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EDITOR'S NOTE

Once again, another volume of Thammasat Business Law Journal has finally arrived. This year, the Journal is pleased to publish five Thammasat LL.M. (English Program) students' articles covering a wide variety of issues, including competition law, consumer protection, business organization, and private international law.

I would like to thank all authors, readers, members of the Advisory Board, and members of the Editorial Board for their works and dedication.

Amnart Tangkiriphimarn
Editor-in-Chief
Thammasat University

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THIRD PARTY PARTICIPATION IN MERGER PROCEEDINGS UNDER THE THAI TRADE COMPETITION ACT BE 2560 (2017)*

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Abstract

Literature on Thai competition law has repeatedly acknowledged the ineffectiveness of the Thai merger control regime. This issue has largely been attributed to the underdevelopment of the procedural rules surrounding merger reviews and the wide margin of discretion left to the Trade Competition Commission (hereinafter the TCC) in rendering decisions to prohibit anticompetitive mergers. However, the TCC has yet to issue a prohibition, even in the face of merger proposals that would seemingly have anticompetitive effects, i.e. substantially reduce competition or result in a monopoly in a market. In these controversial cases, affected third parties have been vocal in their criticisms of the TCC and its failure to afford an opportunity to participate in merger proceedings. This article explores this procedural aspect of Thai merger proceedings as regulated under the Thai Trade Competition Act B.E. 2560 (2017). More specifically, it aims to answer whether and to what extent third party participation is necessary during the Thai merger review proceedings and whether the current

* This article is summarised and rearranged from the thesis "Third Party Participation in Merger Proceedings under the Thai Trade Competition Act B.E. 2560," Faculty of Law, Thammasat University, 2021.

procedural rules in the Thai merger control regime accommodate adequate third party participation.

To answer these questions, the article considers the arguments in favour of and against third parties' participation and the legal gaps that currently exist under other Thai laws applicable to merger proceedings. A comparative study has also been done to compare the approaches adopted by the EU and the US and extract key takeaway points from their experiences to improve Thailand's merger proceedings in addressing third parties' participation.

Keywords: Thai merger control, Third party, Right to participate, Third party participation, Thai competition law, Trade Competition Commission

1. Introduction

Although mergers can contribute to the proper function of an economy and its efficiency, certain mergers are undesirable because they can be anticompetitive. They can cause harm to consumer welfare, reduce competition, limit outputs and increase the prices of products and services offered in a market.[1] Because of these effects, merger control regimes are developed to help competition authorities assess, identify, and prohibit these potentially harmful mergers before they are consummated. Merger control regimes, depending on the particular jurisdictions, will often entail a merger review in which competition authorities examine a proposed merger based on the information and evidence gathered to come to a decision on whether the merger proposed should be permitted or prohibited. However, competition authorities occasionally make errors and fail to prohibit anticompetitive mergers. These are known as 'false negatives.'[2] Under such circumstances, it is generally understood that third parties can be adversely affected.[3] The article will focus on two particular groups, consumers and competitors, as references used in the discussion surrounding the necessity of third parties' participation during Thai merger proceedings.

The article aims to answer whether and to what extent third party participation is necessary during Thai merger review proceedings and whether the current procedural rules in the Thai merger control regime accommodate adequate third-party participation. Firstly, in answering these questions, the article explains the current merger control regime under the

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[1] Keith N Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press 2003) 311–332.

[2] Fred S McChesney, 'Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law' (2003)52 Emory Law Journal 1401, 1413; Alan Devlin and Michael Jacobs, 'Antitrust Error' (2010) 52(1) William & Mary Law Review 75, 80.

[3] For example, see in Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 242; Jonathan B Baker, 'Market Concentration in the Antitrust Analysis of Horizontal Mergers' in Keith N Hylton (ed), *Antitrust Law and Economics* (Edward Elgar Publishing 2010).

Trade Competition Act B.E. 2560 (hereinafter the 2017 TCA) in Part 2. Then, Part 3 considers the necessity of third parties' participation in merger proceedings by presenting different arguments to be taken into account. Part 3 also delves into the legal limitations under other Thai laws which strongly indicate the necessity for third parties' participation to be stipulated under the 2017 TCA. Part 4 explores the EU's and the US' approach to third parties' participation in their respective merger regimes and draws out the lessons that Thailand can learn to improve its own approach.

2. Merger control under the Trade Competition Act BE 2560 (2017)

The current merger control is generally regulated by the 2017 TCA. Unlike its predecessor which generally prohibited anticompetitive mergers unless permitted, section 51 of the 2017 TCA consists of two different procedures, constituting a dual merger control regime: Firstly, the post-merger notification and secondly, the mandatory pre-merger notification. For the purpose of this article, the mandatory pre-merger notification will be focused on as it pertains to merger review proceedings.

The mandatory pre-merger notification under section 51 is supplemented by the Trade Competition Commission Notice on Rules, Procedures, and Conditions for Merger Approval B.E. 2561 (2018) (hereinafter the TCC's Notice on Merger Approval Rules). According to the Notice, the business operators requesting permission to merge must provide the TCC with information about the merger, including the merger plan, details of the merging parties, an analysis of the merger and its impact on competition. Having received the request, the TCC has 90 days to complete its consideration which takes into account reasonable business necessity, benefits to the promotion of businesses and harm to the economy and general consumers.[4] The time may be extended upon necessity.[5] Once a

[4] Thai Trade Competition Act B.E. 2560 (2017), s 52 para 1.

[5] Ibid.

decision is reached, the TCC shall provide justifications for granting or denying the merger request.[6] If the requesting parties do not agree with the TCC's decision, they have the right to file an administrative appeal within 60 days.[7]

In the case of a violation of the pre-merger notification, the TCC can issue an order demanding rectification. Other parties, namely persons suffering damage or consumers, are also entitled to file a lawsuit to claim damages.

The 2017 TCA does not provide for any participatory rights to third parties in merger proceedings. However, the TCC's Notice on Merger Approval Rules merely states that the TCC may summon any persons to provide information or opinion for supporting the consideration of the application.[8] Without any further rules, the TCC is left as the only unilateral party that can seek participation from third parties. Nevertheless, the past and current roles of third parties in mergers that have been approved by the TCC seem to suggest that the TCC has not made use of this provision to involve third parties in merger review proceedings.

3. The necessity of third parties' participation

3.1 The past and current roles of third parties in Thai merger

Upon looking at the past and more recent roles of third parties in Thai mergers, third parties have seemingly shown interest to express their opposition if a merger adversely affects them. What can also be observed is that, thus far, third parties can only formally take action *after* the approval merger. As such, it is proposed that the question of the necessity of third parties' participation arose because there is a discrepancy between the

[6] Ibid, s 52 para 4.

[7] Ibid, s 52 para 5.

[8] TCC's Notice on Merger Approval Rules, s 9(3).

actual interest third parties have shown in merger review proceedings and what the legal framework enables third parties to do.

One of the more prominent examples concerns the roles of consumers and competitors in the merger between CP Group (hereinafter CP) and Tesco Plc in the wholesale and retail sectors. Due to CP's position as a dominant player in the market, its merger fell within the purview of the mandatory pre-merger notification requirement overseen by the TCC. Despite the proposed merger's likelihood of anticompetitive effects, the TCC issued an approval decision, albeit with conditions that CP-Tesco must fulfil to address adverse effects on competition.[9] The controversy of this decision led to many criticisms against the TCC's merger proceedings, with the Foundation for Consumers and other consumer groups lodging an administrative appeal against the TCC for its decision.[10] The appeal sought to overturn the TCC's decision based on unlawfulness, specifically also

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[9] 'Phon Kham Winitchai Khong Khanakammakan Kan Khaengkhan Thangkan Kha Korani Kan Kho Anuyat Ruam Thurakit Rawang Borisat CP Retail Development Chamkad Lae Borisat Tesco Stores (Prathet Thai) Chamkad' [The Decision of the TCC in the case of a merger request between CP Retail Development and Tesco Stores] (*TCC,* December 2020) ('ผลคำวินิจฉัยของคณะกรรมการการแข่งขันทางการค้า กรณีการขออนุญาตรวมธุรกิจระหว่าง บริษัท ซี.พี. รีเทล ดีเวลลอปเม้นท์ จำกัด และบริษัท เทสโก้ สโตร์ส (ประเทศไทย) จำกัด' (TCC, ธันวาคม 2563))<https://www.prachachat.net/wp-content/uploads2020/12/%E0%B8%9C%E0%B8%A5%E0%B8%84%E0%B8%B3%E0%B8%A7%E0%B8%B4%E0%B8%99%E0%B8%B4%E0%B8%88%E0%B8%89%E0%B8%B1%E0%B8%A2_CP-Tesco_18122563-final.pdf> accessed 23 May 2021.

[10] 'Consumer groups sue Trade Competition Commission for approving CP-Tesco merger' *Thaiger* (16 March 2916) <https://thethaiger.com/news/business/consumer-groups-sue-trade-competition-commission-for-approving-cp-tesco-merger> accessed 22 July 2022; 'CP: Phak Prachachon Yuen Fong Sanpokkhrong Hai Phoekthon Mati Khana Kam Kan Khaengkhan Thangkan Kha Fai Khiao Thet Ko CP Kuab Ruam Kitchakan' [The People File a an Administrative Lawsuit to Revoke the Decision of the TCC in Allowing the CP Merger] *BBC* (15 March 2021) ('ซีพี: ภาคประชาชนยื่นฟ้องศาลปกครองให้เพิกถอนมติคณะกรรมการแข่งขันทางการค้าไฟเขียวเทสโก้ -ซีพี ควบรวมกิจการ' *บีบีซี* (15 มีนาคม 2564)) <https://www.bbc.com/thai/thailand-56398660> accessed 22 July 2022.

claiming that the TCC failed to afford the opportunity for consumers to participate during the merger proceedings. Competitors were similarly aware of the adverse consequences of the merger and were rather vocal about their opposition to the merger, though no formal actions were taken against the TCC.

Other examples of active roles of consumers and competitors can be seen in the complaint lodged by consumers in the merger case between UBC and UTV in the cable television sector during the previous TCA of B.E.2542 (1999)[11] and even more recently in 2022, AIS' objection to the merger between its competitors, TRUE and DTAC in the telecommunication sector.[12]

Despite the signs of active interest, it has been stated previously that the 2017 TCA does not grant any participatory rights to third parties. The examples above have shown that third parties have resorted to post-merger decision remedies. This article posits that these options provided to third parties are unaligned with their interest in being heard and being given the opportunity to object to mergers. Additionally, the lack of scrutiny by third parties during the TCC's merger proceedings gives rise to decisions being made that may not necessarily be well-informed or as informed as they could be.

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[11] Deunden Nikomborirak, 'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries' (2006) 26(3) Northwestern Journal of International Law and Business 597.

[12] Na-ark Rojanasuvan (Reporter) and Thammarat Thadaphrom (Rewriter) 'AIS Opposes TRUE - DTAC Merger Deal' National News Bureau of Thailand (8 April 2022) <https://thainews.prd.go.th/ en/news/detail/TCATG220408102810537> accessed 22 July 2022; 'Deal TRUE-DTAC Yang Rathuek Board Kor.Sor.Tor.Chor. Jor Thok Eek Rob Lang AIS Yuen Nangsue Khatkhan' [TRUE-DTAC Deal Challenged After AIS Files Objection] (The Standard, 6 April 2022) ('ดีลควบรวม "TRUE-DTAC" ยังระทึก บอร์ด กสทช. จ่อถกอีกรอบ หลัง AIS ยื่นหนังสือคัดค้าน' (The Standard, 6 เมษายน 2565) <https://thestandard.co/true-dtac-joint-venture-deal-still-in-nbtc-board/> accessed 22 July 2022.

Consequently, the limited roles of third parties in merger proceedings in the past mark the start of the assessment as to the reasons why third parties are necessary for merger proceedings. As will be illustrated in the following sections, the major arguments in favour of including third parties' participation in merger proceedings revolve around the idea that their participation can contribute to competition authorities' decision-making process by providing supplemental information about a proposed merger and thus, help limit the competition authorities' failure to identify anticompetitive mergers. The key considerations on the issue are discussed in the following part.

3.2 Considerations in favour of third parties' participation in merger proceedings

3.2.1 Competition authorities can err in their decisions

The process of merger reviews entails conducting an ex-ante assessment of the merger proposed. During this process, the competition authorities make use of different types of evidence, such as factual evidence, economic evidence and opinion which will be taken into account to determine whether a merger should be approved or prohibited.[13] While the process aims to enable the competition authorities to carefully consider the information gathered, competition authorities can still err in their decision-making and fail to prohibit anticompetitive mergers due to the anticipatory nature of ex-ante assessments. After all, competition authorities cannot be certain whether mergers will be anticompetitive once consummated: They can only make an informed decision based on the information they have.

[13] Paul K Gorecki, Cormac Keating and Brendan O'Connor, 'The Role of Economic Evidence in Merger Control in the State: Current and Future Practice' (2007) 3(2) European Competition Journal 345.

However, there is an issue when the use of different types of evidence is not balanced. In this regard, ex-ante assessments which heavily rely on economic evidence have been said to be more problematic because they do not provide a holistic perspective of the potential effects of mergers. Thailand's merger control regime is argued to have an over-reliance on economic evidence as concluded from the listed factors that would be taken into consideration during merger reviews, namely 'business-related necessity, benefit in supporting a business operator, not causing severe damage to the economy, and no impact on the essential benefits consumers are entitled to as a whole.'[14]

Additionally, there is not much evidence in the TCC's decisions which indicates that it has taken into account other types of evidence. The challenge in identifying whether the TCC is prone to make decision errors is exacerbated not only due to the brevity of its justifications, lacking in the citation of evidence used, but also that the TCC is not obliged to conduct ex-post assessments which could confirm false negatives.

In pointing out that competition authorities can err in making decisions about approving or prohibiting mergers, it is argued here that the participation of third parties can be used as a source of information that can help the TCC make better-informed decisions.

3.2.2 Limited incentive for competition authorities to acquire information

In a research conducted by Dertwinkel-Kalt and Wey, it was found that there is a correlation between the merger decisions that competition authorities can render and the incentive to gather information.[15] Their research has found that a merger control regime within which the competition authority can make a compromising decision, i.e. render a

[14] 2017 TCA, sec 52 para 2; TCC's Notice on Merger Approval Rules, sec 10.

[15] Markus Dertwinkel-Kalt and Christian Wey, 'Evidence Production in Merger Control: The Role of Remedies' (2021) 59 Review of Industrial Organization 1.

conditional approval to a merger, in addition to an approval or a prohibition, reduces the incentive of the competition authority to gather information.[16] This is due to the reduced severity of the effects that could come from the competition authorities' errors. As Dertwinkel-Kalt and Winkel explain, a decision which is neither approval nor prohibition, containing remedial conditions 'represents a compromising choice which limits the negative effect of a false extreme decision, allowing for it reduce the agency's incentives to obtain information on the merger's efficiency type.'[17] Thailand's merger control regime falls within this category: The TCC can approve, prohibit or conditionally approve a merger (as can be seen in the TCC's decision on the merger between CP and Tesco). Under the assumption that this type of merger control regime does not create an incentive for the TCC to gather information, third parties' participation ought to be enshrined in the merger control regime to open the channel through which the information can be received by the TCC which would not have otherwise been sought after.

3.2.3 Challenges in reversing the effects of anticompetitive mergers

The extent to which the anticompetitive effects of mergers can be remedied determines the importance of the competition authorities' accuracy in their identification of anticompetitive mergers during the merger proceedings.

The challenges in attempting to reverse the effects of anticompetitive mergers highlight that it is preferred that competition authorities accurately identify and prohibit anticompetitive mergers rather than seek remedies upon the occurrence of anticompetitive effects. In simple terms, prevention is better than cure. While some have found that

[16] This does not negate the competition authority's reliance on information by the parties seeking merger approvals.

[17] Markus Dertwinkel-Kalt and Christian Wey, 'Evidence Production in Merger Control: The Role of Remedies' (2021) 59 Review of Industrial Organization 3.

anticompetitive effects of mergers are 'hardly catastrophic'[18] and are remediable, this has been contested by some empirical studies which have shown the ineffectiveness of remedies in addressing the adverse effects that have already occurred.[19]

3.2.4 Balancing interest tool

The participation of third parties is another source of information that can be used to supplement the competition authorities' evidence-gathering and fact-finding processes during merger proceedings as well as a tool that can also facilitate competition authorities in the weighing of different interests at play. According to Farrell, competition authorities 'find it worth seeking informed parties who (in the instance, and at least broadly) share their goals, in order to learn from the parties' judgments.'[20] Third parties' information is particularly important to balance the information obtained from the merging parties that may be self-serving.

3.3 Caveats to third party participation

The consideration of the necessity of third parties' participation is not without consideration for some issues, namely the risk of receiving unreliable information.

Information and opinion obtained from third parties may be biased on unreliable if they oppose a merger. For example, competitors of merging

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[18] Daniel A Crane, 'Rethinking Merger Efficiencies' (2011) 110(3) Michigan Law Review 347, 383.

[19] See, for example in Stephen Davies and Matthew Olczak, 'Assessing the Efficacy of Structural Merger Remedies: Choosing Between Theories of Harm?' (2010) 37(2) Review of Industrial Organization 83. Challenges concerning the reversal of anticompetitive mergers is pointed out in Scott A Sher, 'Closed but Not Forgotten: Government Review of Consummated Mergers under Section 7 of the Clayton Act' (2004) 45(1) Santa Clara Law Review 41, 81-82.

[20] Joseph Farrell, 'Listening to Interested Parties in Antitrust Investigations: Competitors, Customers, Complementors, and Relativity' (2004) 18 Antitrust 64, 65.

businesses may be incentivised to present the competition authority with information that may suggest anticompetitive effects. While consumers are perceived as more reliable, the information received may only be surface-level or does not accurately represent the market. Under this circumstance, the competition authorities must be critical of information received and the process of verifying information is especially crucial.

Furthermore, the potential abuse of rights may also be considered in association with granting third parties' the right to participate. Third parties who oppose a merger may also attempt to make use of participatory rights in order to cause procedural delays to the merger review proceedings to the detriment of the merging parties.

However, it is argued that these few reasons alone may not be compelling to entirely negate the possibility of allowing third parties' participation, especially in light of the contribution such participation can make in enabling a better decision-making process for competition authorities.

3.4 Legal gap and shortcomings of third party participation in Thai laws

Although there are arguments against third parties' participation, it is the legal gap in other Thai laws that makes it imperative that such participatory rights are embedded under the 2017 TCA.

Having established that consumers and competitors are not granted participatory rights under the 2017 TCA but have an interest in being included in merger proceedings, it is imperative to also examine whether their participatory rights can be derived from other applicable laws. It will be illustrated in this section that the necessity of third parties' participation is exacerbated by the legal gap in the provision of participatory rights in other applicable laws, namely the current Constitution and the Administrative Procedure Act BE 2539 (hereinafter the 1996 APA).

3.4.1 The Constitution

The Constitution contains many provisions which grant the people participatory rights. For example, section 41 states that a person has the right to be informed and have access to information, to present a petition to a state agency and to take legal actions against a state agency. The people also have the right to direct participation which is most prevalent in the form of political participation, such as introducing a bill or a constitutional amendment and voting. Along with these rights, the Constitution also imposes the obligation for the State to ensure participation in some cases. For example, section 58 obliges the State to carry out an impact assessment and hold a public hearing before the State permits a person to carry out any undertakings which may severely affect the essential interest of the people, the community or the environment.

Despite these provisions, the Constitution is found to lack a provision which directly grants the right to participate in State administrative proceedings, which also include merger proceedings. Interestingly, this has not always been the case. The past Constitution did contain a provision which granted the people a general right to participate in State administrative proceedings. Section 59 of the 2007 Constitution states that 'A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his rights and liberties.' However, this provision was never included in the current Constitution even though a similar one was drafted.[21] This goes to show that the drafter did not intend to extend a

[21] See Constitution Drafting Committee on the Intention of the Constitution, Table Summarising the Intention of the Sections in the Drafted Constitution of the Kingdom of Thailand (กลุ่มงานบริการเอกสารอ้างอิง สำนักกรรมาธิการ ๑ ฝ่ายเลขานุการคณะกรรมาธิการยกร่างรัฐธรรมนูญด้านจัดทำเจตนารมณ์, ตารางสรุปเจตนารมณ์รายมาตราของร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย คณะอนุกรรมาธิการบันทึกเจตนารมณ์รัฐธรรมนูญและการจัดทำจดหมายเหตุการณ์ยกร่างรัฐธรรมนูญ ในคณะกรรมาธิการยกร่างรัฐธรรมนูญ) 73 <https://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=496> accessed 31 July 2022.

general participatory right to its people in the context of administrative proceedings.

Due to this legal gap, consumers and competitors are not entitled to participate in merger proceedings on a constitutional basis.

3.4.2 The 1996 APA

The right to participate is granted to a 'participant' of administrative proceedings as defined by section 5 of the 1996 APA. According to section 5, four types of persons that may qualify as a participant: 1) an applicant who files an application with an official, 2) a person who challenges the application, 3) a person subject to the administrative act as a result from the request and 4) a person who participates in the administrative process as their rights may be affected by the administrative act. The 1996 APA's applicability to merger proceedings is rooted in the nature of merger decisions and merger proceedings as an administrative act and an administrative process, respectively.

The 1996 APA grants several rights to parties who are participants which also includes the right to adequate opportunity to be informed of the facts, to object and to provide their own evidence in the administrative process in section 30. This essentially corresponds to the aim of third parties' participation in merger proceedings, i.e. to be heard and be afforded an opportunity to object: If consumers and competitors can invoke this section as the legal basis to participate in merger proceedings, there would not be a necessity in enshrining participatory rights within the merger control regime under the 2017 TCA.

However, the applicability of this provision to third parties in merger proceedings depends on whether they fall within the meaning of 'participants' as defined by section 5. While consumers and competitors may fall within the second or fourth category of participant at first glance, the current interpretation of participant as adopted by scholars indicate the contrary.

The second category, 'a person who challenges an administrative act' has been interpreted as limiting to only persons who have been notified that they have the right to object as *provided by the law* under which the administrative decision is made.[22] Since the 2017 TCA does not impose an obligation for the TCC to notify third parties of the right to object, third parties are barred from relying on the rights granted under the 1996 APA to participate in merger proceedings.

A similar barrier is also found in the interpretation of consumers and competitors as persons affected by the administrative act, i.e. the merger decision. Thus, it seems that they would have more grounds to rely on the fourth category as parties whose rights would be affected. With that said, a major requirement to qualify as this type of participant is said to be that the persons must *already be parties to the administrative process*, i.e. merger proceedings, upon the competition administrative official's initiative.[23] Again, the TCC is not under any obligation to afford an opportunity for third parties to participate in merger proceedings---it merely has the discretion to do so as stated by the TCC's Notice on Merger Approval Rules.

[22] Woraphot Wisarutpitch, *Banthuek Kham Banyai Wicha Kotmai Pokkhrong Rueang Kho Kwamkid Lae Lakkarn Phuenthan Bang Prakaen Khong Kodmai Pokkhrong* [A Record of Lecture in Administrative Law on Observations and Some Fundamental Principles of Administrative Law] (Winyuchon 2019) (วรพจน์ วิศรุตพิชญ์, *บันทึกคำบรรยายวิชากฎหมายปกครอง เรื่อง ข้อความคิดและหลักการพื้นฐานบางประการของกฎหมายปกครอง* (วิญญูชน 2562)), 161.

[23] Jiraniti Havanont, Kham athibai Kodmai Pokkhrong Phak Thuapai [Administrative Law] (Thai Bar 2016) (จิรนิติ หะวานนท์, คำอธิบาย กฎหมายปกครอง (ภาคทั่วไป) (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2559)) 178.

4. The approaches to third parties' participation in the EU and the US: lessons for Thailand

4.1 The approaches of the EU and the US

4.1.1 Third parties in the EU's merger control regime

The EU's merger control regime is marked by its comprehensive procedural rules that aim to safeguard and balance the interests of all the parties involved in merger proceedings. Under the EU's merger control regime, third parties have unequivocal rights to participate, especially in the form of the right to be heard. The right to be heard constitutes one of the most fundamental rights of the EU and thus, can be seen implemented through the EU's merger proceedings.

According to the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter the ECMR) and the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings as consolidated by the Commission Implementing Regulation (EU) No 1269/2013 (hereinafter the IR), third parties are entitled to respond to information requests sent by the EU Commission, the agency responsible for the implementation of competition law in the EU, during merger investigations. Third parties may also take part in the state of play meetings and triangular meetings in which they can engage in an exchange of information with the EU Commission and other involved parties.[24] More notably, third parties have the minimal right to be heard in writing and are entitled to request to be heard in oral hearings as well.[25] In the latter case, the request will be subject to consideration by the EU Commission and the Hearing Office, an agency tasked with handling the procedural aspects of

[24] European Commission 'DG COMPETITION Best Practices on the conduct of EC merger control proceedings' (*European Commission*) para 35 <https://ec.europa.eu/competition/mergers/ legislation/proceedings.pdf> accessed 22 July 2022

[25] ECMR, art 18(4).

the EU's competition law. Despite this element of discretionary power, the EU Commission and the Hearing Officer are guided by a set of rules known as the Terms of Reference that must be complied with in its determination whether to accept or deny the request of third parties to be heard in writing.[26]

The involvement of third parties in the EU's merger proceedings is echoed in the extent of transparency in the EU Commission's decisions which often make clear any third parties' participation that has occurred during the merger proceedings, including the position of third parties expressed and the EU Commission's responses.[27]

4.1.2 Third parties in the US' merger control regime

In contrast with the EU's approach, the US's merger control regime as regulated by the Hart-Scott-Rodino Act does not confer any rights at all to third parties. However, third parties' roles in supplying information about the mergers notified to the competition authorities, the Federal Trade Commission (hereinafter the FTC) or the Department of Justice (hereinafter the DOJ), are well-recognised in practice.

Third parties are perceived as valuable sources of information.[28] Additionally, it has been noted that the US' merger proceedings rely on the input from consumers and competitors in gauging the potential effects of

[26] Decision of the President of the European Commission of 13 October 2011 on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings OJ L 275/29

[27] For example in COMMISSION DECISION of 6 February 2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (*Case M.8677 – SIEMENS/ALSTOM*) [2019] paras 14, 21, 26, 32, 75, 116, 246, 474, 526 <https://ec.europa.eu/ competition/mergers/cases1/20219/m8677_9376_7.pdf> accessed 22 July 2022.

[28] Ken Heyer, 'Predicting the Competitive Effects of Mergers by Listening to Customers' (Discussion Paper, September 2006) <https://www.justice.gov/atr/ predicting-competitive-effects-mergers-listening-customers> accessed 22 July 2022.

mergers. As such, third parties' voluntary initiative in producing documents is welcomed and manifested in the FTC's Protocol for Coordination in Merger Investigations, specifically about the coordination between the FTC and DOJ's State Attorneys General in identifying third parties to take part in merger investigations.

As such, it can be said that, while there is no legal basis or obligation for the FTC and the DOJ to involve third parties, they do have the discretion to extend participation opportunities to third parties as reflected by observations of their practice in merger review proceedings.[29]

4.2 Lessons Drawn from the experiences of the EU and the US

The EU and the US have had a long history in the development of their competition laws. Furthermore, the merger control regimes of the two jurisdictions share a commonality with Thailand in requiring pre-merger notifications when a merger potentially reduces competition substantially or leads to a monopoly. For these reasons, a comparative study is taken to explore how both of these jurisdictions have approached the issue of third parties' participation within their merger control regimes. The comparison has demonstrated that the EU and the US drastically differ in their approaches, with Thailand bearing more similarity to the US' approach for their non-obligatory nature of third party participation. Having said that, the US' merger control regime has shown more due regard for third parties' contribution in the practice of the FTC's and the DOJ's conduct in merger proceedings, whereas Thailand's merger control regime has not shown any third party participation, whether in the legal framework or practice. Given this difference, Thailand ought to model its third parties' participation after the EU's approach. This recommendation is substantiated by the lessons that Thailand can draw from the experiences of the EU and the US:

[29] See William E Kovacic, Petros C Mavroidis and Damien J Neven, 'Merger control procedures and institutions: A comparison of the EU and US practice' (2014) Graduate Institute of International and Development Studies Working Paper, No. 01/2014, 32 <http://hdl.handle.net/10419/122096> accessed 22 July 2022.

4.2.1. Give meaning to third party participation through transparency

The foregoing mentioned that in the Thai merger proceedings, the TCC neither has the obligation to reach out to third parties nor has it shown any signs of exercising its discretionary power to summon third parties to participate during merger proceedings. However, it must be noted that the imposition of third parties' participation in merger proceedings or making available participatory rights would not be meaningful if the competition authority does not make clear whether and how third parties have been involved.

4.2.2 Include a minimum participatory right

Neither the US nor Thailand have a minimum participatory right to third parties. On the contrary, the EU has the right to be heard entrenched in its merger proceedings. Under the EU's merger control regime, third parties are entitled to at least be heard in writing. As such, the EU's merger control regime has symmetry in that both the EU Commission and third parties may take the initiative to ensure third parties' participation. The existence of a minimum participatory *right* further serves as a firmer ground for scrutiny of the EU Commission's decision upon violation of the right to be heard.

4.2.3 Supplement the right with more rules

What is notable about the EU's approach to third parties' participation is the extensiveness of the legal framework which grants the right to participate as well as regulates the procedural aspects attached throughout different legal instruments that prescribe rules to supplement each other, i.e. the ECMR, the IR and the ToR. Through this approach, legal certainty that third parties have in their process to partake in merger proceedings is established. Additionally, the rules enable the EU Commission's discretionary power to be firmly limited within the bounds provided by the legal frameworks unlike the unlimited discretionary power

granted to the TCC under the TCC's Notice on Merger Approval Rules with regards to third parties.

4.2.4 Ensure procedural balance

The extensive set of rules provided in the EU's merger control regime also safeguards the legitimate interest of other involved parties, ensuring procedural balance. This is most evident in the imposition of time limits for third parties' participation to ensure the merging parties' right to a timely procedure while also allowing sufficient time for the EU Commission to consult the parties involved. Furthermore, the right to confidentiality is granted to third parties as well as the merging parties during the mutual exchanges of information which, while securing business confidential information, is accompanied by the right to access sufficient information to prepare their comments for both third parties and the merging parties.

5. Conclusion and recommendation

From the findings of the thesis, as summarised by this article, it can be concluded that there is a necessity for third parties' participation considering the arguments in favour and a significant gap in Thai laws, namely the Constitution, administrative law and, especially, the 2017 TCA. Upon reflecting on the current practice of merger review proceedings under the 2017 TCA, insufficient measures to ensure participatory rights to third parties are recognised. In this vein, it was found that the 2017 TCA confers complete discretionary power for the TCC to determine whether third parties would be summoned to participate. This discretionary power is unguided by any rules and, to date, there is no indication that this provision has practical effects in providing adequate opportunities for third parties to be heard.

The comparison between the approaches of the EU and the US with respect to the manners in which they address third parties' participation in merger proceedings resulted in the identification of key lessons that Thailand can learn and use to improve its own approach to the issue. These

key lessons have also indicated that the EU's approach is significantly more developed as an extensive legal framework is structured in order to guarantee participatory rights of third parties, accompanied by other procedural safeguards that are made effective with transparency and establish procedural balance.

In light of this, the right of third parties to participate should be explicitly stipulated and guaranteed under the 2017 TCA, with supplemental procedural rules and safeguards to guide the TCC's implementation of the right enshrined in secondary legislation, namely, the TCC's Notice on Merger Approval Rules. The objective of this change is to make available the opportunity for third parties to actively and voluntarily make use of their participation right without complete reliance on the TCC exercising its power to summon third parties.

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CONSUMERS' RIGHT TO REPAIR DEFECTIVE ELECTRONIC PRODUCTS*

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Abstract

Currently, the manufacturers attempt to restrict the owners and third-party repair shops from repairing electronic products, such as specifying the terms under warranty or limiting spare parts. Therefore, the consumers have been forced to receive authorised service only. The manufacturer will not provide the spare parts and essential information to owners and third-party repair shops. There are only two choices left: requiring the authorised service provider to repair the product or disposing it. The consumers' right to repair seems unobvious in Thailand because Thai Civil and Commercial Code and regulations relating to consumer protection do not specify the right to repair. Consumers have to spend more money on repair services by the manufacturer. The study mainly analyses relevant laws of the United States: the Magnuson-Moss Warranty Act and the Fair Repair Act. The study finds that Thailand should adopt the right to repair to protect consumers from unfair practices. Therefore, the article would like to propose the new regulation and provisions which protect the consumer from the unfair practice of manufacturers. Firstly, the regulation should mandate the manufacturers to distribute the spare parts, equipment and information at "the equitable price." The manufacturer has to consider the

* This article is summarised and rearranged from the thesis "Consumers' Right to Repair Defective Electronic Products", Faculty of Law, Thammasat University, 2021.

ability of users and repair shops to afford the parts, equipment, or guidance information. Secondly, the regulation shall provide a specific provision to prevent consumers from being bound by unfair terms. For example, the manufacturer shall not specify the warranty clauses that compel the consumer to receive only the manufacturer's service.

Keywords: Consumer Protection, Consumers' Right to Repair, Defective Electronic Product

1. Introduction

Once an accident occurs and causes malfunctions on your smartphones, tablets, or laptops, such as a broken screen, blurred camera, and blown speaker, the users may require the manufacturer to repair the device, find a reliable third-party repair shop, or undertake it by themselves. More than thirty per cent of smartphone owners have damaged their device's display screen at least once, and twenty-one per cent of people are currently using a phone with a damaged screen.[1] Currently, the manufacturers attempt to restrict the owners and third-party repair shops from repairing electronic products, such as specifying the terms under warranty, terminating user licence agreement, and limiting spare parts. Therefore, the consumers have been forced to receive authorised service only. When the consumer's product got a defect made by themselves or others, the consumers will not be able to claim the defect under the warranty coverage, and the consumer has four choices: 1) requiring the original equipment manufacturer or authorised provider to repair the product; 2) using the service of a third-party repairer; 3) attempting to repair it by themselves or 4) discarding and replacing the device.

Therefore, the consumers' right to repair is regarded as a right that the consumers can intentionally choose their preferable repairer, parts, price, and place for repairing their electronic products. The era of electronic manufacturers may not have a good impact on customers who have no power and insufficient knowledge to receive fair service and products from the manufacturer. The customer would receive the only minimum right specified by law like consumer protection law in their countries. It is about time that the lawmaker reconsiders any provisions to provide the customers' rights and amend some necessary points.

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[1] Adam Lella, 'U.S. Smartphone Penetration surpassed 80 percent in 2016' (COMSCORE, 3 Febuary 2017), <http://www.comscore.com/Insites/blog/US-Smartphone-Penetration-Surpassed-80-Percent-in-2016> accessed 24 August 2021.

The consumers' right to repair seems unobvious in Thailand because Thai Civil and Commercial Code and regulations relating to Consumer protection do not specify the right to repair. Consumers have to spend more money on repair services of the manufacturer. The study mainly analyses relevant laws of the United States: the Magnuson-Moss Warranty Act and the Fair Repair Act.

The main benefit of the right to repair is that electronic customers will be capable of repairing their own electronic devices by themselves. The customer could extend their product life at a reasonable cost. These policies not only raise the competitiveness of the third offering the repair services party but also benefit local repair shops in the big scheme that consumers will repair electronics rather than discard and replace them with new ones.

Nevertheless, when the customers decide to discard and replace the devices, every part of the electronic device causes carbon emissions and material waste. Instead of dumping the items, repairing or recycling them would not deteriorate the environment with thousands of tons of e-waste. Therefore, under the purpose of the Fair Repair Act, the aims are not only considered to grant the customers right but also to reduce the electronic waste that directly affects climate change at present.

2. Consumer protection measures

Normally a contract was not made between parties having equal matters in economy, knowledge and expertise, and liberty to decide. The public sectors, including related government offices, found it necessary to issue the law so as to protect the party having an inferior power and restrict the liberty both prior to a contract or after contract execution for justice. Consequently, although the contract of sale originated from Thai Civil and Commercial Code, there are many regulations related to the contract of sale in according to protect purchasers, including a) Consumer Protection Act (Issue No. 2) B.E. 2541, b) Unfair Contract Terms Act B.E. 2540, c) Electronic Transaction Act B.E. 2544, d) Direct Selling and Direct Marketing

Act B.E. 2545, e) Consumer Case Procedure Act B.E. 2551, and f) Product liability Act B.E. 2551.

2.1 Fundamental consumers' rights

Besides the incorporation, investment, and management, there are some regulations related to consumer protection that the manufacturer shall consider before they run the business. Some products or services require a license before distribution or sale with controlled price, which could be deemed as a limitation of liberty.[2] Therefore, the consumer protection law shall protect consumers from unfair practices and provide fundamental consumer rights.

2.1.1 Right to be informed

Providing the information will lead to the consumers' knowledge to consider desirable products or services. If the consumer is barred from the importation information of the products or services, it causes they may be misled to enter into the contract. The right to be informed will decrease the manufacturer's unfair practice, which may insulate their customers against proper information. Therefore, the consumer protection law needs to regulate and control the use of advertisements, labels, and product information.[3]

2.1.2 Right to choose

Consumers should be granted the right to choose their desired products and services because the right to choose is the fundamental right in any liberal economic system that promotes competition and improvement of the manufacturer. Diminuation of the right to repair could result from the inferior economic power of the consumers, whereby the

[2] Suksom Supanit, Kham Athibai Kotmai Khumkhrong Phuboriphok [Commentary on Consumer Protection Law], (6th edn, Chulalongkorn, 2551) (สุษม ศุภนิตย์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค, (พิมพ์ครั้งที่ 6, จุฬาลงกรณ์มหาวิทยาลัย 2551)) 11.

[3] Chaiwat Wongwattanasarn, Kotmai Khumkhrong Phuboriphok [Consumer Protection Law], (Winyuchon 2543) (ชัยวัฒน์ วงศ์วัฒนศานต์ม กฎหมายคุ้มครองผู้บริโภค (วิญญูชน 2543)) 19.

consumers must accept all the manufacturer's offers because they have no bargaining power. Moreover, monopoly is another cause of the consumers having no alternatives.[4]

2.1.3 Right to safety

The products or services offered by the manufacturers to the consumers should be regarded as a presumption that the manufacturer has already prepared and produced products that are suitable for use. The manufacturers have no duty to produce, but, once they decide to produce, they should ensure that their products are appropriate to be sold to the consumers. The suitability of the product shall be considered in terms of its effectiveness and safety. The consumer protection law sets out the manufacturer's standard to provide products or services that are non-defective. As a result, the consumer protection law should consider not only the right to safety but also the right to goods or services that meet certain standards.[5]

2.1.4 Right to a fair contract

The right to a fair contract should be concerned with two matters.[6] Firstly, the contract should specify the details and quality of products and services for consumer's consideration. Secondly, the contract should not bind the consumers to accept all offered goods and services. Therefore, if the contract terms do not satisfy these two requirements, they could be considered unfair contract terms.

2.1.5 Right to be compensated

From the economist's perspective, they said that the government do not need to take part in the case that the consumers receive the damage

[4] Ibid.

[5] Ibid, 20.

[6] Ibid.

from unsafe products. However, from a legal perspective, the law should take part to force the manufacturers to remedy (Corrective justice) the affected consumers.[7]

2.2 Consumers' right to repair

At present, manufacturers do not allow consumers to choose the preferred repairer, parts, price, and place for repairing electronic products. With respect to consumer protection law, the regulations of Thailand are not regarded as the preferable measures to protect the consumer in this country. The regulations are still neglecting protection and assistance to the customers, especially in the case of the technology products, because all the manufacturers that are marketing in Thailand are foreign companies, and the government has not ever engaged in the consumers' rights conscientiously. The consumers' right to repair is a modern right for the customer in a technological era in which all the developed countries are facing challenges on this issue, whereas the manufacturers attempt to distribute their products in the market and monopolise them in various ways.

When consumers buy electronic devices, the manufacturer has to provide product warranty. According to the warranty terms, the consumer is entitled to receive repair service if defects or non-functioning are occurring to the device. The warranty terms may be considered fair practice for the consumer, but the manufacturer constantly includes the limitation terms, in which the right to repair under warranty will be restricted or terminated in some cases. For example, all manufacturers specify that the warranty shall be terminated after the consumer uses the service or parts unauthorised from the manufacturer or dealer.

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[7] Sakda Thanitkul, Naeokhit Lak Kotmai Lae Khamphiphaksa Kotmai Thurakit [Concept, Legal Principal, and Court Decision Relating to Business Laws] (4th edn, Nititham, 2557) (ศักดา ธนิตกุล, แนวคิด หลักกฎหมาย และคำพิพากษา กฎหมายธุรกิจ, (พิมพ์ครั้งที่ 4, นิติธรรม 2557)) 132.

According to the manufacturer's innovations and patents, the manufacturers who invent or develop the device do not provide the parts, annual repair, diagnostic software, and tools for the user or repair shop. For example, joystick spares of the Nintendo Switch control are unavailable and impossible to repair. Third-party repairers or owners are forced to depend on recycled, imitation, or lower-quality parts because of restricted or unavailable OEM parts.[8]

Users may be forced to receive the manufacturers' authorised parts and equipment only because of the embedded software that detects the unauthorised parts. Some features, such as the TrueTone display, won't be possible if you replace the screen on your iPhone, even if it's a completely new OEM screen from another iPhone.[9] When consumers upgraded to the latest software and system, Apple deactivated iPhones containing non-OEM spares by warning users, "Do not use non-genuine Apple's components to repair your device, or else."[10] There are a few options for Thai consumers to choose from after they accidentally break their electronic belonging.

Moreover, when the manufacturers do not provide some important parts of the product or repair manual to the user or third-party repair shop, the user or third-party repair shop will not be able to fix the consumer's devices.

3. Legal measures purposing to protect consumers in the United States

Even though consumers' right to repair is a new concept and the Consumer Bill of Rights does not specify the right to repair as a basic consumer right, it should be regarded as a right that the consumer can

[8] Daniel A. Hanley, Claire Kelloway & Sandeep Vaheesan, Fixing America: breaking manufacturers' aftermarket monopoly and restoring consumers' right and repair (openmarketsinstitute, April 2020) 11.

[9] Nixing the Fix: An FTC Report to Congress on Repair Restrictions, (Federal trade Commission of the United States of America, May 2021) 23.

[10] Apple Inc., 'Apple Warranty' (Apple 11 March 2021) <https://www.apple.com/legal/warranty/products/warranty-edition-row-english.html> accessed 24 August 2021.

intentionally choose their preferable repairer, parts, price, and place for repairing. The United States has two regulations relating to consumers' right to repair: 1) Magnuson Moss Warranty Act and 2) Fair Repair Act. The regulations will increase the possibility that consumers can access spare parts for their electronic products.

3.1 Magnuson Moss Warranty Act

The Magnuson-Moss Warranty Act aims to control the warranties of goods and products in the United States. The Act, which was enacted in 1975, compels producers and marketers of consumer items to disclose complete information regarding manufacturer warranty to customers.

Under the U.S. Code, Section 2302(c) mentions about the products warranty that "The warrantors shall not determine the warranty coverage to limit the consumer's utilise of an article or service identified by brand, trade, or corporate name unless the company provides the report or free service or has received a waiver from the Federal Trade Commission."[11] However, Section 2302(c) is still obscure for the warrantor to provide warranty conditions, so the Magnuson-Moss Warranty has to clarify it under the interpretation of the Magnuson-Moss Warranty Act.

Many consumers must confront product warranties that the consumers are required to use service and maintenance arranged by providers or authorised providers only. The interpretation under Magnuson-Moss Warranty Act Section 700.10 (c) states: "No warrantor may condition the continued validity of a warranty on the use of only authorised repair service and/or authorised replacement parts for non-warranty service and maintenance… For example, provisions such as, "This warranty is void if service is performed by anyone other than an authorised `ABC' dealer and all replacement parts must be genuine `ABC' parts," and the like, are

[11] McDermott Will & Emery, 'FTC Looks to Fix Repair Restrictions', (Antitrust Alert, 3 August 2021), <https://www.antitrustalert.com/2021/08/ftc-looks-to-fix-repair-restrictions/> accessed 19 March 2022.

prohibited where the service or parts are not covered by the warranty."[12] Therefore, the manufacturer shall not write their warranty terms with conditions that their consumer must accept only authorised spare parts from the manufacturer.

3.2 Fair Repair Act

Many technology companies now demand that repairs or parts of electronic devices needed for repair must be authorised by the original equipment manufacturer (OEM) or its approved suppliers. Therefore, under this Act, OEMs will be required to make diagnostic and repair information, parts, and tools available to third-party repair shops and owners promptly and on fair and reasonable terms under the Fair Repair Act, assisting consumers and repairers in reducing unnecessary costs and time while also eliminating electronic waste.

The requirements under the Fair Repair Act are separated into two parts. Firstly, the general requirement under Section 2(a) specifies that the owners or third-party repairer of electronic devices sold or used in the U.S. will receive the documentary, parts and tools for diagnosis, maintenance, or repair from the original equipment manufacturer promptly and on fair and reasonable terms. This Section aims to force the manufacturers to provide their information and electronic device components, which are marketed in the U.S., to all owners and third-party repairers. Moreover, the manufacturers have to conform to this requirement under the provision fairly and reasonably.

Secondly, the additional requirement under Section 2(b) demands the manufacturer to contribute parts, tools, and documentation regarding the repair of the device "at a fair price" for an owner if the manufacturers have warranted such a device and the price is more than or equal to 100 dollars. It means that the manufacturers have to consider these factors:

[12] Magnuson-Moss warranty Act Section 700.10 (c).

> (1) the actual cost to the OEM to prepare and distribute the part, tool, or documentation, exclusive of any research and development costs incurred;
>
> (2) the ability of owners and independent repair providers to afford the part, tool, or documentation; and
>
> (3) the means by which the part, tool, or documentation is distributed.[13]

So, the manufacturer cannot independently determine the price of parts and device tools, which should be accounted for with the substantial cost of preparing by OEM, the affordability of the owner and third-party repairer, and the distribution process.

Moreover, Under Section 4(1), the manufacturer has to make the devices available that their functions may be secured by owners or third-party repairers to repair electronic devices under fair and reasonable terms. The manufacturer must provide documentation, tools, and parts required to turn off its security.

However, under this Section, the purpose of this Act does not apply to motor vehicle industries and medical devices.

4. The analysis and possibility of adopting the consumers' right to repair to Thailand

4.1 The consumer protection and consumer rights in Thailand

As mentioned previously, certain fundamental consumers' rights are specified under Thai regulations relating to consumer protection: Thai Civil and Commercial Code (CCC), Consumer Protection Act (Issue No. 2) B.E. 2541 (CPA), and Unfair Contract Terms Act B.E. 2540 (UCT)

[13] Fair Repair Act, H.R.4006, 17th Congress (2021-2022) Section 2(b).

4.1.1 Right to be informed

A consumer has the right to information, including a correct and adequate description of quality.[14] Moreover, the consumer shall receive correct and sufficient information which the providers or manufacturers shall conform to the CPA regarding Advertisements and Labelling.

4.1.2 Right to choose

A consumer has the right to enjoy freedom in the selection of goods or services.[15] However, the provisions under CPA only mention the purchase phase and does not cover the post-purchase service.[16]

4.1.3 Right to safety

A consumer has the right to be afforded safety in the use of goods or services.[17] The suitability of the product shall be considered with the effectiveness and safety of the products.

4.1.4 Right to a fair contract

A consumer has the right to fairness in concluding contracts.[18] CPA prescribes that certain types of businesses are subject to control over the contract from Consumer Protection Board on Contract, and UCT is prescribed to apply to a contract in which contract terms are unfair through the court procedure.

4.1.5 Right to be compensated

A consumer has the right to have injury considered and compensated.[19] In the case of the defective product, once the defect is

[14] Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(1).

[15] Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(2).

[16] Chaiwat, (n 3) 30.

[17] Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(3).

[18] Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(3) bis.

[19] Consumer Protection Act (Issue No. 2) B.E. 2541, Section 4(4).

occurred to sold property and lead to decrease in property value or make the property unusable, the seller will be liable for the defect under Section 472 of CCC. The provision aims to specify the seller's responsibilities on the sold property that has any defect at the time of purchase or delivery of such property.

To summarise, as the author has mentioned, Thailand does not specify the regulations which could reduce or address any manufacturer's restriction to repair electronic products. Moreover, the consumers' problems are still unresolved.

Therefore, it could be considered that the legal status of consumers' right to repair is not valid in Thailand. Hence, to enhance consumers' right to repair, the lawmaker has to propose new regulations which could address the restriction to repair interfering with consumers' rights.

4.2 The analysis of consumers' right to repair in the United States and its possible adoption in Thailand.

Even though consumers' right to repair was not specified under the Consumer Bill of Rights 1962, the U.S.A. has provided legal measures that grant their people the right to repair. The consumers' right to repair is regarded as a right in which the consumers can intentionally choose their preferable repairer, parts, price, and place for fixing. Consumers' right to repair needs to provide consumers with the distribution of spare parts, and fair warranty terms. Therefore, the author would like to propose that the concepts found in the Fair Repair Act and Magnuson Moss Warranty Act be adopted in Thailand on the following matters.

Firstly, concerning the provision of electronic spare parts, CPA does not mention the right to repair. Moreover, there is no regulation in which the manufacturer shall provide the spare parts, equipment and information about the electronic device. Enacting the new regulations which mandate the manufacturer to provide spare parts to users and third-party repair shops would be a good solution for enhancing consumers' right to repair in Thailand instead of amending the existing regulations.

Secondly, the warranty and end-user license agreement is separated from the sale of the contract because of their content. The warranty and end-user license agreement has been considered as an agreement between the manufacturer and consumer in the post-purchase phase and cannot satisfy the principles under Section 35 Bis of CPA. So, when the application of Section 35 Bis is obscure, enacting a new regulation would be more suitable than an amendment or issuing the Notification of the Contract Committee under CPA. Therefore, the unfair warranty terms shall not be resolved by applying Section 35 Bis of CPA to announce the Notification of the Committee Regarding Controlled Contract.

And lastly, because of the extent of UCTA, which lacks certainty, the court has to exercise its discretion on a case-by-case basis. The court can use their discretion whether the restriction according to warranty terms or end-user licence agreement provided by the manufacturer is an unfair contract term or not, and there are no prior court decisions ruling under this issue. Therefore, the UCTA is unsuitable for applying to the warranty term or end-user license agreement to address this issue. It may cause unstable decisions on this issue.

5. Propositions

The author would like to propose the new regulation and provisions which protect the consumer from the unfair practice of manufacturers as follows.

The regulation should mandate the manufacturers to distribute the spare parts, equipment and information at “the equitable price.” The manufacturer has to consider the ability of users and repair shops to afford the parts, equipment, or documentary. Because this regulation aims to protect the consumer from manufacturer’s malpractice, in determining the price of parts, the manufacturer shall consider the owners’ and repair shops’ ability to afford it.

The lawmaker should consider offering the spare parts, equipment, and repair guidance to be applicable and conform to the reality of the

product's lifetime. Moreover, it would be unfair for the manufacturer to produce spare parts without limited time. So, the distribution period should be considered by the nature of each kind of device. This regulation shall mandate manufacturers to sell spare parts, equipment, or diagnosis manuals to give repair information and parts in the specific years specified by the Notification of Committee issued under this regulation.

The provision does not cover vehicles and medical devices. In this case, from the author's perspective, some devices and equipment need to be repaired only by experienced repairers because their performance and functionality concern people's lives. In the case of medical devices, manufacturers' products often affect performance and patient safety. Therefore, medical devices should not be governed by these provisions. In other words, in some circumstances, consumers' right to repair cannot be applied to every device and equipment, such as medical devices, machinery, argosy, and aircraft.

According to the author's analysis, the consumers do not receive the fair warranty when the manufacturers adopt terms leading to the prohibition and limitation of consumers' right to repair. Therefore, In the author's opinion, the lawmaker shall provide a specific provision to prevent consumers from being bound by unfair terms. For example, the manufacturer shall not specify the warranty clauses that compel the consumer to receive only the manufacturer's service and authorised spare parts.

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MINORS IN CORPORATE ROLES*

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Abstract

It is universal that juveniles are protected by law due to their immaturity, innocence, and inexperience. However, the extent to the minor's ineligibility to enter valid transactions in business areas differs from country to country. One of the most complicated contracts is the type of contract relating to the corporation, which is further governed by corporate laws and involves many parties, such as partners as the co-investors, or shareholders as the beneficiaries. Problems are incurred once the minors without legal capacity engage in the corporation to operate the business with other parties. On the one hand, they might not precisely comprehend the contracts they engage in and can be disadvantageous in commerce. On the other hand, business transactions can be undermined and suffer from minors' fragmented contracts due to the legal effect of voidable acts.

The problem of the study covers the areas of law on capacity, family, and corporation that the application of the laws is still inconsistent and adversely affects all contractual parties. The comparative analysis from the model countries, namely Germany, the UK, Singapore, and France, is the primary contribution to observe the improvement of the Thai laws. Some countries completely preclude minors from the corporation. The others

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provide the proper conditions, such as minimum age requirements or judicial approval. The proposed solutions will eliminate legal uncertainties in business while maintaining minor safeguards for performing corporate roles.

Keywords: Minor, Capacity, Corporations

1. Introduction

The position of children and their business engagement have been advancing progressively in our modern social and economic developments. Presently, though the minors have been actively participating in many commercial aspects, it is still controversial in their legal capacities in business areas.

Thai Civil and Commercial Code (CCC), Section 27, also eases commercial transactions for minors and deems them as a majority in order to ascertain businesses.[1] However, some minors might not precisely comprehend the contracts they engage in, and they can be exploitable and inducible due to the lack of mature judgment and self-determination so that such permission can be revoked at any time upon prejudicial causes.[2] Meanwhile, a corporation contains a group of persons establishing a new entity that minors will neither solely conduct the business nor engage in transactions alone. They will jointly operate the business with other persons as a long-term commitment for a common returns and responsibilities. The alliance aims to collaborate on funding, brainstorming, and creditability to deal with the more significant transactions. The business operator will be shifted from the individual to juristic, and the corporate roles will be bound by legal duties and liabilities of corporate laws. Therefore, there will be the following problems arising under Thai law: 1) Problem concerning legal capacity of minors in corporations, 2) Problem concerning the authority of minors' legal representatives toward minors' business, and 3) Problem concerning minors' qualifications under corporate laws.

Apart from Thai law, the framework of other countries for minors doing business differs from country to country. Some countries allow minors from sixteen or eighteen to join a corporation, while others demand the court's approval to allow only the capable ones.

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[1] Civil and Commercial Code of Thailand, s 27.

[2] ibid, s 27 para 3.

The current Thai applicable law undermines business certainty, reduces reliability, and deprives the business of commercial opportunities. The minors' protection should, however, have the most negligible potential impact on other parties, such as other partners, shareholders, other directors, employees, contracting parties, banks, or creditors. Therefore, the proposed solution will adjust the incapacitated person's interests with those whom they deal with commercially.

2. General concepts and problems of minors joining corporate roles under Thai law

2.1 Legal capacity of minors in corporations

2.1.1 General concepts concerning legal capacity of minors in corporations

In Thailand, a person ceases to be a minor and becomes a majority, *sui juris*, on the completion of twenty years of age.[3] The age of twenty is a Thai legal criterion to distinguish a person who is legally capable of self-management from a minor who should still be under supervision by his representative or guardian. Respectively, minors under Thai law are framed in a stage that cannot accurately exercise some rights at their own sole discretion.

In general, minors are not prohibited from contracting with other people. Thai law of capacity merely protects minors that minors' juristic acts shall be governed by legal representatives empowered by laws to review and consent minors' contracts. Otherwise, the act shall be voidable under Section 21 CCC.[4]

The word "voidability" under Thai law is interpreted in the way that the juristic act is valid and enforceable by law. However, there is a flaw that

[3] ibid, s 19.

[4] ibid, s 21.

the act can eventually be avoided by the legal representative or minor himself after becoming the majority.[5] Such voidable act, upon avoidance, results in being deemed to have been void from the beginning.[6] This is a privilege for minors that private law trades off legal certainty by allowing them to later disaffirm the agreed contract unilaterally as a second chance to re-decide on the engagement.

In terms of corporations, there is no explicit provision applicable for the legal capacity of minors' participation in the partnership or the company. It is still controversial with no evidence or court decision whether Section 27 CCC applies to the corporate event. Currently, there is a subordinated law that the registration by minors with an age not less than twelve years old must be accepted to be a partner, a promoter, a director, and a liquidator of a partnership or company.[7] In practice, consent is not required to be proven to ensure minors' act.

2.1.2 Problem concerning legal capacity of minors in corporations

Since the current law contains no apparent provisions for minors to join the corporate role, the general application of the capacity shall apply. If Section 27 CCC is applied, there can be legal effects that minors who grant the consent will be deemed majority, and the permitted acts cover all pertinent to business conduct. Such permission can be revoked at any time upon prejudicial causes. Abstain of consent, the act shall be voidable that the participation can be eventually avoided, and the corporate relationship and the registration of juristic person can also be questionable from the beginning.

The corporation's participation differs from the sole business operator that such an application cannot provide an efficient consequence. It will provide many conflicts with other provisions and may not be

[5] ibid, s 178, 175(1), 177.

[6] ibid, s 176.

[7] Notification of the Office of Central Company and Partnership Registry B.E. 2561 (2018) s 49.

sufficient to safeguard minors adequately from business risk, obligations, and corporate duties and liabilities. Furthermore, the voidability should not be allowed in this situation, and the business certainty should be improved.

2.2 The authority of minors' legal representatives toward minors' business

2.2.1 General concepts concerning the authority of minors' legal representatives toward minors' business

Parental cultures and family relationship practices have played a significant role in determining every aspect of Thai society. The CCC assigns an authorized person, as the "legal representatives," to take care of minors' assets until they become *sui juris*.[8] They may prohibit, permit, or act in lieu of minors to operate a business.

However, there are some restrictions of parental power that merely consent is not adequate for the minors' transactions under Section 1574 CCC. They are valuable transactions that require additional court permission, such as selling immovable property or making a loan.[9]

2.2.2 Problem concerning the authority of minors' legal representatives toward minors' business

In corporations, personal qualifications for the roles are considered a matter of operation. A corporation is usually formed by related people who trust one another and desire to operate a business together in the way that a partner must be liable for one another or conduct the management on behalf of others. Such persons cannot be changed or replaced unless agreed mutually by contracting parties due to their professional qualifications. Therefore, representing minors on their behalf should not be allowed in this case.

[8] Civil and Commercial Code of Thailand, s 1566.

[9] ibid, s 1574.

Moreover, the business operator will be shifted from the minors to the corporation, in which the minors performing the role will not fall under Section 1574. Therefore, it disregards the legal concerns that aim to protect minors.

2.3 Minors' qualifications under corporate laws

2.3.1 General concepts concerning minors' qualifications under corporate laws

The corporation is unlike a human being, or natural person, that possesses the capabilities of physical actions or ideas generated. The corporation requires a natural person, appointed by the law as a legal representative, to think, manage, or act on its behalf. The roles of the legal representative consist of partner, promoter, director, liquidator, and shareholder that shall bear different duties and qualifications according to the corporate laws, such as many specific duties of legal compliance and standards of care under corporate laws. Failure to comply will lead to liabilities to both corporation and legal representative, including the minors acting in the roles.

2.3.2 Problem concerning minors' qualifications under corporate laws

The Corporate laws escalate the standards to govern the contractual relationship between business partners internally and among third parties externally. For example, the director must apply *the diligence of a careful businessman* in conducting a business.[10] Otherwise, directors can be liable and be filed a lawsuit against relevant persons.[11] Therefore, participating minors must owe the same level of duties as adults with no excuses. Currently, Thai law merely requires minors to be only over the age of

[10] ibid, s 1168.

[11] ibid, s 1169.

eleven to participate in corporations.[12] An issue incurs that a 12-year-old person may not have managerial capacity qualified for the duties and liabilities of corporate law as permitted by Thai law. Currently, minors can be restricted from these positions only when there are specific laws that require the qualification of the representative to be a majority, for example, carriage business,[13] foreign business,[14] insurance business,[15] any public company limited,[16] and businesses required professions, such as lawyers, engineers, architects, and others. Therefore, the minors still cannot be protected sufficiently.

3. Minors and corporate roles in foreign countries

3.1 German law

The German Civil Code (*Bürgerliches Gesetzbuch* or BGB) determined the legal age to be eighteen.[17] The BGB divides minors into two groups of age ranges—children younger than seven years as persons lacking judgment and are incapable of contracting (incapacity),[18] and children between the age of seven and younger than eighteen as persons with limited capacity (limited capacity).[19] The law completely disregards the capacity of children whose age has not fully reached seven years. In some instances, the latter group shall have limited capacity to contract under Sections 107 to 113.[20]

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[12] Notification of the Office of Central Company and Partnership Registry B.E. 2561 (2018), s 49.

[13] Land Transport Act 1979, s 97-98.

[14] Foreign Business Act 1999, s 16.

[15] Life Insurance Act 1992, s 69; Non-life Insurance Act 1992, s 64.

[16] Public Limited Companies Act 1992, s 68, 72.

[17] German Civil Code (*Bürgerliches Gesetzbuch*), s 2.

[18] ibid, s 104.

[19] ibid, s 106.

[20] ibid, s 106.

The general rule of minors' capacity requires prior consent from the minors' legal representative according to Section 107 of BGB.[21] If the consent is absent, the contract's effectiveness is subject to ratification by the legal representative, in accordance with Section 108 of BGB.[22]

As a result, the status of the contract will be referred to as effectiveness or ineffectiveness. The status of the ineffective contract, also known as indeterminate validity, is suspended, in which both the minor and the other party are bound by the contract but are unable to, for the time being, demand for the performance or deprive any rights of it.[23]

Minors can perform an independent trade or business operation under Section 112 BGB while entering into a trade or business for shareholders' or partnership contract falls under Section 1882 BGB. In both cases, the permission required not only the representatives' consent but also the family court's approval. If the minors conduct the business themselves without consent, their legal transactions do not become effective. Apart from the BGB, minors are precluded from the corporate role as directors under the German Limited Liability Company Act[24] and German Stock Corporate Act.[25] It requires only a natural person of full legal capacity to be a director of the company limited and the public company limited.

Regarding the authority of minors' legal representatives toward minors' business, the parental custody shall be restricted from minors' independent operation of trade or business and cannot act on behalf of minors.[26] However, the legal representatives' consent is still maintained with the court's permission under Section 112 or 1882 BGB.

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[21] ibid, s 107.

[22] ibid, s 108.

[23] Gerhard Dannemann and Reiner Schulze, *German Civil Code (BGB) Volume 1 Book 1-3: Section 1-1296 Article-by-Article Commentary* (Verlag C.H.Beck oHG 2020) 131, 133.

[24] German Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*), s 6.

[25] German Stock Corporate Act (*Aktiengesetz*), s 76 para 3 and 100 para 1.

[26] German Civil Code (*Bürgerliches Gesetzbuch*), s 1629a para 2 and 1645.

3.2 UK law

The age of majority in the UK is reduced to eighteen according to the Family Law Reform Act 1969 for England and Wales,[27] the Age of Majority (Scotland) Act 1969 for Scotland,[28] and the Age of Majority Act (Northern Ireland) 1969 for Northern Ireland[29]

The long-established common law rule law is that "[a] contract made an infant was voidable at this option.[30] The minors' contract is subjected to the common law rules and equity. The legal consequences depend on each nature of the contract in various senses to be void or voidable. The word voidable is further used in two senses: one is that the contract is valid and binding but could be repudiated, and another is that the contract is not binding until ratified when he or she reaches the age of majority.[31] Meanwhile, Scottish law has its own act applicable only in Scotland, which replaced the old rules that minors shall have a full legal capacity to enter into any transactions at sixteen.[32] The applicable acts reflect the mixed legal systems of Scotland that make Scotland different from others in the UK.

In terms of corporations, the capacity to contract also depends on each transaction. To operate a business as a partner, the minors can be bound by the partnership agreement and operate the business as a partner.[33] However, they cannot be made liable during their minority for any

[27] Family Law Reform Act 1969, s 1.

[28] Age of Majority (Scotland) Act 1969, s 1.

[29] Age of Majority Act (Northern Ireland) 1969, s 1.

[30] H J Hartwig, 'Infants' Contracts in English Law: With Commonwealth and European Comparisons' (1966) 15 Int'l & Comp LQ 780.

[31] Basil Markesins, Hannes Unberath and Angus Johnston, *The German Law of Contract; A Comparative Treatise* (2nd edn, Oxford and Portland, Oregon 2006) 230.

[32] Age of Legal Capacity (Scotland) Act 1991, s 1.

[33] *Lovell & Christmas v Beauchamp* [1894] AC 607 at 611.

debts that the partnership incurs.[34] Meanwhile, the minor shareholder remains liable for any calls for the acquisition of the shares, so long as the shares are held, unless he expressly repudiates that holding.[35] On the other hand, the Companies Act 2006, Section 157, restricts the minimum age of being appointed as a director at sixteen.[36]

Unlike civil law countries, English law further lacks the institution of a statutory representative who can consent or represent a minor when composing a contract that the authority does not exist in common laws.

3.3 Singaporean law

Singapore has received the source of law from English law, as the historical or general methods, accepted in applying the common law and equity. The law has derived from the common law that the age of majority remains twenty-one years old.[37] As the law of England continues to be a part of Singapore law, the right to contracts of minors shall be as prescribed in the UK part until the enactment of the Civil law (Amendment) Act 2009, which was effective from 1 March 2009. The minors from eighteen are entitled to contract in general and engage in the commercial contract in business as if they were of full age.[38] It excludes only some transactions under Section 35(4)-(5), such as the sale of land, that allow the legal capacity for minors' aged twenty-one onwards to engage. Therefore, minors from eighteen can freely engage in the business as any corporate roles.

The reason for the change is that the minimum age to contract of twenty-one is considered a legal barrier, preventing young people from

[34] Basil Markesins, Hannes Unberath and Angus Johnston, *The German Law of Contract; A Comparative Treatise* (2nd edn, Oxford and Portland, Oregon 2006) 233.

[35] ibid.

[36] Companies Act 2006, s 157.

[37] Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) 43-45.

[38] Civil Law Act 2009, s 35 para 1.

starting and conducting a business.[39] The sole aim is to broaden and support the entrepreneurial society,[40] which is the improvement for the modernized era to ease the flexibility to contract in commerce.

3.4 French law

According to the French Civil Code, the age of majority is fixed at the full age of eighteen.[41] On the contrary, French law prohibits minors from contracting or conducting a business as per Article 1145 of the French Civil Code,[42] except only the day-to-day contracts that pose no risk to the minors' financial position.[43] Minors under eighteen must be assisted or represented by their parents, a legal administrator, or a guardian. Otherwise, the contract shall be null and discharge minors from the obligations.[44]

The only way for the minors to conduct business in the corporation is to apply for the status of "emancipation." The emancipated minors can avail themselves of personal freedom and are empowered to be granted the capacity to do any act before the legal age, such as entering into contracts. Typically, the requested minors need to prove that they are financially independent and capable of living on one's own, and the case should be in the best interest of the minors. They will no longer be protected by the law on capacity and thus be granted the full right as if they reach the age of majority before the legal age stipulated by law. Currently, minors can be emancipated by applying for the status upon reaching sixteen.[45] The emancipated minors can be a trader with the

[39] Ministry of Law of Singapore, *The Consultation Paper on the Draft Civil Law (Amendment) Bill 2008* 2.

[40] ibid.

[41] French Civil Code 1804, s 414.

[42] ibid, s 1145.

[43] ibid, s 1148.

[44] ibid, s 1147.

[45] ibid, s 413-2.

authorization of the guardianship court upon declaring the status of emancipation with the additional request for conducting a business.[46]

Regarding the authority of minors' legal representatives toward minors' business, they are also not allowed to engage in the business on minors' behalf, despite the extensive power of representation.[47]

4. Comparative analysis

4.1 Comparative analysis of legal capacity of minors in corporations

In German, UK, and Singapore, minors are allowed to contract and are eligible for special protection provided by laws. The parties to contract may satisfy the elements required in forming a contract, but the legal capacity is another element to concern for enforcing the effect.

In Thailand, minors can be allowed to conduct a business and participate in the corporation by obtaining consent from legal representatives. Meanwhile, German law requires both consent from the legal representative and the court's permission. In case of a corporation, Thai law contains no explicit provision applying to minors, and the implementation of Section 27 CCC can incur participation ambiguities. The corporation and non-corporation acquire different nature of the formation, operation, and termination. The acts of engaging a business by minors can still affect multiple parties in the business organization. The applicable provision should be separated with different conditions and consequences.

In Thailand, the law governing the specific transactions is cited from the acts under Section 1574 CCC, which stipulates that parental power is no longer sufficient for a contract. In Germany, Sections 1821-1822 BGB list the transactions that also require the family court's approval. German law includes participating in the corporation as one of the specific transactions. This model sets the constructive application of the laws that protect minors

[46] ibid, s 413-2 and 413-8.

[47] ibid, s 387-2.

from the valuable acts incurred due to the business operation permitted on a case-by-case basis, which is a greater minors' protection.

The interpretation of the voidable effect under Thai law is different from other countries in that voidability under Thai law refers to the valid and enforceable act until the minors repudiate the contract. German law does not apply the voidable concept as to the basics of common law and Thai law. The essence of the contract under German law shall not be effective, same as Section 1574 CCC. Such legal consequences can be considered firm and secure minors from undesired acts. Having the enable effect upon permission may benefit the business area more than the freewheeling consent. The legal effect should not immediately start binding the minors with the corporation's obligations until they renounce their act. It should become enforceable once the conditions are met. Therefore, Section 1574 provides the proper condition and legal consequences for corporate situations.

In the meantime, the common-law countries do not have the concept of pre-approval for minors to operate a business but will depend on the precedent courts' decisions, which are dissimilar in characteristics of each legal system. The characteristics of Thai law are considered incompatible with common-law systems, and the minors' act relies on the conditions of consent in principle as stipulated by the code.

French law, on the contrary, prohibits minors from acts in general and in business. This is the conservative way that prevents minors from binding obligations. However, the liberty to engage in an occupation as a constitutional right of Thailand cannot be overlooked. The restrictions of the business engagement shall be made only by virtue of laws to the extent of necessity.[48] Meanwhile, the partial prohibition appears in some roles of the corporation in other countries, such as in Germany, the director must be a

[48] Constitution of Thailand 2017, s 40.

person who has full legal capacity.[49] The director under German law requires to apply the care of a *prudent businessman* to be exercised when managing the company's affairs.[50] Otherwise, the director must be liable to the company for the violation incurred by the breach.[51] Similar to Thai law, the director's performance shall comply with the standard of conducting business with the *diligence of a careful businessman*.[52] These are the standards of care specified by a particular level for business management, which can be higher than generally personal qualifications.

Prohibiting minors entirely from the corporation would be an obstacle to competent minors in this modern world to initiate their own business. Therefore, proper conditions and legal measures should instead be replaced in order to maintain minors' protection rather than prohibiting them from business opportunities.

4.2 Comparative analysis of the authority of minor's legal representative toward minors' business

In common law countries, the legal effect shall be fixed and fall under common law and equity with no difference in the acknowledgment of the legal representatives. In this case, the parental authority in common-law countries, such as UK and Singapore, has nothing to relate to minors' acts. On the other hand, Thailand, Germany, and France rely on parental power to grant consent or to represent minors. It is the principle of General Provisions that consent is required for minors' acts. The legal representatives are further authorized by law to represent minors by acting on their behalf. Notwithstanding their provided authority of representation

[49] German Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*), s 6; German Stock Corporate Act (*Aktiengesetz*), s 76 para 3 and 100 para 1.

[50] German Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*), s 43 para 1.

[51] ibid, s 43 para 2.

[52] Civil and Commercial Code of Thailand, s 1168.

under German and French laws, the legal representatives are still prohibited from representing minors in the business area in their name.[53] Considering the nature of the engagement in the corporation under Thai law, the personal qualifications and eligibility for business operations will be considered by other partners to evaluate the appropriateness of being in that corporate position in order to decide whether to enter into the contract with them or not. Thai law should also explicitly state that legal representatives are not allowed to represent minors to engage in the corporation.

However, in terms of consent, Thai law, similar to other civil laws, relies on parental power to consent for juristic acts. Parents can further be liable for the consequences of minors' wrongful acts, or Thai minors might not be financially independent, so the parents must still bear minors' burdens instead. Thus, the law should maintain parental consent as per General Provisions to avoid any legislated conflicts but further requires the court's approval.

4.3 Comparative analysis of minors' qualifications under corporate laws

4.3.1 Court's intervention

The courts of many countries are involved in the consideration for permitting minors' act, such as approving some significant transactions under Section 1574 CCC, the permission under Section 27 CCC when it lacks reasonable grounds from representatives' prohibition, permitting minors to engage in business under Section 112 or 1822 BGB, or granting minors' right to be emancipated under French law.

The court may choose to allow only the competent minors, who are potentially eligible to participate in the business organization. Apart from

[53] German Civil Code (*Bürgerliches Gesetzbuch*), s 1629a para 2; French Civil Code 1804, s 387-2.

those who are eligible, other minors will also certainly be free from liabilities incurred from the unapproved business.

4.3.2 Minimum age

Setting the age is also one of the general solutions that many countries opt-in to unlock the restrictions, including Thai law that twelve years old can be a partner, a promoter, a director, and a liquidator of the partnership or company.[54] Although there are still distinctions in people to be mature faster or slower, it is the legal policy accepted worldwide to apply the same standard of age, such as the legal age in every country or the age of capacity in Singapore at eighteen or in Scotland at sixteen. The age varies from one country to another depending on the country's society. In the corporate event, UK law allows minors to be a director only two years before the legal age, while Singapore law is three years before the legal age. In many countries, the court can further allow minors to be emancipated only few years before becoming majority before age. According to the current minimum age of Thai minors to participate in a corporation, twelve, it is considered eight years to bind with corporate duties and liabilities until minors become the majority. This shall be considered that the age is too low for business engagement, which can ensure setbacks with insufficient protection for minors.

Age can be a helpful tool for legislation. Using age can be a convenient mean to verify minors distinctively from adults.[55] It can eliminate court's burden and facilitate the business operation with liquidity and rapidity.

However, age-based alone may not be the best solution. In some cases, maturity is the question of the judgment of each individual to

[54] Notification of the Office of Central Company and Partnership Registry B.E. 2561 (2018) s 49.

[55] Loo Wee Ling, 'Full Contractual Capacity: Use of Age for Conferment of Capacity' (2010) Sing J Legal Stud 328.

consider that the satisfaction and benefits of the economy still should not be outweighed by minors' protection.

In order to find the best way to adjust the minors' protection, the author considers the duties and liabilities of each role to impose the different conditions:

1) The condition of the partner and the shareholder should be subjected to the court's permission. For the role of partner, Thai law requires the level of care to be at the level of his or her own business, which means it can be at an individual qualification based more on the freedom of contract of all partners. In the meantime, the shareholder role contains no legal standard of requirements, and its liabilities are rather limited. The law should not prohibit minors absolutely from these roles, but the court should be involved in the determination for each minor.

2) The condition of the promoter, the director, and the liquidator should be the status of majority. The minors should be prohibited from these roles because the roles contain greater responsibilities that should require the legal age for the performance.

5. Proposed solutions

To solve the problem concerning legal capacity, it must be made clear on the applicable provision that in the event of corporations, Section 27 CCC shall not be applied. Moreover, Section 1574 CCC should be amended to include a shareholders' or partnership agreement to be subjected to the legal representatives' consent and the court's permission. The law should further prescribe the legal consequence of a non-approved transaction to be ineffective, not voidable.

To solve the problem concerning the authority of minors' legal representative towards minors' business conduct, an explicit provision should be added that the legal representatives cannot represent minors in the corporate situation.

To solve the problem concerning minors' qualifications, the proper criteria should be imposed as the pre-approval conditions as follows:

1) The roles of partner and shareholder are subject to the court's approval; and
2) The roles of promoter and director require the legal age.

Consequently, the proposed amendments will benefit both sides, as they will ensure the business certainty while providing minors with adequate safeguards.

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LEGAL ASPECTS OF CONTRACT FARMING UNDER THE THAI CONTRACT FARMING PROMOTION AND DEVELOPMENT ACT B.E. 2560 (2017) *

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Abstract

This article aims for a solution to prevent unfair practices in a contract farming agreement under the Contract Farming Promotion and Development Act B.E. 2560 (2017) which is the first specific law on contract farming in Thailand. This law was implemented to build fair deals in good faith for contract farming between the agricultural business and farmers. Along with the study of a legal framework on the current agricultural law in Thailand, the author will look at laws of the United States and the United Kingdom which are more protective of the farmer's side of agricultural agreements.

Contract farming is an important part of the economy in many countries. In Thailand, it began in 1987 with no specific legislation to support and enforce the agreements. The laws related to contract farming

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were the Thai Civil and Commercial Code under section 587 hire of work,[1] the Unfair Contract Terms Act,[2] and the Regulations of the Ministry of Agriculture and Cooperatives.

This article argues that the Contract Farming Promotion and Development Act B.E. 2560 (2017) still needs improvement to prevent unfair agriculture agreements between the parties. There is no standard framework or formulation to limit and regulate the contractual outline. The current act and the diversity and complexity of the agricultural production contracts leads to the situation in which agricultural business operators could exploit farmers.

Keywords: Contract Farming, Agricultural Business Operator, Farmer, Agricultural

[1] Pathaichit Eagjariyakorn, Kham Athibai Chang Raengngan Chang Tham Khong Rap Khon [Hire of services Hire of work Carriage] (9th edn, Winyuchon 2009) (ไผทชิต เอกจริยกร, คำอธิบายจ้างแรงงาน จ้างทำของ รับขน (พิมพ์ครั้งที่ 9, วิญญูชน 2552)).

[2] Unfair Contract Terms Act, B.E. 2540 (1997).

1. Introduction

1.1 General aspects of the contract farming

The nature of agriculture has changed significantly over the last decades. Contract farming got more popular but it needs fairer agreements between agricultural business operators and farmers. Those agreements regulate the terms of promotion and production factors such as animal species, seeds, food, fertilizer, drugs, and chemical substances, as well as interdictions or restrictions regarding the purchase price yield or purchase guarantee under current conditions. As it stands, farmers entering into contract farming often face unfair conditions due to a framework that allows exploitation by agricultural business operators.

The government enacted the specific law of contract farming to promote and develop agricultural on 23 September 2017, namely the Contract Farming Promotion and Development Act B.E. 2560 (2017). The Act is a good start in solving problems. However it alone is not enough to solve all the issues. Contract farming with large private companies such as Charoen Pokphand (CP)[3] has to ensure that the farmers get a fair income. In this article, the author aims to develop a legal framework that effectively improves the quality of life of farmers since there are a lot of farmers who are caught up in debt and poverty.[4] Farmers are more likely to take the risks from external factors that are out of their control such as natural disasters and epidemics which prevent them from delivering the goods defined by the contract.

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[3] Charoen Pokphand Foods, 'Response to the Myth of Contract Farming' (A Means for Job Security and Sustainability for Thai Farmers, 07 April 2015) <https://www.cpf worldwide.com/en/media-center> accessed 10 December 2021.

[4] Somporn Isvilanonda, Kan Nam Khwamru Dan Setthasat Kasettakon Ma Wikhro Panha Kasettakon Thai Warasan Setthasat Kaset Mahawitthayalai Kasetsat (2550) [Applying Knowledge of Agricultural Economics to Analyze Problems of Thai Farmers] (2550) (สมพร อิศวิลานนท์, การนำความรู้ด้านเศรษฐศาสตร์เกษรตกรมาวิเคราะห์ปัญหาเกษตรกรไทย วารสารเศรษฐศาสตร์เกษตร มหาวิทยาลัยเกษตรศาสตร์ (2550)).

1.2 Background and issues

Contract farming is a system for agricultural production to operate under an agreement between the agricultural business operator and the farmer. It sets the conditions on the production and marketing of the commodity under the agreement by predetermining the price and the quality expected. The arrangement also invariably involves the purchase and the provision of a degree of production support. For example, the agricultural business operator will supply intellectual inputs and provides technical advice to the farmers. The basis of such an agreement is a commitment on the farmer's part to provide a specific commodity in specified quantities and quality.

The current problem in contract framing concerns inequality between the parties. The distribution of risks, the share of benefits, and bargaining power are often unequal per definition at the expense of the farmers. This is leading more and more to an unhealthy acceptance of unfair terms and conditions in the industry. It becomes even more critical when external factors like droughts or sicknesses prevent the fulfilment of the contracted requirements which can create massive economic backlashes that jeopardize the farmer's business.

2. General concepts underlying contract farming

2.1 The role of contract farming

Agriculture has been the economic base of Thailand for a long time. Contract farming has been implemented and promoted to help develop the agricultural sector and mitigate fluctuation in market prices and income for farmers. Thailand is an agricultural country with very successful commodity products. Agricultural cultivation of plants and other products is the foundation of many people's lives.

2.2 The history of the agricultural agreement

The agricultural agreement first appeared in the ancient Greek[5] era, commonly observed in the form of paying rent or debt according to a portion of the defined output of the agreed crop. In China it has been recorded since the first century. In the United States, in the late nineteenth century contract farming was introduced in the form of paying land rental with crops produced on land. The contract-bound farming activity with the owner of this land developed from the feudal system in the first half of the twentieth century making the agreement with farmers started in the colonial country. Agricultural agreements are often proposed by public and private sectors to assist farmers in earning and increasing economic returns and helping farmers reach their capital sources.[6]

2.3 The development of contract farming

The unfair risk distribution between the parties and the inequality in sharing the benefits and law enforcement have led to a situation where big companies have more power than farmers who are being handicapped under the contract. The main negotiating power is with the agribusiness operator. A farmer must agree on things that are not totally in his control, such as the outcome of the product, and the risks are on the farmer's side. Drought, sickness, flood, earthquake, or electric blackout can prevent the farmer from fulfilling the contract.

The contract frequently predetermines a price and quality including a delivery schedule. The arrangement also invariably involves the purchase in providing a degree of production support. For example, the agricultural business operator will supply inputs and provide technical advice to the farmers. The basis of such agreement is a commitment of the farmers to

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[5] Signe Isager and Jens Erik Skydsgaard, Ancient Greek Agriculture (1st edn, London and New York Press 1992) 248.

[6] Erkan Rehber, 'Contract Farming in Practice: An Overview' (2007) <https://ideas.repec.org/p/ags/ucozrr/290069.html> accessed 07 June 2022.

deliver a defined number of products following the company's needs and quality standards.

2.4 Advantages and disadvantages of contract farming

Contract Farming has not only possible benefits for both agricultural business operators and farmers but also serious problems. The advantages of contract farming are varied. For instance, farmers have a more productive sale, and the raw materials can be fed into the production process with a guaranteed price. Farmers receive knowledge from the agricultural business operators to reduce production costs. The agricultural business operator's supply of raw materials and inputs may include financial support. It increases the efficiency of sharing from the company because of the raw materials cost control can be predicted by the marketing plan. The company also minimises costs because of the large production scale. The products meet the standards set by the agricultural business operators and meet the needs of the market. Also the consumers benefits from higher product quality and lower prices.

On the other hand, the investments per farm are quite high compared to the upcoming revenue which returns take many years. The contract farming agreement often penalizes farmers in term of return, risk, and fairness. Due to the high risk, farmers are also more vulnerable to loss of productivity including operating expenses such as electricity bill, fertilizer, and etc. Also, the agreement does not clearly calculate the revenue from the production. Hence, farmers cannot predict the exact profit from the investment.

3. Contract farming concepts in foreign countries

Agricultural law refers to the law that deals with agricultural infrastructure. It pertains to agricultural production, marketing, and distribution, the aims of which are to ensure the efficient production and distribution of foods and fibers. Since the industry is so broad in the scope, the laws and regulations in this area of law are extremely complex.

Agricultural law often overlaps with other laws such as labor laws, environmental laws and commercial laws.

3.1 The United States of America

The legislation in the United States is divided into two levels, the law of the federation which is applicable throughout the country (Federal Laws) and the laws of the state which are applicable within the state itself (State Laws). The tenth amendment is the basis for states being able to enact their agricultural laws if those laws are not in contravention with federal laws and regulations.

The following laws and acts are considered as the main regulations overseen by the United States Department of Agriculture (USDA): The Packers and Stockyards Act 1921 (P&S Act)[7] and the Iowa Model Producer Protection Act.[8]

The P&S Act have determined that the Grain Inspection, Packers and Stockyards Administration (GIPSA) is the main unit of authority to issue regulatory requirements and to oversee the benefits of the farmer. The P&S Act defines a rigorous method of administrative remedies to ensure that the farmers will receive payment for poultry and poultry yields when delivered. The payment guarantee fund by GIPSA will take the money from the insurance fund if the Ministry of Agriculture has received a complaint from the farmer who has not received the remuneration from the company within the time required. Concerning the poultry, the merchant has placed a legitimate trust with GIPSA, which has the effect that the company's assets shall not be applied to any transaction until the farmer receives a full repayment. This protects the farmer when the company cannot settle all debts or later files for bankruptcy. The US way of enforcement is the

[7] Packers and Stockyards Act 1921, United States Department of Agriculture (15 August 1921) 7 US Code § 181-229.

[8] Producer Protection Act 2000, Section 4a – also e.g., in Minnesota Act section 17.91(2)

application of Statutory Trust.[9] The trust is used with a poultry merchant company with an annual turnover or an annual average turnover of not less than 100,000 USD unless the Ministry of Agriculture has reason to believe that the company is unlikely to pay compensation or cannot pay the remuneration to the farmers on the schedule stated in the contract. The local courts can be requested to prohibit the company's operation as "poultry merchant" according to the definition of the P&S Act until the end of the settlement.

3.2 The United Kingdom

Contract farming has been utilized in the United Kingdom (UK) to respond to landowners who want to have several tenants under the Agricultural Property Act.[10] Contract farming agreements use the terms landowners and agricultural tenants and besides standard rental conditions, define the required farmer's skills and equipment. The terms of contract farming may be used loosely in flexible agreements.

The UK has a land registration system since 1862. In 1925, the intention was that all lands should be registered at the land registry and registration would be the only way to prove land ownership. Land registration lists confirm the ownership and also provides details of the rights of the administrator and the liabilities attached to the land. Those who want to receive land or land rights will conduct a detailed examination of the land registration. The agricultural lease agreement is subject to two separate legal systems, depending on whether it has been leased before or after 1995. A lease received before 12 July 1984 has the right to inherit, which may result in a farmers Model per holding on Land Registration Act, 1925.[11]

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[9] 7 US Code § 202 (a).

[10] Agricultural Property Act 1947, Io & II GEO.6. CH48.

[11] Land Registration Act 1925, 15 GEO. 5. CH21.

Contract farming is a joint venture between landowners and farmers (contractors). Both parties maintain a business identity and trade for tax and VAT benefit purposes. Contract farming defines the duties of landowners and farmers, including revenue sharing and expenses.[12] Each party has different investment factors, sharing of costs of various inputs and surpluses. The contract farming agreements (CFAs) are mostly used on the farmland, but it can also work for milk and some other livestock companies.[13]

The main benefit of contract farming in the UK is that the farmer can save physical farm work and working capital for labor and equipment. The agreement is also attractive to a new jointer who wants to invest in farmland. Besides, the agreement could generate higher and more stable income than in-hand farming as a farmer benefits from the contractor's lower labor and machinery costs and experience. The contractor's farms have more land without the requirement to buy it and enter a tenancy agreement which require both higher levels of work and long-term capital, including risks. The farmers' overall return under a CFA can be comparable to or better than one under an in-hand farming operation as significant capital is released from investment in machinery and others. A contractor's costs are invariable and less than the farms existing overheads due to economy of scales.[14]

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[12] Richard Means, 'Strutt & Parker Contract Farming Agreement' (13 June 2018) <https://farming.co.uk/news/strutt--parker-contract-farming-agreement-survey---latest-results-revealed-at-cereals-2018> accessed 10 December 2021.

[13] Charlotte Cunningham, 'Contract Farming Agreements Could Pay Different Rates for Different Corps' (Crop Production Magazine, 10 June 2020) <https://www.cpm-magazine.co.uk/2020/06/10/contract-farming-agreements-could-pay-different-rates-for-different-crops> accessed 11 December 2021.

[14] GOV UK, 'Future Farming: Overview How Farming Is Changing' (23 June 2021) <https://defrafarming.blog.gov.uk/2021/06/23/how-farming-is-changing> accessed 11 December 2021.

4. Regulations of contract farming under Thai laws

Thailand has no specific law to enforce contract farming in the agricultural system. The general law is the Civil and Commercial Code (CCC) in the case of agriculture agreements. This is due to an agreement in the agricultural system which is assembled from the labor contract, hire contract and trading contracts. It is complex and difficult to analyse the value and cost of producing agricultural products or services. As a result, minor farmers have less bargaining power in contracting than agricultural business operators, who use contract templates to their advantage. This results in a risk of farmers complying with the conditions specified in the contract, like full responsibility for uncontrollable conditions such as weather. Therefore, it is necessary to amend the Contract Farming Promotion and Development Act B.E. 2560 (2017) to ensure equality for all parties.

4.1 The Contract Farming Promotion and Development Act B.E. 2560 (2017)

The Contract Farming Promotion and Development Act B.E. 2560 (2017) aims to promote and develop a fair agreement by focusing on protecting farmers who are less versed in entering a contract farming agreement with agricultural business operators. The act was created to ensure fairness between the contracting parties and to help to cooperate and develop the production potential, resulting in the development of income and the knowledge of the essential technology. If the parties entered a farming contract before the effective date of this law (23 September 2017), the act will not be applicable. Specific rules and ways of mediations or dispute resolutions are specifically contracted but must comply with the regulations of the Contract Farming Promotion and Development Act.

In contract farming by placing the rules and measures to govern the contracting process, the agricultural business operators are committed to drafting the contract and providing the documents to the farmers in

advance. The contracts define an agricultural system of manufacturing, production, and services, that agricultural business operators and farmers have to agree.

4.1.1 Definition of contract farming

Contract farming refers to a system of production of agricultural products or services arising from contracts to produce agricultural products or services of the same type between one agricultural business operator and ten or more natural persons who do agriculture or with agricultural cooperatives or farmers groups. According to cooperative law or community enterprises or community organization networks under the law on promotion of community enterprises, in which the other agricultural occupation has conditions for production, sale or employment of agricultural products or services, farmers agree to sell or contract to produce agricultural products. This goes under the quantity, quality, price or period specified and the agribusiness operator agrees to purchase such products or pay the compensation as specified in the contract by the agricultural business operator participating in the process products such as determining methods of production breeding or production factors for farmers.

If a contract is required to produce agricultural products or services between the agricultural business operator and natural persons who are less than ten, but not less than two, the agricultural system must be adopted under this Act[15] to enact a royal decree.

4.1.2 The setup of a committee

The committee for the Contract Farming Promotion and Development Act B.E. 2560 (2017), which has the primary responsibility of overseeing and enforcing this law, considers that due to the composition of

[15] Contract Farming Promotion and Development Act 2017, Section 4, Government Gazette, 26 May 2017.

the legal committee, it usually focuses on government agencies, private sector and agriculture but it seems that the proportion is not balanced as it should be. It is a weakness of the committees not having members from the farmer side.

4.1.3 The registration of the agricultural business operator

In the past, problems from the traditional concept of contract farming were created since each party must be cautious in preserving their interests. The law system or other sectors cannot interfere with the business which leads to a problem with monopolies. The registration has changed its original frame. Duties of the agribusinesses operator in any area can now be determined so that all farmers can work under the law and can be tracked and monitored. This method will help to count the number of counterparts in the system which will make it easier to help farmers in the system. By defining contract standards, the agribusinesses operator often poses a risk to farmers through contract terms such as requiring farmers to invest in everything or force them to purchase materials where the company also has the same power to set prices. Some issues can also arise from the location. The agribusinesses operator is not responsible for environmental issues. Thailand should work toward sustainability, supporting initiatives initiated by the sustainable agriculture Initiative and promote resource management by involving the public in the implementation and monitoring of those projects. It should be ensured that all plans and projects are supported by research. Since research is vital for long-term success, it should be executed frequently and built upon past results. Conducting agricultural zoning can ensure that crop production meets the needs of the market.[16] It is also vital that the farmland receives enough water for the

[16] Surasak Boonrueang, Kaset Yangyuen Khosangket Kiaokap Kotmai Kaset Phantha Sanya Phorobo Songsoem Lae Phatthana Rabop Kaset Phantha Sanya 2560 [Sustainable Agriculture Observations on the Contract Farming Promotion and Development Act 2017] (สุรศักดิ์ บุญเรือง, เกษตรยั่งยืน ข้อสังเกตเกี่ยวกับกฎหมายเกษตรพันธ

plant to enhance growth in the area. Cooperatives must be capable and effective, and members should work together to achieve and utilize knowledge, technology, and agricultural inputs. Enhancing the capabilities of government officials can result in pride and dignity to work for a mutual benefit the same as providing public agencies with efficient and transparent services.[17]

4.1.4 Agreement on contract farming

The agricultural business operator is obliged to make a contract in writing and must deliver a copy of the agreement to the farmer on the day of signing. The contract must use wording that is easy to understand for every Thai.

This law has been enacted to protect farmers under the agreement by prohibiting a contract that is disproportionately advantageous to the contractor and unfair to farmers (Section 26). If this principle is violated or prohibited terms are found therein, such agreements or conditions would be ineffective. A good thing is that certain aspects such as forcing the farmers to deliver despite of force majeure cannot be included in the contracts.

It is prohibited to divide contracts between agricultural business operators and farmers or do any other action that makes the contract not to comply with the Contract Farming Promotion and Development Act. If a contract is made in such a manner, it shall be deemed that the contract is in the agricultural system (Section 25).

สัญญา พ.ร.บ. ส่งเสริมและพัฒนาระบบเกษตรพันธสัญญา พ.ศ.2560). <https://thailaw4green.wordpress.com/?s=ข้อสังเกตุเกี่ยวกับกฎหมายเกษตรพันธสัญญา> accessed on 11 December 2021.

[17] Thai Agricultural Standard TAS 6914-2017, The Royal Gazette, Announcement and General Publication, Vol. 134, 28 November 2017.

4.1.5 Dispute resolution of contract farming

This law requires the use of a dispute mediation process before the use of another method of dispute resolution or the litigation method in court. If one or more parties decide to use the mediation process, the counterparty must enter the dispute mediation process.

The dispute mediation committee shall make a compromise agreement between the parties which is binding for both parties. If the parties cannot agree, the dispute mediation committee shall decide over the disputes. This does not disqualify the parties that will bring the dispute to arbitration or bring the case to court. In the case of farmers who were damaged by contractual practices in many covenants, agricultural systems and farmers can request group-based litigation for the dispute mediation committee to notify the Department of Rights and Liberties to coordinate for further legal proceedings.

4.1.6 Penalties

To effectively enforce the law, there are penalties of up to 300,000 Baht for non-compliances with the laws.

5. Conclusions and recommendations

Contract farming is a form of a contemporary agriculture agreement with a combination of employment contracts, sale contracts, outsourcing and product sales or agricultural services. It is usually found to be disadvantageous towards farmers and does not achieve fairness. Existing laws could not be applied efficiently because the contract between the agricultural business operator and the farmer is not based on equality. The agricultural business operator has superior bargaining power and often has a contract preparation department, which can use adhesion contracts that take advantage of the farmer's lack of knowledge and understanding of the contract. Therefore, it is necessary to have a specific legal framework that promotes and creates fairness between contracting parties in the agricultural system.

Sections 21 and 26 of the Contract Farming Promotion and Development Act B.E. 2560 (2017) are provisions that intend to promote and create fairness between parties in the agricultural system. Additionally, we should follow and adopt international agreements as the food processing agreement of the United Nations (UN), Food and the Agriculture Organization (FAO) for the trust and cooperation between entrepreneurs and farmers. This can create confidence, business strength and promotes the competitiveness of the commercial market of the agricultural system in Thailand.

5.1 Conclusions

5.1.1 Advantages of the Contract Farming Promotion and Development Act B.E. 2560 (2017)

The benefits of the Contract Farming Promotion and Development Act B.E. 2560 (2017) to promote and develop a sustainable agricultural system are going in the right direction. The legal support and contractual protection that were built cooperated and developed the potential for production, productivity and agricultural services between farmers, agricultural business operators and related sectors. In the process of efficient production to reduce market risk, standard production technology has been transmitted to farmers, resulting in the creation of the revenue stability for farmers. Businesses can be more productive, have higher professional know-how and can standardize for a set period which is the first step towards sustainable development in the agricultural industry of Thailand. The contract is clear and transparent and protects the parties. It also protects the parties from discrimination, dishonesty and unfair terms. The overall goal is to reduce conflicts arising from contracts and to reduce the court's burden to handle disputes. This makes contract farming faster and more flexible than the dispute resolution process in the court, including the protection measures under the contract during the dispute resolution process.

5.1.2 Disadvantages of the Contract Farming Promotion and Development Act B.E. 2560 (2017)

As things currently stand, contract farming is not fair towards the farmers. Contracts lack fairness regarding the partnership and are untransparent. With the development of the audit system to follow the contract as well as the development of relevant legal frameworks, it also shows that agricultural production is barring natural risks. The farmer almost exclusively bears the risk in cases where goods are damaged. The business partners' risk is minimal except for the business owner's liability in the contract and his status to be an authorized party to acquire and prohibit the farmers from selling to others. The business owner has the authority to force the trade by the set price. This leads to an unbalanced structure. Another factor that contributes to the inequality is the farmers lack the power to negotiate in all aspects, from the agreement to the production contract, price, production factor, purchase price and yield. Established businesses often use premade contracts by defining the conditions of the contract in advance which leads to the farmer's disadvantage.

5.2 Recommendations

5.2.1 Support all farmers to ensure fair contracts

Within the framework of the Contract Farming Promotion and Development Act B.E. 2560 (2017) policies and regulations, the author would advise the government to support smaller farmers in their contract farming arrangements. This should play a role in regulating general market payment terms. The farmers' lack of knowledge on market prices and agricultural trends is negatively influencing the farmers' negotiation of fair prices. Like previously discussed, they have weaker negotiating power. In isolated situations, governments may choose to set prices for the farmers, and they should be given access to market price information and trends to help farmers assess whether contract terms and conditions are appropriate. The law should be more specific regarding the contract type to close the

loopholes and prevent farmers from being exploited by the often more versed business operator.

The limitation of the Contract Farming Promotion and Development Act, to be valid for certain products or services only is an issue to be resolved in future amendments. Also, the limit of 10 natural persons as contract partners (Section 4, paragraph 1), should be removed. The act should be mandatory for any contract between an agricultural business operator and a farmer. This would also remove the mentioned necessity to create a new decree for such cases (Section 4, paragraph 2). The act should also be applied to all agricultural business operators no matter if they are registered or not. Possibly a fine can be applied if the operator does not follow his duty to register.

This lack of coverage is one of the main arguments to support the author's hypothesis that the act is currently insufficient.

5.2.2 Establish a government agency to ensure fairness

In practice, the Office of the Secretary of Agriculture is responsible for this Act and should engage with farmers frequently to minimise the disputes and improve the effectiveness of development and promotion the contract farming.

In Thailand, contract farming should consider using the U.S. model which is based on a much longer experience and for example look at the USDA duties, which includes reporting legal problems to the congress.

5.2.3 Develop proven standard contracts for common cases

To improve the law and to generate appropriate measures to protect farmers, the law should be revised in the future. Standard contracts should be enforced in contract farming. The government should determine most of the content of the contract to distribute the risk of the parties equally. The standard contract form should be fair for both parties. A government agency should be established to be responsible for inspecting

and certifying the production contract for accuracy, transparency, and fairness for all parties.

5.2.4 Close legal loopholes and ensure adequate penalties

In the case of a dispute between the contract parties, the commission may be asked to mediate. This is generally a solid approach but the commission has limited power. The penalties under this act are of criminal nature, but depending on the case the fine will not exceed three hundred thousand baht which is not sufficient to prevent violations. This opens loopholes for agribusiness operators to exploit farmers. This leads to the act being an insufficient framework to solve the dispute between agribusiness operator and farmers.

5.2.5 Promote the UK style joint venture operations

UK style joint ventures are objectively fairer when the agricultural business operators and farmers share the benefits and risks of the operation. This should also be promoted in the Thai Act.

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THE INSPIRATION OF INTERNATIONAL INSTRUMENTS IN THE ESTABLISHMENT OF SINO-THAI JUDICIAL COOPERATION OF JUDGMENT CIRCULATION*

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Abstract

In order to ensure the performance of cross-border litigation in general civil and commercial matters between Thailand and China, this article examines the legitimacy issues and judicial gaps between Thailand and China. To protect the flow of people, goods, and services between Thailand and China, it is crucial to establish the instruments of judgment circulation.

The author discovers the incompatibilities of Sino-Thai legislative frameworks for the validity of foreign judgments. It will be interesting to see how the presumed reciprocity mechanism, which the Supreme Court of China (SPC) and the ASEAN countries jointly proposed in a forum, develops in actual usage. However, the vacuum of judicial mechanism for recognition and enforcement of foreign judgment requests a new instrument between Thailand and China. This article employs a comparative study and legal history research, of how common instruments, i.e., the international convention (HCCH), regional treaty (EU), and bilateral treaty (Germany-Israel

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treaty), develop instruments from the perspective of principles, criteria, procedures, and effects in order to identify a method of Sino-Thai judgment circulation.

The author first suggests that China and Thailand enter into a bilateral agreement, textually referencing the examined instruments and the shared characteristics of conventions that commonly bind China and Thailand. The author also suggests that legislative integration be used to lessen the incompatibility between national legislative statutes and international conventions.

Keywords: Recognition and Enforcement of Foreign Judgment, Sino-Thai Instrument, HCCH Convention, Brussels I Regulation Recast, Germany-Israel Treaty

1. Introduction

In order to provide instrumental recommendations for the Sino-Thai mutual movement of civil and commercial judgments, Section 2 below first describes the judicial situation in China and Thailand with respect to the recognition and enforcement of judgments of other countries; Section 3 examines existing and developed instruments, including the 2019 HCCH Convention (Section 3.1), Brussels I Regulation Recast (Section 3.2), and Germany-Israel Treaty (Section 3.3), with an in-depth study of their background, principles, rules and procedures. Based on the findings in Section 3, Section 4 provide recommendations for instruments to facilitate the flow of civil and commercial judgments between Thailand and China. Section 5 will summarize the research and recommendations of this paper.

2. Necessity and challenge of the Sino-Thai judgment movement

Since the establishment of diplomatic relations in 1975,[1] China and Thailand have entered into extensive bilateral agreements in the cooperation of trade and investment, which in 2019 officially deepened into a comprehensive strategic partnership from policy, economy, science, education and people-to-people connectivity.[2] Furthermore, the past three years have seen a rising trend of Sino-Thai trade and investment in which China is one of Thailand's biggest trading partners, as shown in the statistics below.

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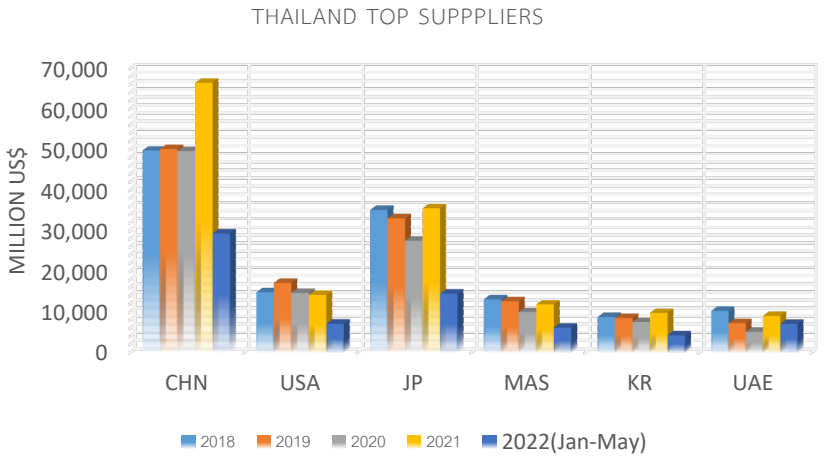
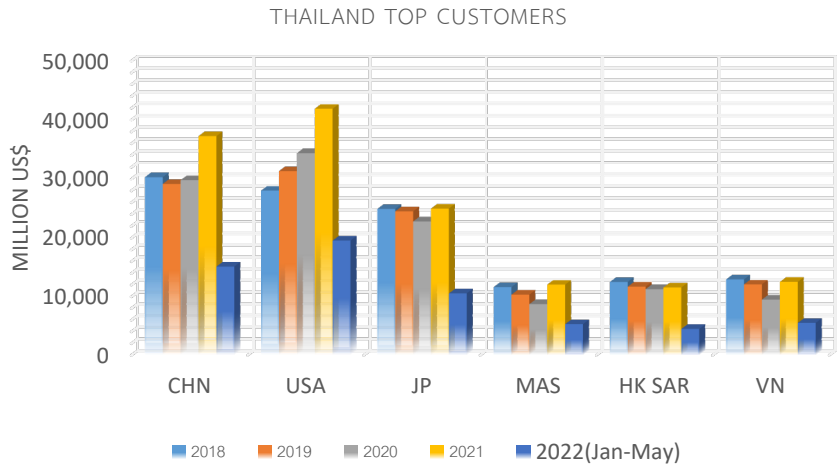
[1] Ministry of Foreign Affairs of Thailand, 'JOINT PRESS STATEMENT between the Government of the Kingdom of Thailand and the Government of the People's Republic of China issued on 5 November 2019, Bangkok' <https://www.mfa.go.th/en/content/111092-joint-press-statement-between-the-government-of-the-kingdom-of-thailand-and-the-government-of-the-people%E2%80%99s-republic-of-china-issued-on-5-november-2019,-bangkok?page=5d5bd3da15e39c306002aaf9> para 5, accessed 09 December 2019.

[2] Ibid, para 3.

Table 1 Thailand's Top trading partners 2018 – 2022[3]





However, judicial cooperation in securing cross-border trading and business is lacking in the mechanism of judgments circulation between the courts of two countries. Overviewing Sino-Thai histories and legal systems find no legitimacy and procedure allowing the circulations with each other,

[3] Office of Permanent Secretary, 'Major Trading Partners' (Information and Communication Technology Center with Cooperation of The Customs Department, May 2022 <https://tradereport.moc.go.th/TradeThai.aspx> accessed 13 July 2022

as further explain below.

On Thailand's side, there is a so-called "judicial resistance"[4] lurking in the justice system of private international laws (PIL) areas. On one hand, neither has Thailand issued perspective legislatures nor joined any international agreements of judgments movement in general civil and commercial matters. On the other hand, no precedents have given direct recognition and enforcement to foreign judgment since the judge's comments on the explicit criteria of recognition and enforcement in the Supreme Court's Decision No. 585/2461 (1918). There are comments that Thailand courts are restricted from the legal authority of judgment recognition and enforcement.[5] Instead, few cases relevant to this topic imply bringing a new case to the competent Thai court.[6]

On China's side, the refusal grounds of judgment movements actually exclude Thailand's judgments. The Civil Procedure Law of China (CPC)[7] and the Supreme Court of China (SPC) interpretation[8] prohibit recognising and enforcing foreign decisions issued by a country's court not mutually binding with China on any international convention, bilateral treaty, or reciprocity principle, i.e., the precedential principle in practice.[9]

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[4] Akawat Laowonsiri, '14 Thailand' in Anselmo Reyes (eds), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart Publishing, 2019).

[5] Poomintr Sooksripaisarnkit, 'Thailand' in Adeline Chong (eds), *Recognition and enforcement of Foreign Judgments in Asia* (Asian Business Law Institute, 2017) 205.

[6] Central Juvenile and Family Court No.2351/2548 (2005); SCJ No.15066/2555 (2012).

[7] **中华人民共和国民事诉讼法** (Civil Procedural Law of the People's Republic of China) (1991), s 268, carry forward in Section 281-282 of the latest 2017 amendment at <http://www.moj.gov.cn/Department/content/2017-07/05/592_201360.html> accessed 14 September 2020.

[8] **最高人民法院关于适用《中华人民共和国民事诉讼法》的解释** (Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China) (2015) <http://www.court.gov.cn/fabu-xiangqing-13241.html> s 549.

[9] *(1995)* **民他字第** 17 **号]最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函** (1995/17 Reply of SPC on whether the People's Court of

China hopes to improve relations with ASEAN allies by resolving the judicial impasse. In 2017, SPC and the representatives of all ASEAN member states' Supreme Courts reach a written consensus (the Declaration) at the 2nd China-ASEAN Justice Forum (2017).[10] Section 7 of the Declaration suggested a presumptive reciprocity mechanism between ASEAN nations and China in the absence of treaties, as long as there is no precedence for refusing to recognise and enforce civil judgments on the grounds of reciprocity. The method of presumptive reciprocity is a suggestion declared by the SPC and all ASEAN members, including Thailand. It suggests a potential solution to the problem of judgment circulation that the China-ASEAN enforcing courts might consider.

Later in 2019, the SPC expressly recommends broadening the criterion of reciprocity from a precedential base to a presumptive base for the judgments rendered by ASEAN countries, if no precedents prove the courts of the origin country have ever refused decisions issued by China for reciprocal reasons.[11] However, it cannot ensure the exterritorial efficacy of Thailand's judgments in China. Because on one side, such opinions of SPC take suggestive roles in judicial proceedings. Only SPC's judicial interpretations on the particular application of the law in the trial are legally effective.[12] On another side, following the conservative tradition of

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China should recognize and enforce the judgment of the Japanese court on the content of claims and Debts).

[10] The Nanning Declaration at the 2nd China-ASEAN Justice Forum (2017), para 7, see the following English version signed by Association of Southeast Asian Nations, Afghanistan, Bangladesh, Pakistan, Sri Lanka, Nepal <http://cicc.court.gov.cn/html/1/219/208/209/800.html> s 7, accessed 22 September 2022.

[11] No. 29 [2019] of SPC, ***最高人民法院关于人民法院进一步为"一带一路"建设提供司法服务和保障的意见*** (Opinions of the Supreme People's Court Regarding Further Providing Judicial Services and Guarantees by the People's Courts for the B&R Initiative) (2019) <http://www.court.gov.cn/zixun-xiangqing-212931.html> para 24;.

[12] ***中华人民共和国立法法(2015 修正)*** (The Legislation Law of the People's Republic of China (2015 Amendment)) s 104, 45 (2).

precedential reciprocity, China's courts may not be confident to take the first step of presumed reciprocity when seeing the vacuum of conventions, legislatures, and rulings of recognition and enforcement of foreign judgments in Thailand.

In other words, the goal of the Sino-Thai judgment movement is hard to achieve under the current conflict between the judicial resistance of Thailand and the conservative legislatures of China. Enforcing a Thai judgment in China, in turn, is identical to restarting a new proceeding.

To find the resolutions of the Sino-Thai judgments movement, the following Section 3 will study three instruments, which all aim to unify the criteria of regulating on recognition and enforcement of foreign judgments in general civil and commercial matters, but with different coverages. A comparative study of instruments with respect to their background, principle, criteria, and procedure will give enlightenment to the Sino-Thai judgments movement.

3. International instruments

Instruments of judgment movements in the form of international conventions, multilateral treaties, or bilateral treaties establish standards of recognition and enforcement in different areas. It enables the judgments with strong characters of judicial sovereignty to circulate on a broader scale with predictability and certainty.

3.1 The international convention: 2019 HCCH Convention

3.1.1 Background

The Hague Conference on Private International Law (HCCH) devotes to developing transnational judicial cooperation utilising multilateral legal instruments with a worldwide influence. Its efforts to unify standards of judgments movements in conventional instruments were mainly achieved in four initial results, including **Phase 1:** Convention of 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial

Matters; **Phase 2**: Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (2000 adopted); **Phase 3**: Convention of 2005 on Choice of Court Agreements; and **Phase 4**: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 2019 Convention).

A historical overview finds that the previous two Phases encountered too many difficulties to be approved in the majority, which is mainly attributed to unreachable consensus on jurisdictional bases and litigation coverage.[13] This, in turn, explains the success of the 3rd Phase among 28 contracting states, which narrows the scope of the convention to judgments issued by chosen courts, and potential success in the 4th Phase that contextually consists of the 3rd phase.

In consistency with the historical contexts and experiences, the draft of the 2019 Convention concluding in the 4th Phase is the latest and worldwide contribution to the uniform rules of civil judgment movements, which is contextually accepted by 150 countries. Its approval in the distant future prefigures the universal circulation of judgments in most areas of private international law with the following characteristics.

3.1.2 Principles

Article 4 of the 2019 Convention sets the tone of judgments circulation with an efficient system rather than movement restrictions, which requests to:

(1) recognise and enforce the competent judgments among all member states to secure effectiveness;

(2) prohibit review of the merits of original judgments to reduce duplicative proceedings;

[13] The Permanent Bureau, Conclusion of the special commission of May 2000 on general affairs and policy of the conference (2000) 11ff <https://assets.hcch.net/docs/a154cf311583-4602-90eb-6b251d2eb7a4.pdf> accessed 25 September 2020.

(3) facilitate the proceedings at the requested court of recognition and enforcement to enhance the efficiency and money-saving for the claimant.[14]

The core of the general principle is mainly deployed in Chapter II of the 2019 Convention, to be introduced in the following sections.

3.1.3 Rules

To practically secure judgments circulation, Chapter II of the 2019 Convention designs the mechanism of exhaustive limitations[15] and jurisdictional filter,[16] which leave accession to the judgment disqualified to the criteria of the 2019 Convention.

On one side, Article 4(1) commits the requested court of the signatory state to recognise and enforce the judicial decision issued by the court of other signatory states, which is in satisfaction of both any link in the jurisdictional filter of Article 5 and the exclusive jurisdictional bases of Article 6. Only when the refusal grounds of recognition and enforcement at Article 7 are triggered may the foreign judgment be rejected. The jurisdictional filter is simply the accession of enforcing court except when the listed refusal grounds are challenged.[17]

On another side, the rejected judgments out of Article 7 above still have the second chance to file to the enforcing court based on national laws as the reserved right in Article 15.

What also deserves a notice is the exclusion of relations with other one or more signatory states is possible according to Article 29. One state could enter the 2019 Convention only with the selected signatory states by

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[14] Francisco Garcimartín and Geneviève Saumier, 'Judgments Convention: Revised Draft Explanatory Report' (2018) Preliminary Doc. No.1 of December 2018 Judgments Convention, paras 6-13.

[15] Ibid, para 17.

[16] Ibid, para 122.

[17] Ronald A Brand, 'The Circulation of Judgments Under the Draft Hague Judgments Convention' (2019) University of Pittsburgh Legal Studies Research 4.

notifying the depositary. It doubtless benefits to shelve irreconcilable divergence of sovereignties interests and expand the signatory scope, regardless of a probably results of the more complex application of the 2019 Convention.

The 2019 Convention set up minimum standards of refusal while the local judiciary of signatory states is not restricted to going further.

3.1.4 Procedures

Domestic laws of the enforcing court are commonly complied with to proceed with the recognition and enforcement as Article 13(1) requested, and there are three distinguished issues: (a) whether the recognition is an automatic or special procedure; (b) whether the enforcement is ruled with registration procedure or declaration, i.e., exequatur procedure; and (c) the final execution of judgments.[18]

While the adoption of national procedural rules practically facilitates enforcing courts, what needs to be noted is the additional restrictions to secure judicial efficiency during the proceedings. For one thing, procedural delays of the enforcing court are prohibited as Article 13(1) also demands an expeditious proceeding. Secondly, there is an exception to Article 13(1) that the Forum-Non-Convenience doctrine, which may arise from some legal systems proposing the enforcement declaration on the jurisdictional basis, shall be prohibited.[19] Thirdly, if the national procedural rules are insufficient, the general provisions of Article 4 will be complied with to automatically recognise the judgment. The 2019 Convention balance the flexibility and efficiency of the proceedings of enforcing court in authorising and limiting to the national procedural rules.

To sum up, the main goal of judgment circulation of the 2019 Convention is theoretically achieved in terms of stated rules and procedures. The rules of jurisdictional filters, and exhaustive limitations in

[18] Garcimartín and Saumier (n 14) paras 353-354.

[19] Ibid, para 361.

harmonising with remedies of national laws of the enforcing country, facilitate the applicant with predictable and extensive opportunities for recognition and enforcement. Oppositely, there is a gap for the judgment enforcement when the judgment falls in the grey areas of a specified list of refusal grounds and jurisdictional of the 2019 Convention.

Nevertheless, the substantive impact of the 2019 Convention still depends on broad ratifications and interpretations of signatory states that harmonise the sprits of the 2019 Convention with domestic laws to proceed with judgment circulations.

3.2 The multilateral treaty: Brussels I Regulation Recast

3.2.1 Backgrounds

Along the process of European integration and judicial cooperation, the Brussels Regime plays the main role in the regional judgment movement in general matters of PIL, which consists of three multilateral treaties.[20] The Recast is the latest version binding almost all the EU member states for the qualified judgments rendered after 10 January 2015. Its application is consistent with the Brussel Regime and other EU legislatures of judgment circulations in well-defined matters as secured by interpretation of the Court of Justice of EU (ECJ).[21]

[20] Phase 1: 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention); Phase 2: Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation); Phase 3: Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation Recast or the Recast).

[21] Brussels I Regulation Recast, recital (34).

3.2.2 Principles

Based on policies of the Stockholm Programme emphasising the dominant importance of legal enforcement approaches in the field of justice,[22] the Recast makes a breakthrough in abolishing enforcement declaration while keeping structural consistency with the Brussels Regime.[23] A streamlined principle of automatic recognition and free-exequatur-enforcement of judgments issued by courts of member states is designed to give effects of *res judicata* to qualified judgments. At the same time, the Recast have direct and prior effects[24] on member states before the rules and general principles of EU member states for regulated matters because of the ordinary legislative procedure of EU.[25]

Nevertheless, the streamlined principle has a territory limitation. The principle of domicile jurisdiction only gives accession to judgments issued at one EU member state requests for recognition and enforcement at another member state.[26] The other decisions issued by the court of the third country will be treated otherwise under national proceedings of the member state.

3.2.3 Rules

Jurisdictional rules develop in predictable and efficient directions. Firstly, the jurisdictional hierarchy of Chapters II and VII of the Recast states that the lawsuit shall follow the domicile principle of the defendant, except

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[22] European Council: The Stockholm Programme - An Open and Secure EUROPE Serving and Protecting Citizens (2010) OJ 115/01.

[23] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the recognition and Enforcement of Judgments in Civil and Commercial Matters [2010] COM/2010/0748 final - COD 2010/0383 (hereinafter called as EC Proposal of 2010).

[24] The Recast, Recital (6).

[25] Treaty on European Union (TEU) amended in Lisbon Treaty [2009] OJ C 306/01 (Treaty of Lisbon), Art 48 (7) para 4.

[26] The Recast Recital (13) - (15), Arts 4-6.

specific jurisdictions or party autonomy is linked to other courts. At the same time, the Recast prohibits substantive review of the jurisdiction of origin court and upholds the *lis pendens* principle among different enforcing countries to reduce jurisdictional chaos.

Additionally, the Recast designs the minimum standards of refusal grounds to promote judgments circulation to the maximum with special concerns for parties' interests. On one side, the streamlined mechanism of the Recast can only be interrupted by the application of refusal grounds or recognition and enforcement listed in Article 45 of Chapter III, which is manifestly contrary to the fundamental elements of (1) public policy; (2) default judgment; and (3) irreconcilable confliction with judgments given outside the origin country. On another side, it also gives special concerns to weaker parties such as the holder of insurance, the consumer, and special subjects, such as real estate and intellectual property.

Lastly, the uniform application of the Recast between different courts is guaranteed by the preliminary rulings and interpretation of the ECJ.[27]

3.2.4 Procedures

The streamlined procedures are significantly displayed in Sections 1-2 of Chapter III of the Recast, with a good balance of defendants' remedies.

On the one hand, the streamlined procedures request a simplified and efficient proceeding of enforcing court including (1) automatic recognition, (2) free-exequatur-enforcement, and (3) immediate protection of the judgment enforceability.[28] It gives qualified judgments the effect of *res judicata* at the enforcing country, and its exception can almost only be examined in the enforcement procedure.[29]

[27] The Recast, Recital 34.

[28] The Recast, Arts 36, 39, 40.

[29] Peter Arnt Nielsen, 'the Recast Brussels I Regulation' (2014) 83 Nordic J Int'l L 64-65.

On the other hand, the defending rights are secured in Section 3 of Chapter III, allowing the defendant to apply or appeal for the rejection of recognition and enforcement under listed refusal grounds and procedures during the enforcement procedure. That also means the enforcing court may have to stay the enforcement proceeding until the decisions on the application of refusal recognition and enforcement.

Shortly speaking, the streamlined mechanism of the Recast reduces the transnational judiciary obstacles and promotes judgment circulation to the maximum while considering party interest, especially the well-defined weaker party. The Recast gives direct effects of *res judicata* to foreign judgments except for the application of particular refusal grounds. However, it is also important to know the streamlining mechanism is limited to certain territories under the solid foundations of mutual trust and maturate justice administration of the EU.

3.3 Bilateral treaty: Germany-Israel Treaty

3.3.1 Backgrounds

In a historical overview, the prosperity of bilateral treaties (BTs) in the harmonisation of judgment movements in PIL areas between European countries can be traced back to the 19th century,[30] most of which were replaced by the Brussels regime. Nevertheless, the BTs model of Germany still carries weight to the third countries like Israel[31] and potentially resumes in other European countries, especially the British, after the post-Brexit

[30] Brussel I Regulation, Art 69.

[31] Bilateral Treaty between Germany and Israel on the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters 20 July 1977 (Germany-Israel Treaty) <https://www.justiz.nrw.de/Bibliothek/ir_online_db/ir_htm/dt-israel_auv 20071977.htm> accessed 1 October 2020.

period of 2020.[32] Furthermore, the textually similarities between Germany-Israel Treaty and the version once concluded between British and Germany,[33] France, and Belgium make the study of the effective Germany-Israel Treaty greatly valuable.[34]

3.3.2 Principles

It is complex to follow the national laws and procedures that separately regulate the recognition and enforcement of foreign judgments that excludes from the international conventions and BTs that Germany has joined and legitimately transformed.[35] The primary principle and spirit of the Germany-Israel Treaty are to establish a shortcut against the legal complexity, so-called as the presumption of recognition and enforcement, to assume the admissions of foreign judgments.[36] An Israel civil judgment is considered recognisable and enforceable in enforcing courts of Germany unless the refusal list of the BTs is triggered. As a result of compromise and counterbalance of judicial sovereignties of both countries, the refusal grounds are the core of the German-Israel BT, as stated in the following section.

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[32] Kathrin Nordmeier, 'Recognition and enforcement of UK judgements in Germany post no-deal Brexit' (Lexis®PSL Dispute Resolution, 21 August 2019); see also Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University press 2019) 95.

[33] Convention Between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (1960) (German-British BTs).

[34] A D Watts, 'The Enforcement of Judgments: A Convention with Germany' (1960) 36 Brit Y B Int'l L 359, 360-361, 363, the Germany-Israel BTs is textually similar to the draft of the British Committee under the chairmanship of Greer L.J. in 1932 that proposes to conclude with the three countries including Germany.

[35] *Gesetze im Internet* (German Civil Procedure Code) Sec 328 (recognition) and Sec 722-723 (enforcement).

[36] Yoav Oestreicher, 'The Rise and Fall of the Mixed and Double Convention Models regarding Recognition and Enforcement of Foreign Judgments' (2007) 6 Wash U Global Stud L Rev 339, 355-356.

3.3.3 Rules

The presumption mechanisms of recognition and enforcement are separately embodied in Chapters II and III of the Treaty, giving access to foreign judgments except the refusal catalogue is triggered. On the one hand, the refusal criteria of the Treaty are the boundary marker for judicial review; at another hand, the laws and facts decided by the court of the rendering country shall not be challenged in the reviewing process.

Presumption of recognizability

The only grounds for refusing recognition of the foreign judgments are listed in Article 5 and Article 6(2) as classified below:

(1) unqualified to indirect jurisdictions with 11 connections listed in Article 7(1) or exclusive jurisdictions listed in Article 7(2);

(2) legal conflictions between the rendering country and enforcing country on the assessment of the status of matrimonial laws, family laws, and legal entities, except the maintenance obligations;

(3) regular elements contrary to sovereignty interests, defendant rights, and parallel proceedings according to national laws of enforcing country.

These grounds in Article 5 of the Treaty are largely similar to Section 328 of the German Civil Procedural Code.[37]

Presumption of enforceability

The foreign judgment is normally enforceable if it is enforceable in the rendering country and recognised in the enforcing country.[38] However, the claimant has an additional documentary obligation, as regulated in Article 15, to prove the original judgments' authenticity, finality, and procedural fairness before the enforcing court.

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[37] Catrice Gayer and Sören Flecks, 'Germany' in Louise Freeman and others (eds), *The International Comparative Legal Guide to: Enforcement of Foreign Judgments* (4th edn, Global Legal Group Ltd., 2019) 74.

[38] The Treaty, Art 10. See also in Gayer (n 37).

Besides, a finality status requires that a foreign judgment shall not be subject to any ordinary proceeding of appeal in the rendering country, except the decision in the particular matter of maintenance obligations or the measures serving to secure the creditor, such as the order of provisional procedure.

3.3.4 Procedures

Procedures are designed to simplify and facilitate the judgment movements in the Treaty.

First, national procedural laws of the enforcing country are applied to recognize and enforce foreign judgments by simplifying the Treaty. It principally gives automatic recognition without specific procedures unless a dispute is raised for a declaration action to refuse recognition.[39] Comparatively more complicated, the enforcement requests the claimant with documental work under Article 15, but the enforcing court is limited to review enforcement only on those documents and the refusal grounds of the Treaty.

Secondly, it is worth mentioning that Germany provides rapid procedures to simplify further the enforcement process of judgments falling inside the Treaty from lawyer representation and hearing procedure, according to the law of 13 August 1980 on the execution of the German-Israel Treaty,[40] which practically facilitates the enforcement of foreign judgments.

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[39] Gayer and Flecks (n 37).

[40] Federal Law Gazette of Germany 1980 II 1301, the Execution of the Treaty of 20 July 1977 Between the Republic of Germany and the State of Israel on the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matter) <https://dejure.org/BGBl/1980/BGBl._I_S._1301> accessed 2 October 2020. See also Kurt Siehr, 'The Recognition and Enforcement of Israeli Civil Decisions in the Federal Republic of Germany' (1986) 50 the Rabel Journal of Comparative and International Private Law 598.

Overall, the presumptive mechanism of the treaty provides a shortcut from the complicated and controversial legal system between Germany and Israel and simplifies the judgment circulation with automatic recognition and conditional enforcement with documentary obligations. The listed refusal grounds are the only rejection of the judgment movement.

Additionally, refusal grounds as the core of the Treaty are found in strong textual links with the national procedural law of Germany. It implies a unique character of the instrument of BTs of comparatively more closely presenting the sovereignty interests of the signatory states.

4. Inspiration of a Sino-Thai bilateral treaty of judgment movements

4.1 Findings of instruments

Section 3 above gives a historically overlook and finds the unique foundations which breed different instruments.

First, the draft of the international convention of Section 3.1, which aims to globally standardise recognition and enforcement of judgments in PIL areas, suffered long-term controversies from the 19th to 20th century from different legal systems and sovereignty interests. It leads to a final draft of 2019 with the narrowed scope and subject matters of litigations, and exhaustive grounds of refusal, so as to give enough flexibility to its acceptance and application in various legal systems in the future.

From a different perspective, the Recast mentioned in Section 3.2 provides a streamlined mechanism which successfully abolishes the exequatur procedure while securing the uniform application and interpretation in all enforcing courts of member states. However, the achievement of the streamlined mechanism cannot stand apart from the regional intergradation of EU on policies, economy, and justice cooperation.

Comparatively a closer consideration of the sovereignty interests of each signatory state can be found in the instrument of the bilateral treaty as exemplified in the German-Israel Treaty in Section 3.3 above. It assumes recognition and enforcement of the judgment unless the grounds for refusal

are triggered, which is textually consistent with the domestic German rule of refusal. Additionally, the Treaty also simplifies the procedures of enforcing courts with prohibitions of a substantive review of original judgments as well as rapid procedures as per the transformed law of Germany.

4.2 The Sino-Thai mechanisms of judgment movements

There are insufficient conditions to realize Sino-Thai judgment movements in a general PIL area through the instrument of international convention and regional treaty. On one side, the result of the 2019 Convention of Hague depends on a future effort of each signatory state on ratification and judicial application and that is incentive-requesting and time-consuming. On another side, there is no credible justice cooperation in Asian territory but a pan-Asian conservatism to foreign judgments that hampers efforts on regional harmonization.[41]

Hereinafter the author advises promoting the Sino-Thai bilateral treaty of judgment movement as the first step beyond Thailand's judicial resistance to other countries. For one thing, it may be no more complicated than an amendment of current Sino-Thai BT of judicial cooperation of 1994 at the aspect of documents serving and evidence investigation; it simply proceeds with a bilateral negotiation under harmonization of sovereignty interests and legal systems of both sides to the maximum. Secondly, there will be a predictably positive response from China, considering the legitimacy of BTs in the civil procedural law, and the SPC's suggestion to implement BTs and deepen justice cooperation with strategic partners including Thailand. Last but not least, PROT CLC 1992[42] and PROT Fund

[41] Laowonsiri (n 4); see also in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia: An Overview* (Routledge 2011).

[42] Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (PROT CLC 1992) Art X.

1992[43] which are commonly joined by China and lately transformed in Thailand are beneficial to Sino-Thai common consensus of judgmental movement in general civil and commercial matters.[44]

Aiming to create access to mutual recognition and enforcement of judgments in general PIL areas, Sino-Thai Treaty is suggested to take reference of principle, criteria, and procedure from existing instruments, with comprehensive harmonization of unique legal characters of both China and Thailand, and the criteria of PROT CLC 1992 and PROT Fund 1992 that have been mutually entered.

4.2.1 Principle of mutual circulation with certainty and efficiency

Principally, the Treaty shall be designed for mutual recognition and enforcement of judgment between the courts of Thailand and China with practical certainty and efficiency. It demands the precise scope of application and criteria upon which the judgment recognition and enforcement are based; it also requests the rapid procedure to prevent the procedure of recognition and enforcement from repetitive proceedings and hampers in local laws of the enforcing courts.

4.2.2 Exhaustive limitation of refusal grounds

The only situation to reject recognition and enforcement shall be limited to refusal grounds of the Treaty. It is suggested to adopt the following lists that are commonly accepted by Chinese procedural law, PROT CLC 1992 and PROT Fund 1992, and mostly assemble to Thailand judiciary attitude presented in a few cases: (1) not an effective and final

[43] Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (PROT Fund 1992) Art 8.

[44] The Civil Liability for Oil Pollution Damage Caused by Ships Act B.E.2560 (2017) come into force on 8th July 2018 Art 36. The Requirement of Contributions to the International Fund for Compensation for Oil Pollution Damage Caused by Ships Act B.E. 2560 (2017) come into force on 8th July 2018, Art 34.

judgment; (2) not a monetary judgment or otherwise not being enforceable; (3) default judgment under the infringement of defending rights; (4) given by fraud; (5) the existence of Irreconcilable judgments adjudicating on the same subject matters between same parties by the enforcing country or a third country; (6) prejudicial to the sovereign, security, or public order of the enforcing country.

Besides, the origin court's standards of legitimate examination, i.e., the indirect jurisdiction, are recommended to be exhaustively itemized in the Treaty. It should contain all acceptable connections which link to competent origin courts.

4.2.3 Streamlined recognition and enforcement with remedies

To promote the efficiency of judgment circulation, it is suggested to give automatic recognition to judgments and abolish the exequatur procedures before the judgment execution. Once receiving and examining the certificate of recognizability and enforceability issued by the origin court is complicated, the execution shall proceed expeditiously except if the exhaustive list of refusal grounds is triggered.

At the same time, the defendant or other interested parties are entitled to submit a refusal application according to the listed refusal grounds during the proceeding of enforcing court, the right of which may extend to post-proceedings but within the statute of time limitation of the enforcing court.

To further broaden the circulation of judgments, a similar measure of enforcement for the part or whole judgment could be adopted if the original measure does not exist in the local laws of the enforcing country.

5. Conclusions

The increasing demand for the circulation of Sino-Thai judgments in the IPL field calls for more efforts beyond the existing legal framework of Thailand and China. Examining instruments including the convention, multilateral treaty and bilateral treaty, the author has identified not only

the strengths of each instrument in terms of criteria and procedures, but also their differences in terms of history and context. In short, the framework of one convention cannot be copied and pasted into the text of another regional treaty. The successful conclusion and entry into force of an instrument has been found to depend on whether its rules strike a good balance between the various sovereign interests of the applicable states. For example, the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 2019 Convention) (Section3.1), a spiritual and textual successor of the Convention of 2005 on Choice of Court Agreements, is mostly uncontroversial due to its narrow subject matters and exhaustive list of refusal grounds.

There is a Pan-Asian Conservatism that opposes foreign litigations. Meantime, Thailand's legislative and precedent vacuum on judgment flow is incompatible with the limited options available under the Civil Procedure Code of China. Chinese precedential reciprocity or promoted presumptive reciprocity would not be satisfied by the Thai legal system and practices that are unlikely to provide effect to any Chinese judgments. Hence a bilateral treaty is a viable proposal for cooperation in the Sino-Thai judgmental flow. It would be easier for representatives of the two countries to sit down and negotiate the precise scope and criteria for the application, grounds for refusal and enforcement procedures of a Sino-Thai bilateral treaty than the effort required to reach consensus on a convention or regional treaty.

For the scope of subject matters, the Sino-Thai BT should apply to mutual judgment circulations of all foreign rulings and decisions in civil and commercial matters that have been formally issued and taken into effect by the competent court of the rendering contracting member. The Sino-Thai BT shall also refer to matters expressly provided in the conventions or multilateral agreements that both Thailand and China have joined, such as PROT CLC 1992 and PROT Fund 1992 (Section 4.2).

In the aim to improve the efficiency of judgment flow, the Sino-Thai BT is suggested to take a reference of the HCCH 2019 attempts, which

examine the foreign judgments with the refusal grounds of recognition and enforcement of foreign judgments. At the same time, considering that Chinese courts have rejected recognition requests on public policy grounds, the Sino-Thai BT should also prudently refine the public policy exception.

Last but not least, unlike the German-Israeli BT, the Sino-Thai BT will be difficult to convert into local Thai law, because Thailand has no civil procedure rules to recognize and enforce foreign judgments in the private international laws area. For example, Thai courts may have questions about what the local rules are for enforcing foreign judgments on their local assets directly, without restarting fresh litigation on the same matters. It is recommended that Thailand begin to develop the terminology, criteria and procedures for the recognition and enforcement of foreign judgments, while recommending that China liberalize a third access mechanism in addition to the existing mechanisms for the flow of judgments, such as automatic recognition and remedies based on conditions for refusal, as set out in the 2019 Attempt.

On the basis of the Sino-Thai BT, Thailand and China should further develop their legal frameworks and interpretations of the recognition and enforcement of foreign decisions, and engage in the development of regional dialogues and international conventions in civil and commercial matters in general.

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