regulations

Consumer Protection Act B.E. 2522 (1979)

Constitution of the Kingdom of Thailand B.E. 2560 (2017)

Order of Office of National Telecommunications Commission No. 8/2552

Websites and Blogs

Australian Competition and Consumer Commission (ACCC), 'ACCC & AER Annual Report 2017-18' (ACCC, 2017) <<https://www.accc.gov.au/accc-book/printer-friendly/78660>> accessed 11 February 2019

Australian Competition and Consumer Commission (ACCC), 'About the ACCC (2010)' (ACCC) <<https://www.accc.gov.au/about-us/australian->

[competition-consumer-commission/about-the-acc>](#) accessed 11 February 2019

Consumer Council (HK), 'Advocating for Establishing Consumer Dispute Resolution Centre' (Consumer Council, August 2016) <https://www.consumer.org.hk/sites/consumer/files/competition_issues/20160831/summary_e.pdf> accessed 12 February 2019

Damrongtham, Ministry of Interior, 'Complaint Guide Book' (MOI, 2018) <<https://www.damrongdhama.moi.go.th>> accessed 3 May 2019

Food and Drug Association (FDA) Ministry of Public Health, 'Consumer Guidebook' (FDA, 2015) <<http://www.fda.moph.go.th/SharedDocuments/pdf>> accessed 1 April 2019

Office of Insurance Commission, 'Introduction' (OIC, 2019) <<https://oic.or.th/thconsumer/complaint1>> accessed 30 April 2019

The Judiciary (HK), 'Small Claims Tribunal' (2016) <http://www.judiciary.gov.hk/en/crt_services/ppht/html/schtm> accessed 12 February 2019

INDICATION OF PROVISIONAL MEASURES AMIDST THE INTERPRETATION OF JUDGMENTS IN THE INTERNATIONAL COURT OF JUSTICE

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Abstract

The judgment of the International Court of Justice has the effect of *res judicata* as confirmed by Article 60 of the Statute. However, under certain circumstances, a party may file a petition to the Court requesting an interpretation or a revision of a judgment. As for the interpretation, where there is a dispute pertaining to the meaning or scope of the judgment, either party may request the Court to construe such disputing subject matter. Considering the objective of the provisional measures to preliminarily protect parties before the issuance of final judgments, one may question the Court's authority to order provisional measures amidst the interpretation proceeding. Notwithstanding this concern, the Court has granted provisional measures in the middle of two interpretation proceedings: the *Avena* the *Preah Vihear* Interpretations. This article focuses on the Court's authority to order provisional measures during interpretation proceedings. It aims to clarify when and under what circumstance can and should the Court exercise such power.

Keywords: Provisional Measure, Interpretation of Judgment, International Court of Justice, *Avena*, *Preah Vihear*

1. Introduction

Adjudication is a crucial dispute settlement method. That said, it might take some time before a final decision could be rendered so that due process is preserved, i.e., that each disputing party has reasonable opportunity to present its case.¹ Thus, under certain circumstances, it might be necessary for an adjudicatory tribunal to order a disputing party, especially a respondent, to do or refrain from doing something that may vitiate the effect of the tribunal's final decision. This kind of order has been *inter alia* referred to as "injunction", "interim measure", and "provisional measure", which could be effectively used to alleviate the problem of "*la lenteur de la justice*" (justice delayed is justice denied).² Most domestic jurisdictions, if not all, authorize their domestic courts to issue such provisional measures.

From the end of the nineteenth to the beginning of the twentieth century, scholars and other participants had endeavored to replace the use of force in settling international disputes with international adjudication.³ To achieve this objective, they had to assure the states that the proposed substitution was truly efficient. That is, notwithstanding the time-consuming character of the adjudication process, *status quo pendente lite* must be preserved.⁴ Hence, to maintain the disputing states' rights pending the decision on the merits,⁵ the tool of provisional measure was introduced. However, unlike the domestic system whereby the court has compulsory jurisdiction, an international tribunal's jurisdiction is generally based on the

¹ Masanori Kawano, *Comparative Studies on Enforcement and Provisional Measures - Provisional Measures as a Necessary Instrument for Effective Justice* (Mohr Siebeck 2011) 192

² Karin Oellers-Frahm, 'Expanding the Competence to Issue Provisional Measures - Strengthening the International Judicial Function' (2011) 12 *German Law Journal*, 1279

³ Jerry Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Kluwer Law and Taxation 1983) 1

⁴ *ibid*

⁵ Oellers-Frahm (n 2) 1281

disputing parties' consent.⁶ Thus, as Sztucki observes, one should refrain from an exercise of mechanical analogy between the indications of provisional measures in domestic and international levels.⁷ As such, and rightly so, this issue of provisional measure in international law has been a subject of much controversy among scholars.⁸

The International Court of Justice ("ICJ"), the successor of the Permanent Court of Justice ("PCIJ"), generally known as the principal judicial organ of the United Nations, has been ascribed with this provisional measure function as set forth in its statute with an objective to preserve respective rights of disputing parties.⁹ While the Court's jurisdiction over a dispute is dependent on the parties' consent,¹⁰ its ability to order provisional measures is referred to as the Court's incidental jurisdiction.¹¹

Once the ICJ renders its final judgment, the judgment would have the effect of *res judicata* as confirmed by Article 60 of the Statute, which states that the judgment is "final and without appeal." However, under certain circumstances, a party may file a petition to the Court requesting an interpretation or a revision of a judgment. As for the interpretation, where there is a dispute pertaining to the meaning or scope of the judgment, either party may request the Court to construe such disputing subject matter.¹²

Considering the objective of the provisional measures to preliminarily protect parties before the issuance of final judgments, one may question the ICJ's authority to order provisional measures amidst the

⁶ *ibid*

⁷ Sztucki (n 3) 3

⁸ Jerome B. Elkind, *Interim Protection: A Functional Approach* (Martinus Nijhoff 1971) 3

⁹ Statute of the International Court of Justice, art 41 (June 26, 1945) 59 Stat. 1031-33 U.N.T.S. 993

¹⁰ *ibid*, art 36

¹¹ Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005) 9

¹² Statute of the International Court of Justice (n 9) art 60

interpretation proceeding. Notwithstanding this concern, the Court has granted provisional measures amidst two interpretation proceedings: the *Avena* Interpretation¹³ and the *Preah Vihear* Interpretation.¹⁴ Judge Donoghue mentioned this point in passing in her dissenting opinion in the *Preah Vihear* Interpretation, stating that she had “doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case.”¹⁵

This article focuses on the ICJ’s authority to order provisional measures during interpretation proceedings. It aims to clarify when and under what circumstance can and should the Court exercise such power. In order to achieve this task, the historical context of Article 41 of the ICJ Statute regarding provisional measures will be examined in Part II. Part III will then discuss the contents and objectives of the provision as well as its applications in contentious cases. A general observation of the interpretation proceeding will be made in Part IV. Subsequently, Part V will review the facts and the Court’s decisions in *Avena* and *Preah Vihear*. An appraisal of the decisions, as well as their associated declarations, separate opinions and dissenting opinions, will also be made. Finally, the author’s conclusions and suggestions will be provided in Part VI.

2. Historical Context

2.1 Provisional Measures in International Law Before the Establishment of the Permanent Court of International Justice

The first implementation of the concept of provisional measure in international adjudication can be traced back to the late nineteenth century when the Institute of International Law considered this matter in the

¹³ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.) Provisional Measures, 2008 I.C.J. 311 (16 July 2018)

¹⁴ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of *Preah Vihear* (Cambodia v. Thai.) Provisional Measures, 2011 I.C.J. 151 (18 July 2018)

¹⁵ *ibid*, (Donoghue, Dissenting) para 10

context of arbitration procedure. In particular, at the recommendation of Asser, a Dutch Jurist, Article 19 of the *Projet de règlement pour la procédure arbitrale internationale* was incorporated; it stipulates that “[l]e tribunal arbitral peut rendre des jugements interlocutoires ou préparatoires.”¹⁶ As for international judiciary, it was not until the early twentieth century when the first provision concerning indication of provisional measure found its place in Article XVIII of the Convention for the Establishment of a Central American Court of Justice of December 20, 1907,¹⁷ which reads:

From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in status quo pending a final decision.

In 1913, to advance international peace, William Jennings Bryan, the then United States Secretary of State, urged the United States to conclude bilateral treaties with other countries to set up a Permanent International Commission to review disputes that might arise. A number of provisions in the bilateral treaties with various countries (“Bryan Treaties”) provided the Commission with power to indicate provisional measures;¹⁸ they reads:

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of

¹⁶ Rosenne (n 11) 12–13

¹⁷ Karin Oellers-Frahm, ‘Article 41’, *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmermann et al, OUP 2006) 925 para 2

¹⁸ Sztucki (n 3) 2

each party ought in its opinion to be taken provisionally and pending the delivery of its report.¹⁹

2.2 Drafting of the PCIJ Statute

When the League of Nations was founded in the aftermath of the First World War, Article 14 of the Covenant of the League of Nations proposed the establishment of the PCIJ. Consequently, the Advisory Committee of Jurists was appointed on February 13, 1920. The Committee, performing its duty from June 10 to July 24 1920, was entrusted with a prominent duty to draft the Statute of the Court.²⁰ To facilitate this task, the Secretariat of the League provided the Committee with the Memorandum presented by the Legal Section of the Secretariat of the League. The Memorandum included a point that was directly concerned with provisional measure: “Is the Court competent to decree, as regards the subject-matter of the dispute, the fixation of status quo pending its decision?” Additionally, it referred to Article XVIII of the Convention for the Establishment of a Central American Court of Justice. However, the Committee seemingly paid little attention to the document.²¹

It was not until the very last days of the Committee’s working period that a Brazilian representative, Raul Fernandes, raised the issue of provisional measure. Fernandes, citing Article 4 of the Bryan Treaty, proposed that the Committee insert the following clause into its draft.²²

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may,

¹⁹ Treaty between China and the United States for the Advancement of Peace, art 4, reproduced in 10 *American Journal of International Law* 268 (1916) 269

²⁰ Rosenne (n 11) 21–22

²¹ Sztucki (n 3) 23–24

²² *ibid*, 24

provisionally and with the least possible delay, order appropriate protective measures pending the final judgment of the Court.²³

Interestingly, Fernandes also proposed that there should be penalty imposed on those who did not comply with the order. Nevertheless, other members promptly rejected the proposition.²⁴ The provision, which was enshrined in the final version of Article 41 of the PCIJ Statute, reads:

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Council.

2.3 Drafting of the ICJ Statute

According to Article 92 of the United Nations Charter, the ICJ is to be the principal judicial organ of the United Nations, thereby replacing its predecessor, the PCIJ and, accordingly, the Committee of Jurists was set up to revise the PCIJ Statute. With some negligible modifications, the ICJ Statute was adopted in the United Nations Conference on International Organization—the San Francisco Conference. Indeed, the “Procedure” matter under Section III of the Statute was regarded as the least controversial part.²⁵ The summary of the seventh meeting of the Conference reveals that “[t]he Chairman then read in turn Articles 40, 41, 42, and 43, which were approved without objection.”²⁶ Thus, Article 41 was

²³ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurist (28th meeting, 1920) 609

²⁴ *ibid*

²⁵ Oellers-Frahm (n 17) 927 para 7

²⁶ United Nations Conference on International Organization, San Francisco, U.S. (Vol. XIV, 25 April – 26 June 1945) 172

again not the main subject of discussion and was left barely touched. Ultimately, there are merely two insignificant changes in Article 41 of the ICJ Statute from the same provision in the Statute of the PCIJ. One is the change from “reserve” to “preserve” in paragraph one given the typographical error in the earlier version and the other is the change from “Council” to “Security Council” in paragraph two.

2.4 The Rules of Court

Article 30 of the Court Statute grants the Court power to enact its own set of procedural rules. Accordingly, the Court has enacted several sets of rules. The first set of rules was adopted in 1922. Seven modifications were subsequently made in 1926, 1927, 1931, 1936, 1946, 1972, and 1978 respectively. These modifications essentially reflected the past experience that the Court had encountered. Under these rules, the term “Provisional Measure” did not appear until the 1978 Rules was enacted, as the term “Interim Protection” had previously been chosen.

Article 57 of the 1922 Rules, the only provision concerning interim protection within the legal instrument, granted the President of the Court power to indicate interim protection when the Court was not sitting. Paragraph two of the Article provided that failure to comply with the suggestion shall be recorded.²⁷

The rule concerning interim protection was amended for the first time in 1931 when the concept of urgency was introduced. It entailed that the application for interim protection shall have priority over all other cases. Moreover, parties were guaranteed the right to be heard before the Court made its decision.²⁸

²⁷ Article 57 of the 1922 Rules provides:

When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President.

Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record.

²⁸ Article 57 of the 1931 Rules provides:

The rule was then thoroughly revised in 1936 with some minor modifications in 1946. Article 61 of the 1946 Rules comprised eight paragraphs.²⁹ The period to request for indication of interim measures was

An application made to the Court by one or both of the parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.

If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient.

In all cases, the Court shall only indicate measures of protection after giving the parties an opportunity of presenting their observations on the subject.

²⁹ Article 61 of the 1946 Rules, which later became Article 66 of the 1972 Rules, provides:

1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed.

2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

3. If the Court is not sitting, the Members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

4. The Court may indicate interim measures of protection other than those proposed in the request.

5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts.

6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the Members in order to submit to the Court the question whether it is expedient to indicate such measures.

7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection.

for the first time stipulated in broad language in paragraph one. The paragraph reads “[a] request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made [...].”

In 1978, the provision concerning interim protection was split up into six articles—Articles 73 to 78. However, the content of the Rules on this matter remained significantly similar to the 1946 Rules.

Having reviewed the drafting history of the Court Statutes and their *travaux préparatoires*, it seems that pertinent committees did not devote much attention to the subject of the indication of provisional measures. This was partly because the drafting was based primarily on past decisions and the Court’s experience and was not much concerned with instances that might occur in the future. In particular, the question of whether the indication of provisional measures could be made after a final judgment had been delivered was never discussed. In other words, as Rosenne aptly notes, “[w]hile Article 41 certainly empowers the Court to indicate provisional measures for the purpose of preserving the respective rights of each party, it does little more than that, and leaves it to the Court to develop the law.”³⁰

3. Indication of Provisional Measures in International Tribunals

Article 41 of the ICJ Statute provides that “The Court shall have the power to indicate, if it considers *that circumstances so requires*, any provisional measures which ought to be taken *to preserve the respective rights of either party*” (emphasis added). The provision only prescribes a vague requirement—“that circumstances so requires”—for the Court to indicate any provisional measures and a broad objective of such measure, that is “to preserve the respective rights of either party.” Because of this

8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures.

³⁰ Rosenne (n 11) 33

ambiguity, Article 41 has been described as one of the most complicated provisions to apply.³¹

Moreover, as aforesaid in the preceding Part, although the Court has established rules to clarify certain matters, such clarifications are restricted to procedural aspects of Article 41; substantive and jurisdictional matters are still left open for future judicial development.³² Hence, an exploration of cases as well as other resources is needed to understand more thoroughly the content and the nature of this judicial tool. As Oellers-Frahm intriguingly observes:

The case of provisional measures provides a particularly fine example of incremental judicial law making through progressive interpretation supported a holistic vision of the international judiciary, reciprocal strengthening and later state practice, as well as its functional legitimation and its limits.³³

3.1 Functions of Provisional Measures

The first obvious function of provisional measures is the preservation of the rights of either party pending a Court decision. This objective is prescribed in the Statute itself and has frequently been reiterated in several Court decisions.³⁴ Also, the Court and jurists have also elaborated its other purposes. For instance, an author categorizes the objects of provisional measures into two main groups: the traditional purpose to resolve conflicts between states and the purpose to protect individuals in such conflict.³⁵

³¹ J. G. Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 *International and Comparative Law Quarterly* 90, 90

³² *ibid*

³³ Oellers-Frahm (n 2) 1280

³⁴ See, e.g., *Fisheries Jurisdiction (U.K. v. Ice.) Interim Measures*, 1972 I.C.J. 12 (August 17) para 21; *Nuclear Tests (Austl. v. Fr.) Interim Measures*, 1973 I.C.J. 99 (June 22) para 20

³⁵ Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Intersentia 2010) 13–36

Preservation of *status quo*,³⁶ prevention of irreparable prejudice,³⁷ prevention of aggravation and extension of dispute,³⁸ and preservation of evidence³⁹ are some other examples that have been mentioned.

In order to achieve the aforesaid functions, the Court has granted provisional measures in various forms. Moreover, it has been promulgated in Article 75 of the 1978 Rules that the Court may indicate provisional measures other than those requested by the parties.⁴⁰ Pursuant to the same provision, the Court may decide *proprio motu* whether provisional measures should be granted in certain circumstances. As such, it can be assumed that the indication of provisional measures is a very crucial tool of the Court to fulfill its task of resolving disputes. Against this backdrop, the Court in *Lagrand* enunciated that provisional measures “prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved.”⁴¹ Without this tool, the rights that the parties seek to protect by submitting their claims to a judicial institution may rarely be realized. This failure of the judicial system may result in a situation whereby the aggrieved parties are forced to resort to other hostile options.

3.2 Requirements of the Indication of Provisional Measures

³⁶ Sztucki (n 3) 72–73

³⁷ Legal Status of the South Eastern Territory of Greenland (Den. v. Nor.) 1932 P.C.I.J. (ser. A/B) No. 48 (August 3) 284

³⁸ Electricity Company of Sofia and Bulgaria, 1939 P.C.I.J. (ser. A/B) No. 79 (December 5) 199

³⁹ Frontier Dispute (Burk. Faso v. Mali) Provisional Measures, 1986 I.C.J. 3 (January 10) para 20

⁴⁰ Article 75 paragraph 2 of the 1978 Rules provides:

When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

⁴¹ *Lagrand* (Ger. v. U.S.) 2001 I.C.J. 466 (June 27) para 102

In general, the power of the Court to order provisional measures is deemed discretionary. To put it differently, it is the Court that has to consider whether that circumstance so requires.⁴² That said, the Court generally follows past decisions which set up good standards. In other words, the Court's exercise of this function is not purely discretionary, as the Court's jurisprudence has gradually developed.⁴³ According to the current jurisprudence, the Court takes a number of factors into account in considering the issue, including the prospect of the applicant's success on the merit and the existence of nexus between alleged rights in main claims and requested rights in interlocutory proceedings and intentions of the parties.⁴⁴ In short, there are three main factors to which the Court usually gives weight: (1) whether there is *prima facie* jurisdiction; (2) whether there would be irreparable harm; and (3) whether there is urgency.

3.2.1 *Prima Facie* Jurisdiction

Article 36 of the Statute concerns the Court's substantive jurisdiction, which is based on the parties' consent. Yet, this substantive jurisdiction could possibly be distinguished from the Court's jurisdiction to indicate provisional measures because the latter is part of the Court's incidental jurisdiction,⁴⁵ as is also the case for the Court's power to interpret⁴⁶ and revise⁴⁷ judgment, as well as its power to allow third states' intervention.⁴⁸ In contrast to the jurisdiction to decide on the merits, these incidental powers do not emerge from the disputing parties' direct consent;

⁴² Sztucki (n 3) 111

⁴³ Elkind (n 8) 209

⁴⁴ Merrills (n 31) 114–25

⁴⁵ M. H. Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972) 46 *British Yearbook of International Law* 259, 308

⁴⁶ Statute of the International Court of Justice (n 9) art 60

⁴⁷ *ibid*, art 61

⁴⁸ *ibid*, arts 62–63

rather, they are bestowed upon the Court by the Statute itself.⁴⁹ For this reason, it is generally accepted that the Court can decide to indicate or not to indicate provisional measures prior to any conclusive decision as to the question of substantive jurisdiction.⁵⁰

Nevertheless, as the effect of provisional measures could be substantial as it deprives or restricts states' sovereign ability to act independently, the Court cannot completely ignore the issue of substantive jurisdiction.⁵¹ As a result, it is widely agreed that at least *prima facie* jurisdiction is required before the Court can exercise this power to indicate provisional measures.⁵² Given this requirement, an applicant requesting provisional measures shall have burden of proof to demonstrate preliminarily that the Court likely has jurisdiction over the substantive dispute. This is a balanced solution between two extreme ends.⁵³ On the one hand, a total ignorance of the Court's substantive jurisdiction might result in unfairness and cause unanticipated damage to the targeted party if the jurisdiction does not in fact exist. On the other hand, the applicant's rights might be irreparably prejudiced if the Court does not order provisional measures in due time. On a related note, the order issued during this interlocutory proceeding should in no way prejudice the effectiveness of the final judgment.⁵⁴ Also, the scope of provisional measures indicated should

⁴⁹ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius 1986) 533; J. G. Merrills, *International Dispute Settlement* (Cambridge University Press 2011) 124; The word "direct consent" is used because this incidental jurisdiction is in fact based on state's consent as well since each party which agrees to be bound by the United Nation Charters is at the same time bound by the Statute of the Court; see M. H. Mendelson (n 45)

⁵⁰ Alison Duxbury, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights' (2000) 31 *California Western International Law Journal* 141, 163

⁵¹ Merrills (n 31) 92

⁵² Fisheries Jurisdiction (n 34) para 17

⁵³ Mendelson (n 45) 261

⁵⁴ *Interhandel (Switz. v. U.S.) Interim Measures*, 1957 I.C.J. 105 (October 24) 111

not exceed the remedies sought by the applicant in its application,⁵⁵ as the provisional measures indicated should merely serve the Court's ultimate function to render the most effective judgment.

3.2.2 Irreparable Harm

Generally, there are two approaches adopted in determining whether an irreparable harm may take place in absence of the provisional measure. On the one hand, the Court could use a narrow interpretation approach where only absolute legal irreparability would be recognized. That is, irreparable harm can be found only in cases where damage cannot be adequately compensated. As the Court in *Sino Belgian Treaty* observes: “[harm is irreparable when it cannot] be made good simply by the payment of an indemnity or by compensation or restitution in some other material form.”⁵⁶ This approach is criticized given that it extremely restricts the scope of provisional measure.⁵⁷ One scholar even notes that every violation of rights could be made good in law by reparation.⁵⁸ On the other hand, the Court could take into account irreparability with respect to both the fact and the law.⁵⁹ This alternative approach would apparently broaden the scope of possible provisional measure. In recent cases, the Court has tended to adopted this approach. Its application, however, remains obscure.⁶⁰

Notwithstanding its complexity, this requirement of irreparable harm could easily be satisfied where the matter involves individual lives; death

⁵⁵ Oellers-Frahm (n 17) 938-39 para 38

⁵⁶ Denunciation of the Treaty of 2 November 1865 between China and Belgium (China v. Belg.) 1927 P.C.I.J. (ser. A) No. 8 (January 8) 7

⁵⁷ Merrills (n 31) 108

⁵⁸ Sztucki (n 3) 109

⁵⁹ Legal Status of the South Eastern Territory of Greenland (n 37) 284

⁶⁰ Oellers-Frahm (n 17) 940 para 42

and torture of individuals are axiomatically deemed irreparable.⁶¹ This is evident in several ICJ cases including *Genocide*,⁶² *Breard*,⁶³ *Lagrand*,⁶⁴ and *Avena*.⁶⁵ For instance, the Court in *Breard* states that “an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims.”⁶⁶

3.2.3 Urgency

According to the Court, this urgency condition is concerned with the imminence of any hostile action against the rights at dispute in merits.⁶⁷ Simply put, the temporal factor is the one to be considered here. The Court in a number of cases have implied that the requirement of urgency is satisfied when “action prejudicial to the rights of either party is likely to be taken before such final decision is given.”⁶⁸ Again, in cases where human lives are at stake, the Court would usually affirm the existence of urgency. Notably, the Court in *LaGrand* even waived the oral proceedings requirement stipulated under the 1978 Rules since Germany filed its application only one day before the execution was to be taken. It based this decision on Article 75 of the Rules specifying that the Court may decide

⁶¹ Jo M. Pasqualucci, ‘Provisional Measures in the American Human Rights System: An Innovative Development in International Law’ (1993) 26 Vanderbilt Journal of Transnational Law 803, 842

⁶² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) Provisional Measures, 1993 I.C.J. 3 (April 8)

⁶³ Vienna Convention on Consular Relations (Para. v. U.S.) Provisional Measures, 1998 I.C.J. 248 (April 9)

⁶⁴ *Lagrand* (Ger. v. U.S.) Provisional Measures, 1999 I.C.J. 9 (March 3)

⁶⁵ *Avena and Other Mexican Nationals* (Mex. v. U.S.) Provisional Measures, 2003 I.C.J. 77 (February 5)

⁶⁶ Vienna Convention on Consular Relations (n 63) para 37

⁶⁷ Oellers-Frahm (n 17) 941 para 46

⁶⁸ *Passage through the Great Belt* (Fin. v. Den.) Provisional Measures, 1991 I.C.J. 12 (July 29) para 23

proprio motu on the matter.⁶⁹ So far, this case was the only instance that the Court applied Article 75. Additionally, in spite of the fact that four to six weeks have approximately been used in each provisional measure case,⁷⁰ the Court in *LaGrand* spent only twenty-three hours to order the United States to postpone the execution of Mr. Walter LaGrand, a German national. This case obviously reflects the implication of Article 74 Paragraph 1 of the 1978 Rules, which obliges the Court to prioritize requests for indication of provisional measures over all other cases.

3.3 Proceed at One's Own Risk Principle

In cases where the Court considers that the circumstances do not so require the indication of provisional measures and thus dismiss the application, it does not imply that the requesting parties are left without protection under international law. In this regard, international tribunals have consistently declared that the other parties are still governed by the "proceed at own risks" principle. For example, this principle was pronounced by the ICJ in *Great Belt*⁷¹ and a Permanent Court of Arbitration ("PCA") tribunal in *Kishenganga*.⁷²

3.3.1 The *Great Belt* Case

In the late twentieth century, Denmark planned to construct a high-level suspension bridge across the East Channel of the strait of the Great Belt, a strait connecting the Baltic with the Kattegat.⁷³ The construction would permanently prevent any vessels with the height of over 65 meters from sailing through the Channel.⁷⁴ Hence, Finland claimed that the

⁶⁹ Lagrand (n 64) para 21

⁷⁰ Oellers-Frahm (n 17) 942 para 46

⁷¹ Passage through the Great Belt (n 68)

⁷² Indus Waters Kishenganga (Pak. v. India) Interim Measures (Permanent Court of Arbitration 2011)

⁷³ Passage through the Great Belt (n 68) para 1

⁷⁴ *ibid*, para 2

construction of the bridge would adversely affect its drill ship and oilrig businesses as these vessels normally navigated through the Great Belt.⁷⁵ Although it was mutually agreed between the disputing parties that Finland did have the right of passage through the Great Belt, the nature and the extent of such right was inconclusive.⁷⁶ Therefore, Finland brought this dispute to the ICJ and requested that Denmark temporarily stay its construction and refrain from any action that might prejudice the case outcome.⁷⁷

As Denmark did not challenge the Court's jurisdiction on the merits, the Court ruled that it had *prima facie* jurisdiction over the case and therefore had incidental jurisdiction to indicate provisional measures.⁷⁸ As for the urgency requirement, the Court elaborated that the urgency could be found in cases where "action prejudicial to the rights of either party is likely to be taken before such final decision is given."⁷⁹ Relying on Denmark's statement that the construction shall not adversely affect Finland's rights before the end of 1994⁸⁰ and the prediction that the decision on the merits should be rendered by that time, the Court held that no Finland's claimed rights would be infringed pending the final decision.⁸¹ Therefore, the Court refused to order provisional measures.⁸²

The principle of proceed at one's own risks was mentioned in the very last paragraphs of the decision where the Court warned both parties of possible consequences in case where the final judgment were not in favor of either of them. For Denmark, the country would have to consider not only the possibility that damages shall be paid but also that the project

⁷⁵ *ibid*, para 3

⁷⁶ *ibid*, para 22

⁷⁷ *ibid*, para 7

⁷⁸ *ibid*, paras 14–15

⁷⁹ *ibid*, para 23

⁸⁰ *ibid*, para 24

⁸¹ *ibid*, para 27

⁸² *ibid*, para 38

shall be discontinued, modified, or dismantled.⁸³ As a result, it might consider delaying or modifying the construction itself.⁸⁴ In contrast, as to Finland, the state should reconsider the position of its drill ship and oilrig businesses.⁸⁵

3.3.2 The Kishenganga Case

In 1960, India and Pakistan entered the Indus Waters Treaty, arranged by the International Bank for Reconstruction and Development (“World Bank”), concerning management of rivers, one of which is the Kishenganga, in their territories.⁸⁶ According to the Treaty, in case of differences or disputes, either party shall have an option to refer them to arbitration.⁸⁷

In 2007, India started the Kishenganga Hydro-Electric Project (“KHEP”), including construction of a dam planned to be completed in 2016. The dam was designed to divert water from the Kishenganga River to a power plant. Pakistan argued that, because of the diversion of river flow potentially caused by the KHEP, India had breached its “obligation to let flow all the waters of the Western Rivers and not permit any interference with those waters”⁸⁸ and obligation to “maintain the natural channels of the Rivers”⁸⁹ respectively.⁹⁰ The dispute was referred to arbitration on May 17, 2010. In its request for arbitration, Pakistan stated that it would, at the first meeting, request provisional measures indicating India to refrain temporarily from continuing the planned diversion of the Kishenganga

⁸³ *ibid*, para 31

⁸⁴ *ibid*, para 33

⁸⁵ *ibid*, para 34

⁸⁶ Indus Water Treaty between India and Pakistan, Preamble, September 19, 1960

⁸⁷ *ibid*, art IX and Annexure G

⁸⁸ *ibid*, art III (2)

⁸⁹ *ibid*, art IV (6)

⁹⁰ Indus Waters Kishenganga (n 72) para 6

River.⁹¹ The provision governing the indication of provisional measures is provided in Paragraph 28 of Annexure G, which reads:

Either Party may request the Court *at its first meeting* to lay down, pending its Award, such interim measures as, in the opinion of that Party, are *necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute [...]*. (Emphasis added).

However, at its first meeting on January 14, 2011, Pakistan did not file an application for provisional measures, explicating that it did not consider the harm caused by the project to be imminent. However, the country expressly reserved its right to request for provisional measures at any time in the future.⁹² It later submitted an application for provisional measures on June 6, 2011, asking India, in Paragraph 15 of its application, 1) to cease all its work on the KHEP, 2) to report the project progress if necessary, 3) to recognize that it had to take at its own risk that the work may later be discontinued, modified, or dismantled, and 4) to commit any relief that the Court deems necessary.⁹³

In analyzing a question as to whether provisional measures should be indicated, the tribunal initially addressed a number of pertinent issues. First, despite Pakistan's failure to request provisional measures at the first meeting as it previously declared, given that India did not challenge the present application, Pakistan shall not be precluded from its right to pursue provisional measures.⁹⁴ Second, paragraph 28 of Annexure G is *lex specialis*. Consequently, the tribunal did not have to follow the ICJ's jurisprudence on the indication of provisional measures; rather, it need only apply the Treaty.

⁹¹ *ibid*, para 30

⁹² *ibid*, para 31

⁹³ *ibid*, paras 34, 52

⁹⁴ *ibid*, paras 60, 125

⁹⁵ In particular, the applicant need not proven the existence of *irreparable harm* and *urgency*, which are two concepts developed the ICJ.⁹⁶ Thus, applying Paragraph 28 of Annexure G, the tribunal primarily considered whether provisional measures were *necessary* to avoid prejudice to the final solution of the dispute.⁹⁷ Accordingly, it determined whether each particular work of the project would cause adverse effect toward Pakistan before the rendition of the award, which was supposed to be released in late 2012 or early 2013.⁹⁸ In this regard, the tribunal expounded:

In the Court's view, the suspension of many of the key components of construction activity of the KHEP, such as the boring of tunnels and the construction of the power house, does not appear to be "necessary" to safeguard its ability to render an effective Award. As seen during the Court's site visit, the construction and completion of these elements of the KHEP occur at some distance from the Kishenganga/Neelum riverbed, and would thus not in and of themselves affect the flow of the river. Thus, even under the hypothesis that the Court finds at the merits stage that Pakistan's claims, or elements of those claims, are meritorious and the KHEP cannot be completed and put into operation as planned, no violations of Pakistan's rights would have been caused by the tunneling and power house construction aspects of the KHEP, and no particular remedies seem to be available from the Court in this regard (at least as far as the Court can see at this early phase in the proceedings).

[...]

⁹⁵ *ibid*, paras 129-30

⁹⁶ *ibid*

⁹⁷ *ibid*, para 136

⁹⁸ *ibid*, para 141

Conversely, the Court considers that the construction of the permanent dam which India proposes to emplace in and on the Kishenganga/Neelum riverbed falls squarely within the category of works that create a significant risk of “prejudice to the final solution.” Although the dam component of the KHEP presumably accounts for only a fraction of the overall construction costs, Pakistan’s legal arguments are, in essence, conditional upon its completion. It is the dam that would eventually enable India to exercise a certain degree of control over the volume of water that will reach Pakistan; the temporary obstruction of the river and its channeling through a by-pass tunnel does not have any such effect. Moreover, it is the dam that would eventually place India in a position to divert parts or all of the waters of the Kishenganga/Neelum river into the Bonar-Madmati Nallah, thus potentially affecting water supplies in downstream areas of the Neelum valley.⁹⁹

Therefore, the tribunal held that India might continue all the works, including the temporary by-pass tunnel, except for the sub-surface foundations of the dam.¹⁰⁰

With regard to the proceed at own risk principle, it was raised by Pakistan at the first meeting, citing the ICJ decision in *Great Belt*, that “a state engaged in works that may violate the rights of another state can proceed only at its own risk. The court may in its decision on the merits order that the works must not be continued or must be modified or dismantled.”¹⁰¹ The tribunal regarded this suggestion as the most contentious assurance sought by Pakistan from India.¹⁰² That said, on the last day of the hearings, the tribunal found that India’s counsel

⁹⁹ *ibid*, paras 142, 146

¹⁰⁰ *ibid*, para 152

¹⁰¹ *ibid*, para 65

¹⁰² *ibid*, para 122

unequivocally stated that the country “is committed to proceed on the ‘own-risk principle’ of international law.”¹⁰³ Moreover, India asserted that it will “fully and wholly abide by any decision taken by the Court of Arbitration.”¹⁰⁴ Taking these statements into account, the tribunal denied the risk of prejudice to the final solution and concluded that:

The continuation of such activity is appropriately governed by the ‘proceed at own risk’ principle of international law, as specifically recognized by India during the hearing. The situation would merely be one in which India would have invested considerable sums of money without reaping the benefit of the operation of the KHEP as currently envisaged. This, however, is precisely the risk that India has declared it is willing to assume, and there seems to be no further risk of “prejudice to the final solution,” in terms of the Court’s Award, in allowing these aspects of the KHEP’s construction works to proceed.¹⁰⁵

4. Interpretation of Judgments in the ICJ

Under the ICJ Statute, no appellate mechanism is available. In other words, there is no controlling entity that can completely re-examine the decisions. In general, the ICJ’s judgments are final and binding between disputing parties;¹⁰⁶ they are *res judicata* and thus “cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose.”¹⁰⁷ This principle of *res judicata* serves two principal values: the stability of legal relations and the parties’ interests.¹⁰⁸ Notwithstanding this

¹⁰³ *ibid*

¹⁰⁴ *ibid*, para 126

¹⁰⁵ *ibid*, para 143

¹⁰⁶ Statute of the International Court of Justice (n 9) arts 59–60

¹⁰⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) 2007 I.C.J. 47 (February 26) para 115

¹⁰⁸ *ibid*, para 116

finality of judgment, under some circumstances, e.g., if a judgment itself is unclear or there is a dispute as to its meaning or scope, either party can request the Court to make an interpretation of the judgment in accordance with Article 60 of the Statute.¹⁰⁹

The purpose of interpretation is to clarify the judgment concerning the parts that are in dispute between the parties.¹¹⁰ For this reason, the Court's authority to interpret is restricted to the issues that have already been decided in the judgment and no new facts can be taken account of.¹¹¹ The Court expressly upholds this notion in the *Asylum* Interpretation:

The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.¹¹²

The restriction *ratione temporis* of the interpretation of judgment is different from the revision of judgment. That is, whereas Article 61 provides that a request for revision of judgment must be made within ten years from the date of the judgment, there is no such temporal limitation prescribed in

¹⁰⁹ Article 60 of the ICJ Statute provides:

“The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

¹¹⁰ Kaiyan Homi Kaikobad, *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press 2007) 85

¹¹¹ Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, vol 3 (3rd edn, Martinus Nijhoff 1997) 1670; Andreas Zimmermann and Tobias Thienel, ‘Article 60’ *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman et al, OUP 2006) 1277 paras 3–4

¹¹² Request for Interpretation of the Judgment of November 20th, 1950, in the *Asylum* Case (Colom. v. Peru) 1950 I.C.J. 395 (November 27) 402

Article 60. As such, there is no time limit for either party to request the interpretation of judgment,¹¹³ provided that there is a dispute as to the scope and meaning of the judgment.¹¹⁴ The most evident example would be the request for interpretation in *Preah Vihear* submitted by Cambodia in 2011, forty-nine years after the judgment was rendered in 1962.

5. Indication of Provisional Measures Amidst Interpretation Proceeding in the International Court of Justice: The Cases of *Avena* and *Preah Vihear*

Since the establishments of the PCIJ and its successor, the ICJ, the Court has had received only two requests for provisional measures during the interpretation proceedings. The first submission was made in 2008 in *Avena*,¹¹⁵ a dispute concerning rights of individuals stemmed from dispute regarding international instruments between Mexico and the United States of America, which the Court rendered its final judgment in 2004. The other was made recently in 2011 in *Preah Vihear*,¹¹⁶ a boundary dispute between Cambodia and Thailand, which was decided about half a century ago.

5.1 The *Avena* Case

On January 9, 2003 the United Mexican States filed an application to the ICJ against the United States of America alleging that the latter had breached its obligations under paragraph 1(b) of Article 36 of the 1963 Vienna Convention on the Law of on Consular Relations (“Vienna

¹¹³ Kaikobad (n 110) 125

¹¹⁴ Zimmermann and Thienel (n 111) 1291–93 paras 46–53

¹¹⁵ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (n 13)

¹¹⁶ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (n 14)

Convention”).¹¹⁷ The provision obliges the authorities of the receiving state, in this case the United States, to inform without delay any nationals of another state, in this case Mexico, detained by those authorities of the right to contact his consulate. Moreover, the authorities have to inform without delay the nearest consular post of the state concerned of the detention and any communication addressed to the consular post by the detained individual.¹¹⁸ According to the application, fifty-four Mexican nationals were on death row in the United States where the relevant authorities failed to inform without delay the Mexican nationals of their rights. Mexico argued that the ICJ had jurisdiction over the case in accordance with paragraph 1 of Article 36 of the ICJ Statute and Article I of the Vienna Convention’s Optional Protocol pursuant to the Compulsory Settlement of Disputes.¹¹⁹

5.1.1 Indication of Provisional Measures in 2003

Mexico requested the Court to order the United States to take sufficient measures to ensure that no Mexican national be executed and that no date for the execution of a Mexican national be set.¹²⁰ Given the fact that three Mexican nationals were to be executed within a short period, the Court concluded that it had power to indicate provisional measures under Article 41 of the Statute of the Court.¹²¹ It unanimously ordered that 1) the United States shall take all measures necessary to ensure that these three Mexican nationals were not executed before the final judgment, and

¹¹⁷ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) Application Instituting Proceedings, 2008 I.C.J. 1 (June 5) para 1

¹¹⁸ Vienna Convention on Consular Relations, art 36 para 1(b) April 24, 1963

¹¹⁹ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (n 117) paras 7–9

¹²⁰ Avena and Other Mexican Nationals (n 65) para 51

¹²¹ *ibid*, para 55

2) the United States shall inform the Court of all measures taken with regard to the order.¹²²

5.1.2 Judgment of the Court in 2004

The Court first recalled that the victims were successfully proven to be Mexican and as a result the United States shall have obligations under the Vienna Convention toward these people.¹²³ Moreover, the United States had never challenged that a large number of Mexican defendants were not informed of their rights. In addition, having expounded that the obligation to inform “without delay” required a contracting state to inform an arrested person as soon as it realized that such person was or was probably a foreign national,¹²⁴ the Court stated that the United States had failed to perform such obligation. Thus, the Court concluded that the United States had violated its obligation under paragraph 1(b) of Article 36 of the Vienna Convention.¹²⁵ It then sentenced the United States to “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals [...] by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this judgment.”¹²⁶

5.1.3 Request for Interpretation of the Judgment in 2008

Following the 2004 judgment, President George W. Bush issued a Memorandum for the Attorney General enunciating that the United States shall discharge its duty under international obligations “by having State

¹²² *ibid*, para 59

¹²³ *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 12 (March 31) paras 53–57

¹²⁴ *ibid*, para 88

¹²⁵ *ibid*, para 90

¹²⁶ *ibid*, para 53

courts give effect to the decision with general principle of comity.”¹²⁷ However, in 2008, the Supreme Court of the United States in *Medellin v. Texas*, despite having acknowledged that the *Avena* judgment “constitutes an international law obligations on the part of the United States,”¹²⁸ ruled that the judgment was not automatically enforceable under domestic law.¹²⁹ The Court furthermore decided that the President did not have authority to unilaterally convert non-self-executing obligations under treaties into domestic law, as such authority was in fact belonged to the Congress.¹³⁰

Given the decision in *Medellin* and the fact that only one state court had granted review and reconsideration of dispute to a Mexican national, Mexico requested the ICJ to interpret the judgment. It claimed that there were disputes concerning the scope and meaning of the judgment as the United States understood that it merely constituted an obligation of *means* whereas Mexico understood that it constituted an obligation of *result*.¹³¹

5.1.4 Indication of Provisional Measures in 2008

On June 5, 2008, after Mexico found out that five Mexican were going to be executed,¹³² the country filed an application asking the ICJ to indicate the following provisional measures: 1) the Government of the United States should take all measures to ensure that the five Mexicans would not be executed before the interpretation is made; 2) the

¹²⁷ George W Bush, ‘Memorandum for the Attorney General: Compliance with the Decision of the International Court of Justice in *Avena*’ <<https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>> accessed 27 December 2018

¹²⁸ *Medellin v. Texas*, 552 U.S. 491, 503 (2008)

¹²⁹ *ibid*, 511

¹³⁰ *ibid*, 525–26

¹³¹ *Avena and Other Mexican Nationals (Mex. v. U.S.) Request for the Indication of Provisional Measures of Protection* (2008) para 3

¹³² *ibid*, para 5

Government of the United States should inform the Court of all measures taken; and 3) the Government of the United States should ensure that no action that might prejudice the rights of Mexico or its national would be taken.¹³³

The Court began its analysis by discussing its jurisdiction on the basis of Article 60. The Court confirmed its long practice that such power was considered as part of the Court's incidental jurisdiction: Even if its original jurisdiction ceased to exist, in this case because of the United States' withdrawal from the Optional Protocol to the Vienna Convention, the Court was still able to consider Mexico's request for interpretation.¹³⁴ Given that there were "different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities," the Court pronounced that it had power to interpret the judgment.¹³⁵

Furthermore, as the Court found that there would have been irreparable harm to the lives of human beings had no provisional measure been provided, and that there was an urgency because the execution would be carried out within months, it concluded that the circumstances required that provisional measures be provided.¹³⁶ Thus, the majority of the Court indicated provisional measures as requested by Mexico.¹³⁷

5.2 The *Preah Vihear* Case

The Temple of Preah Vihear has long been at the center of dispute between the Kingdom of Thailand and the Kingdom of Cambodia. Cambodia filed the application instituting proceeding to the Court on October 6, 1959

¹³³ *ibid*, para 15

¹³⁴ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (n 13) para 44

¹³⁵ *ibid*, para 55

¹³⁶ *ibid*, paras 72–74

¹³⁷ *ibid*, para 80

alleging that Thailand had persistently intervened the occupation of Cambodian Territory since 1949.¹³⁸ The Court rejected Thailand's preliminary objection as to the Court's jurisdiction in its judgment of May 26, 1961¹³⁹ and rendered its final judgment on June 15, 1962.¹⁴⁰

5.2.1 Judgment of the Court in 1962

Given that the dispute was concerned with the territorial sovereignty over the region of the Temple of Preah Vihear and its precincts,¹⁴¹ the Court focused its proceedings on the finding of the frontier line between Thailand and Cambodia. In this regard, maps and other considerations submitted to the Court were examined "only to such extent as [the Court] may find in them reasons for the decision," which in this case was whether the Temple of Preah Vihear and its precincts were under the territorial sovereignty of Thailand or Cambodia.¹⁴²

As Cambodia had been a colony of France until its independence in 1953, the Court had to examine the 1904-1908 boundary settlements between France and Thailand (Siam). Consequently, a boundary treaty dated February 13, 1904 was the most crucial instrument that had to be scrutinized and the Court considered Articles 1 and 3 of the treaty to be the most relevant provisions to the dispute.¹⁴³ Whereas Article 1 provided that the frontier shall be based on several watersheds, Article 3 assigned a Mixed Commissions, officers of which shall be appointed by contracting states, to delimit the frontier. It was further stated in Article 3 that "[t]he work of the Mixed Commissions will relate to the frontier determined by Articles 1 and

¹³⁸ Temple of Preah Vihear (Cambodia v. Thai.) Application Instituting Proceedings (October 6, 1959) 4

¹³⁹ Temple of Preah Vihear (Cambodia v. Thai.) Preliminary Objections, 1961 I.C.J. 1 (May 26) 17

¹⁴⁰ Temple of Preah Vihear (Cambodia v. Thai.) 1962 I.C.J. 1 (June 15) 6

¹⁴¹ Temple of Preah Vihear, Preliminary Objections (n 139)

¹⁴² Temple of Preah Vihear, Judgment (n 140) 14

¹⁴³ *ibid*, 16

2.” Regarding the relationship between these two provisions, the Court noted that the consideration of watershed as provided in Article 1 was only *prima facie* and the frontier line would ultimately be the line drawn by the Mixed Commissions.¹⁴⁴

To support its claim, Cambodia submitted a map showing the Dongrak territory, in which the Temple of Preah Vihear was located, as part of its annex—the Annex I map.¹⁴⁵ According to this map, which had not been approved by the Mixed Commissions, the Temple of Preah Vihear was indisputably located in Cambodia’s territory. Given the map status, the Court preliminarily held that the map had no binding effect between the parties.¹⁴⁶ Nevertheless, although the frontier line found in Annex I map apparently did not follow the watershed line as prescribed in Article 1, the Court continued to assess whether the parties had in fact adopted the Annex I map.¹⁴⁷ As the majority of the Court determined that Thailand had failed to express its disagreement with the map within a reasonable period, the Court ruled that the country be held to have acquiesced in its content.¹⁴⁸ In its operative clauses, the Court ruled that: 1) the Temple of Preah Vihear is situated in territory under the Sovereignty of Cambodia; 2) Thailand had to withdraw any military or police forces, or other guards or keepers, from the Temple and its vicinity on Cambodian Territory; and 3) Thailand had to return objects removed by her from the Temple or the Temple area by the Thai authorities.¹⁴⁹

5.2.2 Request for Interpretation of the Judgment in 2011

Following several clashes between Cambodian and Thai armies in the late 2000s around the area of the Temple of Preah Vihear, Cambodia

¹⁴⁴ *ibid*, 17

¹⁴⁵ *ibid*, 21

¹⁴⁶ *ibid*

¹⁴⁷ *ibid*, 22

¹⁴⁸ *ibid*, 23

¹⁴⁹ *ibid*, 36–37

applied a request for interpretation of the 1962 judgment to the ICJ on April 28, 2011.¹⁵⁰ According to Cambodia, there were disputes as to the meaning or scope of judgment between Thailand and Cambodia on three points: 1) whether the judgment recognized the binding force of the frontier line drawn by the Annex I map; 2) whether the meaning and scope of the phrase “vicinity on Cambodian territory” are in aligned with the Annex I map; and 3) whether the obligation to withdraw any military or police forces, or other guards and keepers is of a continuing or an instantaneous character.¹⁵¹

5.2.3 Indication of Provisional Measures in 2011

On the same day of the request for interpretation of the judgment, Cambodia also filed a request for provisional measures. Having indicated the incidents of violence that had occurred in the vicinity of the Temple,¹⁵² the urgent necessity of preventing the damage to the Temple, and the losses of lives and human suffering,¹⁵³ it asked the Court to indicate the following provisional measures: 1) Thai forces shall immediately and unconditionally withdraw from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear; 2) Thailand shall refrain from all military activity in the area of the Temple of Preah Vihear; and 3) Thailand shall not interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.¹⁵⁴

Having concluded that there were disputes concerning the scope and meaning of the judgment and, therefore, that the Court had *prima facie*

¹⁵⁰ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Application Instituting Proceedings (April 28, 2011)

¹⁵¹ *ibid*, para 5

¹⁵² Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Request by the Kingdom of Cambodia for the Indication of Provisional Measures (April 28, 2011) para 2

¹⁵³ *ibid*, paras 6–7

¹⁵⁴ *ibid*, para 8

jurisdiction to entertain the request for interpretation made by Cambodia, it rejected Thailand's submission to dismiss the case.¹⁵⁵ The Court subsequently considered the requirements stipulated in Article 41 of the Statute to decide whether it should indicate provisional measures. These conditions were: 1) the plausible character of the alleged rights in the principal request and link between these rights and the measures requested; 2) the plausible character of the alleged rights in the principal request; 3) the link between the alleged rights and the measures requested; and 4) the risk of irreparable prejudice and urgency. As these conditions were satisfied, the Court decided that it could indicate provisional measures,¹⁵⁶ which might or might not be the same as those requested by Cambodia.¹⁵⁷ Hence, in its operational clause, the Court indicated that: 1) there shall be no military presence in the Provisional Demilitarized Zone ("PDZ") specified by the Court; 2) Thailand shall not obstruct Cambodia's free access to the Temple or its provision of fresh supplies to non-military personnel in the Temple; 3) both Parties shall continue the cooperation under ASEAN; and 4) both parties shall refrain from any action which might aggravate or extend the dispute.¹⁵⁸

5.3 An Appraisal

Several judges and scholars have extensively discussed the orders of provisional measures in the aforesaid cases. Five judges provided their dissenting opinions with regard to the order of provisional measures indicated in the *Avena* Interpretation in 2008. Judge Buergenthal questioned the Court's jurisdiction to consider the request because he did not believe that there was any dispute regarding the scope and meaning of the judgment. He argued that whereas Mexico cited *Medallin* to support its

¹⁵⁵ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (n 14) para 32

¹⁵⁶ *ibid*, para 57

¹⁵⁷ *ibid*, para 59

¹⁵⁸ *ibid*, para 69

argument that some U.S. governmental authorities, especially Texas, disobeyed the *Avena* judgment,¹⁵⁹ it was the Federal Government who legally represented the country and the latter had declared its intention to comply with the obligations as stated in the February 28, 2005 President Proclamation.¹⁶⁰ In Judge Buergenthal's opinion, this action should already satisfy the 2004 judgment, which provided that the United States shall give effect to the judgment by "means of its own choosing."¹⁶¹ Judges Owada, Tomka, and Keith reaffirmed Judge Buergenthal's opinion that there was no dispute as to the meaning and scope of judgment.¹⁶² They also pointed out that the request for interpretation did not differ from the judgment.¹⁶³ Judge Skotnikhov was of the same opinion that there was no dispute as stipulated in Article 60 of the Statute.¹⁶⁴ He further added that the provisional measures indicated did not have any meaning as it reiterated those that had already been stated in the judgment.¹⁶⁵

With regard to the provisional measures ordered in the *Preah Vihear* Interpretation in 2011, five judges dissented. While all the judges concluded that the Court had jurisdiction as to the indication of provisional measures, they questioned the scope of measures. Disagreements primarily concerned the Court's establishment of the PDZ, which illegitimately covered areas that indisputably belonged to both countries.¹⁶⁶ In short, they argued that

¹⁵⁹ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Buergenthal, Dissenting) (n 13) para 12

¹⁶⁰ *ibid*, 336 paras 13–14

¹⁶¹ *ibid*, 337 para 16

¹⁶² Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Owada, Tomka and Keith, Joint Dissenting) (n 13) 334 para 12

¹⁶³ *ibid*, 344–45 para 13

¹⁶⁴ *ibid*, (Skotnikov, Dissenting) 351 para 9

¹⁶⁵ *ibid*, 351 para 10

¹⁶⁶ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of *Preah Vihear* (Owada, Dissenting) (n 14) para 9; *ibid* (Al-Khasawneh,

the Court had exceeded its power. Some scholars also expressed had also expressed their views, in both concurring and dissenting manners, regarding the Court's imposition of the PDZ.¹⁶⁷

Notably, the question of whether provisional measures can be indicated during the proceeding under Article 60 of the Statute has rarely been discussed by either the Court or scholars. Only one judge sitting in the *Preah Vihear* Interpretation raised the issue. In particular, in her dissenting opinion, Judge Donoghue briefly noted that "I have doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case."¹⁶⁸ However, instead of tackling this suspicion, she merely offered a recommendation that the function of Article 41 to preserve parties' rights can too be achieved by accelerating the interpretation proceeding.¹⁶⁹ She then concluded that, "[n]onetheless, the Statute does not preclude such measures and the Court has issued one such Order, in *Avena Interpretation*."¹⁷⁰ One author briefly mentioned this issue. Given the need to preserve the parties' rights before an interpretation is made, which is identical to the function of provisional measures in normal proceedings, Traviss succinctly concludes that the indication of provisional measures should be allowed in Article 60 cases.¹⁷¹

Neither the Statute of the ICJ nor the 1978 Rules provides any answer to this question: Article 41 of the Statute only prescribes general

Dissenting); *ibid* (Xue, Dissenting); *ibid*, (Cot, Dissenting) para 20; *ibid*, (Donoghue, Dissenting) para 27

¹⁶⁷ Alexandra C. Traviss, 'Temple of Preah Vihear: Lessons on Provisional Measures' (2012) 13(1) *Chicago Journal of International Law*, 317; Kate Shulman, 'The Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand): The ICJ Orders Sweeping Provisional Measures to Prevent Armed Conflict at the Expense of Sovereignty' (2012) 20 *Tulane Journal of International and Comparative Law*, 555

¹⁶⁸ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Donoghue, Dissenting) (n 14) para 10

¹⁶⁹ *ibid*, para 9

¹⁷⁰ *ibid*, para 10

¹⁷¹ Traviss (n 167) 337–38

content of the indication of provisional measures, and Article 73 of the Rules merely states that a request can be made “at any time during the course of the proceedings in the case in connection with which the request is made.” According to these provisions, one might argue that provisional measures can be indicated only before final judgments on the merits are made. Nonetheless, there is in no place where the relationship between Articles 41 and 60 of the Statute is expressly mentioned. Thus, according to the text of the relevant instruments, the question is still left open.

Now, the author will consider a hypothetical situation drawn upon the facts in *Preah Vihear* and examine the implications of the following two possible outcomes—one where provisional measures are available and another where provisional measures are unavailable. Having contemplated these options, we should be able to concretely assess both advantages and drawbacks that might arise from each instance and make a decision on whether the indication of provisional measures should be applicable during the interpretation proceeding.

In the final judgment of *Preah Vihear* in 1962, the Court in paragraph 2 of its operative clause ordered Thailand to “withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in *its vicinity on Cambodian territory*”¹⁷² (emphasis added). There was dispute over the meaning and scope of the phrase “its vicinity on Cambodian territory.” While Cambodia argued that the vicinity of the Temple should be based on the delimitation drawn by the line on the Annex I map, Thailand disagreed with such understanding and asserted that the Court had never defined such vicinity.

Suppose that, relying on its understanding of the judgment, Thailand reasonably believes that only the Temple itself and its extremely limited vicinity are situated in the territory of Cambodia, but the surrounding area, which is in dispute between both countries, belongs to Thailand. Therefore, noticing that some Cambodian nationals are settling down in the disputed

¹⁷² Temple of Preah Vihear, Judgment (n 140) 37

area, Thai Government sends its officials, including both military and police officers, into the area to expel those Cambodian nationals. On the other hand, learning of such operation, Cambodia argues that the operation is unlawful and must immediately be suspended, and all officers must be withdrawn from the area. However, Thailand insists that the area is in its territory and consequently declines Cambodia's requests. As a result of this conflict, Cambodia files a request for interpretation to the Court and simultaneously applies for provisional measures requesting the Court to indicate that Thailand shall halt its operation.

Based on this hypothesis, let us first assume that the Court does not have power to indicate provisional measures. Whereas Thailand would insist that it has authority to continue the expulsion, Cambodia would assert that its nationals have legitimate rights to possess the disputed land. In such circumstance, even though the principle of "proceed at own risks" shall apply, damage would have been inevitable; Cambodian nationals may get injured or even get killed because of Thailand's rational belief that it has rights to use reasonable force in the operation. Accordingly, applying the "proceed at own risks" principle, should the Court, in its interpretation of the judgment, rule that Thailand has violated international obligations, the country would be liable for any damage against Cambodia. Alas, the prejudice suffered by Cambodian individuals is irreversible. In the worst case, in order to protect its people, Cambodia may feel pressured to deploy its armed force, a move that would inevitably aggravate the tension between these two neighboring countries.

By contrast, let us now turn to another hypothetical situation whereby the indication of provisional measures is available. Since it is quite evident that there is a dispute over the meaning and scope of the judgment regarding the vicinity of the temple, the Court tends to have *prima facie* jurisdiction under Article 60. Moreover, as human's lives are at stake here, the requirements of irreparable harm and urgency would also be satisfied. As a result, it is likely that the Court would indicate provisional measures to avoid the damage possibly occurred. Thus, during the interpretation

proceeding, violations are supposed to be temporarily paused because the Court's provisional measures are legally binding under international law.¹⁷³ Then, once the Court issues its interpretation, the disputing states shall know its relevant rights and duties under international law: either Thailand will have to withdraw its officers from Cambodia's territory on the one hand, or Cambodia will have to inform its people to abandon their places and leave Thailand's territory on the other hand. Obviously, this presumption would lead to far less violence and conflicts between states.

As can be seen, allowing the Court to use its discretion to indicate provisional measures in interpretation proceedings would bring the parties some significant advantages in protecting rights pending the interpretation. This power, should it be used appropriately, could effectively promote the United Nations' sacrosanct goal of maintaining international peace and security.¹⁷⁴ Moreover, concerning the enforceability of the Court's judgment, there are no effective enforcement tools such as those normally found in domestic jurisdictions. Although states have legal recourse to the Security Council as the option of last resort, there is no guarantee that the Council will exercise the power.¹⁷⁵ In this respect, the indication of provisional measures could enhance the effects of judgments, which are considered ambiguous, in particular cases. Consequently, the next question would be whether there is any legal foundation for this implementation given that the relevant legal instruments are silent on the issue.

In general, there are two categories of authority that are fundamental to the international judicial organs' power to indicate provisional measure: the express or explicit authority and the inherent authority. Concerning the express authority, it is an authority expressly conferred by constituent legal instruments establishing particular

¹⁷³ Lagrand (n 41) para 109

¹⁷⁴ U.N. Charter, art 1

¹⁷⁵ *ibid*, art 94

adjudicatory entities.¹⁷⁶ This is also the case for the ICJ where the power to order provisional measures is clearly promulgated in Article 41 of the Statute.

With regard to the inherent authority, the concept is often raised where no power to indicate provisional measures is explicitly conferred upon judicial organs. It is generally accepted that every judicial organ has this interim power.¹⁷⁷ For instance, Elkind has focused his study on the aspect as to whether the power to indicate provisional measure is a general principle of international law.¹⁷⁸ After surveying several international judicial decisions and scholarly comments,¹⁷⁹ he concludes that the answer is positive.¹⁸⁰ This conclusion, he adds, is supported by the considerable importance of such interlocutory measures to the function of law “*as an impartial and impersonal technique for the settlement of dispute.*”¹⁸¹ Meanwhile, focusing on the concept of incidental jurisdiction, Rosenne expounds that a court or tribunal can administer the proceedings or the parties’ conduct in relation to the subject matter of dispute with any necessary means as long as it has *prima facie* jurisdiction over the main case.¹⁸²

This explanation of inherent authority can *a fortiori* be applied to the situation where express authorization does exist, but the text may not explicitly cover all circumstances.¹⁸³ Therefore, even though the written

¹⁷⁶ Jo M. Pasqualucci, ‘Interim Measures in International Human Rights: Evolution and Harmonization’ (2005) 38(1) *Vanderbilt Journal of Transnational Law*, 11

¹⁷⁷ Oellers-Frahm (n 2) 1283; Rüdiger Wolfrum, ‘Interim (Provisional) Measures of Protection’ *The Max Planck Encyclopedia of Public International Law* (2006) para 1 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-978019_9231690-e32?prd=EPIL> accessed 27 December 2018

¹⁷⁸ Elkind (n 8) 23

¹⁷⁹ *ibid*, 23–25

¹⁸⁰ *ibid*, 162

¹⁸¹ *ibid*, 256

¹⁸² Rosenne (n 11) 9

¹⁸³ Pasqualucci (n 176) 13–14

documents do not explicitly prescribe the power to indicate provisional measures in specific circumstances, international judicial organs, including the ICJ, should be able to rely on such inherent authority principle to order the measures, as this would enhance the main goal of the adjudicatory bodies of resolving disputes effectively and peacefully.

In sum, from the policy perspective, limiting the Court's power to indicate provisional measures to only the merit phase and prohibiting the Court from using such power in other proceedings such as the interpretation phase does not serve the function of this judicial organ. In other words, this approach does not support the objectives of the Court and its principal organ, the United Nations, to preserve and enhance international peace and security. The result of such restriction would be the inevitability of the potential irreparable harm, as exemplified above in the hypothesis, and the lack of efficiency of the Court's judgments. Thus, the power to indicate provisional measures should not be used too sparingly and should be assigned to the Court whenever it has jurisdiction to hear contentious cases. As such, the Court, which naturally has restrictive and passive power, would be in possession of more tools so that it can successfully manage and resolve disputes at hand.

However, one should also be mindful that the use of provisional measures will inevitably affect disputing states' sovereignty. Accordingly, the power must not be exercised without limit. As the purpose of the interpretation proceeding is to clarify meaning and scope of the judgment that is in dispute, the power to indicate provisional measures must be confined by such aim. The abuse of this mechanism in any interpretation proceeding would result in utterly adverse consequences, because some devious parties may submit their applications for interpretation, which has no time limits,¹⁸⁴ and simultaneously request provisional measures. On this matter, although the Court possesses this power to order provisional

¹⁸⁴ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Buergethal, Dissenting) (n 13) para 25

measures in both the *Avena* and the *Preah Vihear* Interpretations, the author opines that in both cases inappropriately exercised the power.

With regard to the *Avena* Interpretation, the Court ordered the United States to assure that no Mexican nationals, who were not informed of their rights under the Vienna Convention, would be executed pending the interpretation proceeding. This provisional measure is in essence equivalent to the 2004 judgment, which ordered the United States to refrain from the same action. The implication of such provisional measure became more devastating, as the Court later pronounced that it did not have jurisdiction to interpret the judgment.¹⁸⁵ Concerning the *Preah Vihear* Interpretation, regardless of the obvious dispute over the meaning of the phrase “vicinity of the Temple,” the Court decided to set up the PDZ extending to the area which had never been in dispute between Thailand and Cambodia either in the main or the interpretation proceedings.

6. Conclusion

If legitimately utilized, provisional measures are significant tools, which could be effectively utilized to enhance the adjudicatory entities’ function to settle disputes. For this reason, the restriction of the use of such mechanism without any compelling reason to do so would be destructive to ICJ’s function. Therefore, this mechanism should not be utilized too sparingly and should be available in every phase of the Court’s proceedings. Although the Statute, the Rules of the Court, and their preparatory works do not specify a clear answer as to whether this power to indicate provisional measure is extended to the interpretation proceeding under Article 60 of the Statute, as well as the revision proceeding under Article 61, considering the Court’s functions, responsibilities, and its inherent authority, as well as the benefits of provisional measures, the Court should have such power.

¹⁸⁵ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.) 2009 I.C.J. 3 (January 19) para 61

Nonetheless, conferring upon the Court this power would inevitably affect the disputing states' sovereignty. Thus, the jurisprudence that the Court has developed regarding the indication of provisional measures amidst the main proceeding should also be applied in other proceedings *mutatis mutandis*. Notably, the Court's jurisdiction in the interpretation proceeding is naturally narrower than its jurisdiction in the main proceeding. This is because the Court would only have jurisdiction over disputes concerning the meaning and scope of the judgment. Consequently, the Court's authority to indicate provisional measures in Article 60 cases would naturally be more restricted. Therefore, notwithstanding the severe and irreparable prejudice that may happen, the Court must always bear in mind of its limited jurisdiction and exercise its power only within that boundary. In case of the lack of jurisdiction, the Court should step aside and let other pertinent actors perform their roles. Only by doing so that the Court, the jurisdiction of which fundamentally bases on states' consent, could gain state members' trust and recognition as the principal judicial organ of the world community.

Bibliography

Books

- Elkind J, *Interim Protection: A Functional Approach* (Martinus Nijhoff 1971)
- Fitzmaurice G, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius 1986)
- Kaikobad K, *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press 2007)
- Kawano M, *Comparative Studies on Enforcement and Provisional Measures - Provisional Measures as a Necessary Instrument for Effective Justice* (Mohr Siebeck 2011)
- Merrills J, *International Dispute Settlement* (Cambridge University Press 2011)
- Rieter E, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Intersentia 2010)
- Rosenne S, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005)
- Rosenne S, *The Law and Practice of the International Court, 1920-1996*, vol 3 (3rd edn, Martinus Nijhoff 1997)
- Sztucki J, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Kluwer Law and Taxation 1983)

Book Chapters

- Oellers-Frahm K, 'Article 41', *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman et al, OUP 2006)
- Zimmermann A and Thienel T, 'Article 60', *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman et al, OUP 2006)

Cases

International

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) Provisional Measures, 1993 I.C.J. 3 (April 8)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) 2007 I.C.J. 47 (February 26)

Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12 (March 31)

Avena and Other Mexican Nationals (Mex. v. U.S.) Provisional Measures, 2003 I.C.J. 77 (February 5)

Avena and Other Mexican Nationals (Mex. v. U.S.) Request for the Indication of Provisional Measures of Protection (2008)

Denunciation of the Treaty of 2 November 1865 between China and Belgium (China v. Belg.) 1927 P.C.I.J. (ser. A) No. 8 (January 8)

Electricity Company of Sofia and Bulgaria, 1939 P.C.I.J. (ser. A/B) No. 79 (December 5)

Fisheries Jurisdiction (U.K. v. Ice.) Interim Measures, 1972 I.C.J. 12 (August 17)

Frontier Dispute (Burk. Faso v. Mali) Provisional Measures, 1986 I.C.J. 3 (January 10)

Indus Waters Kishenganga (Pak. v. India) Interim Measures (Permanent Court of Arbitration 2011)

Interhandel (Switz. v. U.S.) Interim Measures, 1957 I.C.J. 105 (October 24)

Lagrand (Ger. v. U.S.) Provisional Measures, 1999 I.C.J. 9 (March 3)

Lagrand (Ger. v. U.S.) 2001 I.C.J. 466 (June 27)

Legal Status of the South Eastern Territory of Greenland (Den. v. Nor.) 1932 P.C.I.J. (ser. A/B) No. 48 (August 3)

Nuclear Tests (Austl. v. Fr.) Interim Measures, 1973 I.C.J. 99 (June 22)

Passage through the Great Belt (Fin. v. Den.) Provisional Measures, 1991 I.C.J. 12 (July 29)

Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colom. v. Peru) 1950 I.C.J. 395 (November 27)

Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) Application Instituting Proceedings, 2008 I.C.J. 1 (June 5)

Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) Provisional Measures, 2008 I.C.J. 311 (16 July 2018)

Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2009 I.C.J. 3 (January 19)

Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Application Instituting Proceedings (April 28, 2011)

Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.) Provisional Measures, 2011 I.C.J. 151 (18 July 2018)

Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Request by the Kingdom of Cambodia for the Indication of Provisional Measures (April 28, 2011)

Temple of Preah Vihear (Cambodia v. Thai.) Application Instituting Proceedings (October 6, 1959)

Temple of Preah Vihear (Cambodia v. Thai.) Preliminary Objections, 1961 I.C.J. 1 (May 26)

Temple of Preah Vihear (Cambodia v. Thai.) 1962 I.C.J. 1 (June 15)

Vienna Convention on Consular Relations (Para. v. U.S.) Provisional Measures, 1998 I.C.J. 248 (April 9)

International Laws

Indus Water Treaty between India and Pakistan, Preamble, September 19, 1960

Procès-Verbaux of the Proceedings of the Advisory Committee of Jurist (28th meeting, 1920)

Statute of the International Court of Justice (June 26, 1945)

Treaty between China and the United States for the Advancement of Peace, reproduced in 10 American Journal of International Law (1916)

U.N. Charter

Vienna Convention on Consular Relations, art 36 para 1(b) April 24, 1963

Journal Articles

Duxbury A, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights' (2000) 31 California Western International Law Journal

Mendelson M, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972) 46 British Yearbook of International Law

Merrills J, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 International and Comparative Law Quarterly 90

Oellers-Frahm K, 'Expanding the Competence to Issue Provisional Measures - Strengthening the International Judicial Function' (2011) 12 German Law Journal

Pasqualucci J, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38(1) Vanderbilt Journal of Transnational Law

Pasqualucci J, 'Provisional Measures in the American Human Rights System: An Innovative Development in International Law' (1993) 26 Vanderbilt Journal of Transnational Law

Shulman K, 'The Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand): The ICJ Orders Sweeping Provisional Measures to Prevent Armed Conflict at the Expense of Sovereignty' (2012) 20 Tulane Journal of International and Comparative Law

Traviss A, 'Temple of Preah Vihear: Lessons on Provisional Measures' (2012) 13(1) Chicago Journal of International Law

United States

Medellin v. Texas, 552 U.S. 491, 503 (2008)

Other Document

United Nations Conference on International Organization, San Francisco, U.S. (Vol. XIV, 25 April – 26 June 1945)

Websites and Blogs

Bush G, 'Memorandum for the Attorney General: Compliance with the Decision of the International Court of Justice in Avena' <<https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>> accessed 27 December 2018

Wolfrum R, 'Interim (Provisional) Measures of Protection' *The Max Planck Encyclopedia of Public International Law* (2006) para 1 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e32?prd=EPIL>> accessed 27 December 2018