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# THAMMASAT BUSINESS LAW JOURNAL

## VOL.8: 2018

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### OBJECTIVES AND SCOPE

The Faculty of Law, Thammasat University, publishes the *Thammasat Business Law Journal* with the aim to disseminate scholarly legal articles in English. The main scope of the *Thammasat Business Law Journal* is to publish articles relating to business law. Other scholarly legal articles are permitted to the publication process upon the preliminary review of the editorial board.

### PUBLICATION PERIODS

The *Thammasat Business Law Journal* is an annual journal published within December each year.

### PUBLICATION PROCESS

-All manuscripts must be submitted online through <https://www.tci-thaijo.org/index.php/TBLJ/about/submissions>

-The Thammasat Business Law Journal will not consider any manuscript concurrently submitted for publication elsewhere.

-The editors will review the manuscript. We will not send papers for review that are outside the scope of the journal or do not comply with the guidelines for authors. If a manuscript complies with the guidelines and is within the scope of the Journal, it will be examined by the minimum of two distinguished scholars.

-The Thammasat Business Law Journal uses single-blind review, which means that each reviewer's identity is concealed from an author.

-The reviewer's evaluation will be requested back within five weeks. The decision to publish is based on these comments.

-The manuscript will be published after the authors correct according to such comments.

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All the manuscripts submitted for publication in Thammasat Business Law Journal are checked for plagiarism before the peer review.

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#### EDITOR'S NOTE

This volume is published on time with the support of all steadfast scholars, the Advisory Board, the Editorial Board, the Manager and the Managerial Staff. As an editor, I would like to thank all of them for their countless contribution and their continuous works.

Also, as the editor, I feel responsible for sharing concerns on maintaining the standard of the journal together with providing a forum for scholars to share their passion in academia through their writing. One bitter situation in academia is the 'publish and perish'. Strictly speaking in the world of legal scholars, the editor in the European Journal of International Law just posted an editorial note titled 'Publish and Perish: A Plea to Deans, Faculty Chairpersons, University Authorities' in the November 2018 Issue. Its objective is to explain the disastrous effects of forcing junior scholars to publish and secure their positions. After reading this editorial, I wholeheartedly agree not only as a young scholar but also as an editor to a journal.

My concern as the editor specifically goes to Master's degree students who write a thesis because one condition to graduate is to publish their thesis either partially or wholly into an indexed journal. This point is not mentioned in the abovementioned editorial since the editor of the said journal focuses only young faculty member and post-doctoral. Also, I assume that in the said editor's country, LL.M. students are not forced to publish their thesis. Many countries in Europe such as the United Kingdom, the Netherlands, etc. do not require LL.M. students to publish any part of their thesis. This astonishes me. Do they not want any publication score from Master's students? If not, what do they really expect from writing a master's thesis subject to the fact that it is a requirement in a country? These kinds of questions have been popped up in my head more frequently since the deadline of publishing the Thammasat Business Law Journal is approaching. However, there is no time to search for any answer. There are articles needed to be proofread, rechecked, reformatted and done whatever they have to so as to strive for the everchanging criteria. Let alone thinking about the legitimacy of the requirements!!

Lalin Kovudhikulrungsri

*Editor-in-Chief*

*Thammasat University*

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THE MEANING OF AN HONORABLE PERSONALITY OF  
THE JUDGE OF THE REPUBLIC OF INDONESIA \*

*Fatkur Rosyad* \*\*

**Abstract**

This Article explores the problems of the meaning of an honorable personality of the judge of The Republic of Indonesia and its consequences of the absence formulation of the meaning of an honorable personality of the judge of The Republic of Indonesia. This article applies a qualitative method with a normative juridical type with a statute and conceptual approach. The analysis shows that the meaning of an honorable personality is a specific feature of the judge of The Republic of Indonesia in their relationship with others in the perfect environment, honorable, sensible, honest, wise and discreet, independent, responsible, high self esteem, high discipline, and humble. Meanwhile, the effect from the absence of the meaning of an honorable personality can distort law enforcement for the judge.

**Keywords:** Judge, Personality, Honorable

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\* This article is summarized and rearranged from the thesis “The Meaning of an Honorable Personality of the judge of The Republic of Indonesia” Law Graduates Studies Program, Faculty of Law, Jember University, Indonesia, 2017

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## 1. Introduction

The judge must render a just, legal and definite ruling and bring benefits to the justice seekers. Therefore the judge shall have integrity and be an honorable personality, honest, fair, professional, godly and noble as shall as experienced in the law. This is explicitly stated in Art 24A (2) and Art 24C (5) of the 1945 Constitution of the third amendment and in Art 5 (2) of the The Act No. 48 of 2009. This an honorable personality norm applies to all judges, either judges in the Supreme Court and its subordinate courts or in the Constitutional Court.

As a central figure in the judicial process, judges are always required to build intellectual intelligence, especially emotional intelligence, moral intelligence and spiritual intelligence. If spiritual intellectual, emotional, and moral intelligence is built and maintained properly, not only will it benefit itself, but it will also benefit the community in the context of law enforcement. Judges shall have the attributes of God that are just, wise, authoritative, virtuous, honest, godly who underlies judges in their daily behavior. This is where the essence that puts the judge as a demigod.<sup>1</sup>

Based on the above description, the legislation has stipulated one of the conditions of the judge ,that is an honorable personality. However, the law does not provide an adequate explanation on what is meant by an honorable personality. There are needs to be explained through research so that nothing goes wrong in interpretation. Therefore this research is to find a formula about the meaning of an honorable personality of the judge of The Republic of Indonesia and the legal consequences of the absence of the formulation of its meaning.

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<sup>1</sup> Kamil, Ahmad, *Judge's Code of Conduct in the Ethical Philosophy Perspective*, Suara Uldilag Legal Magazine No. 13, June 2008, 39

## **2. The Importance of the Meaning of an Honorable Personality of the Judge of the Republic of Indonesia**

The judges in the Supreme Court and its subordinate courts or in the Constitutional Court are required to have an honorable personality as in Art 24A (2) and Art 24C (5) of the 1945 Constitution of The Republic of Indonesia, but the norm has not get a concrete explanation. To avoid misinterpretations that will result in legal uncertainty for the judge before an official explanation, it is necessary to provide detailed explanations or interpretations of an honorable personality phrase of the judge of the Republic of Indonesia.

Detailed explanations or interpretations of an honorable personality phrase of the judge of the Republic of Indonesia are useful as a protection against the extent of the accusations of violation of an honorable personality norm due to the vagueness of the meaning of the norm which in turn also influences the law enforcement process by the judge.

## **3. Basic Principles for Building of the Meaning of an Honorable Personality**

The meaning of an honorable personality is very important to be formed to regulate the behavior of the judge of the Republic of Indonesia in carrying out their duties and obligations in law enforcement. In the legal dogma the clarity of the meaning formulation is the basis of legal certainty. This resulted in many laws prior to the actual regulation, limiting the prior understanding of the definitions used in the law as juridical concepts.<sup>2</sup>

If the formulation of the meaning of an honorable personality of the judge of the Republic of Indonesia through understanding with few characteristics and elements, then of the meaning of an honorable personality is broader, conversely if the formulation is through understanding which contains many characteristics and elements, then the meaning of an

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<sup>2</sup> Lanur OFM, Alex, *Overview of Logic*, Jakarta: Kanisius, 1983, 14

honorable personality of the judge of the Republic of Indonesia to be narrower. So in formulating the meaning of an honorable personality of the judge of the Republic of Indonesia can be obtained through a formulation process from various sources of information relating to the object defined.

#### 4. The Meaning of an Honorable Personality of the Judge of the Republic of Indonesia

##### 4.1. Grammatical interpretation

The word personality comes from the basic word *pribadi* meaning human as an individual (human self or self), human condition as an individual, the overall characteristics that are the character of a person, by getting the *ke* prefix and *an* suffix, becoming a *kepribadian* (being a noun) which means ways of behaving that are a particular characteristic of a person and their relationship with others in their environment.<sup>3</sup>

Whereas the despicable word comes from the basic word *cela* (noun) which means something that causes less than perfect, defect, deficiency, injury, disgrace, stain (about behavior, etc.), insults, criticism, by getting the *ter* prefix, being *tercela* (being verbs) which means defective, reprehensible, inappropriate.<sup>4</sup>

Thus what is meant by an honorable personality phrase according to the Big Indonesian Dictionary and the Grammatical Structure of the Indonesia means ways of behaving which are a special feature of the judge of the Republic of Indonesia and their interaction with other people in their environment that are unblemished, appropriate and deserving.

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<sup>3</sup> National Education Department Language Center, *Indonesia Dictionary*, 3<sup>th</sup> ed, Jakarta: Balai Pustaka. 2002, 895

<sup>4</sup> Ibid., 267-268

## 4.2. Historical Interpretation

The an honorable personality norm of the judge of The Republic of Indonesia as in Art 24A (2) and Art 24C (5) of the 1945 Constitution is the result of the third change in the The People's Consultative Assembly of The Republic of Indonesia session during the trial of 2001, but in the third session there was no specific discussion about this norm.

According to the minutes of the discussion of changes to the 1945 Constitution of The Republic of Indonesia, citing the opinion of Hamdan Zoelfa<sup>5</sup>, that 'an honorable personality' of the judge is wise, wisdom, discreet.

## 4.3. Systematical Interpretation

Grammatical and historical interpretation will result in a more satisfying interpretation when combined with the understanding that the occurrence of laws is always related to other laws and regulations, and that there is no stand-alone law completely separated from the overall legislation. According to Sudikno Mertokusumo, that in interpreting the law as part of the whole system of legislation by connecting it with other laws such as this is called systematic or logical interpretation.<sup>6</sup>

In regard of a systematic interpretation of 'an honorable personality' phrase of the judge of the Republic of Indonesia, the author will research the regulations relating to judicial power and the judicial institutions in the Republik of Indonesia, as follows:

### 4.3.1. Legislation Concerning Judicial Power

Art 32 of the The Act No. 4 of 2004 concerning the Basic Provisions of Judicial Power has regulated the provisions of an honorable personality norm of the judge of the Republic of Indonesia. Then this Act was replaced

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<sup>5</sup> The Republic of Indonesia, *Comprehensive Manuscript of Amendments to the 1945 Constitution of The Republic of Indonesia, Background, Process, and Discussion Results 1999-2002*, Book VI Judicial Power. rev. ed., Jakarta: Secretariat General and Registrar of the Constitutional Court, 2010, 102

<sup>6</sup> Mertokusumo, Sudikno, *Know the Law, An Introduction*, Yogyakarta: Liberty, 1999, 157

with the The Act No. 48 of 2009 which is the last Act concerning Judicial Power in the Republic of Indonesia, but an honorable personality norm of the judge of the Republic of Indonesia is no longer regulated generally. However in Art 33 of the The Act No. 48 of 2009 has regulated an honorable personality norm of Constitutional Judge. Up to the The Act No. 48 of 2009, an explanation of an honorable personality norm of the Judge of the Republic of Indonesia is not found.

#### **4.3.2. Legislation Concerning the Supreme Court**

The Art 7 (1) the The Act No. 14 of 1985 has regulated an honorable personality norm of the judge, with the editorial 'behaving impeccably'. Then this Act was amended, the first amendment by the The Act No. 5 of 2004, but the provisions of an honorable personality norm of the judge of the Republic of Indonesia is not regulated. The second amendment by the The Act No. 3 of 2009 has regulated the provisions of an honorable personality norm of the judge in Art 6A, but until the latest Act concerning the Supreme Court, the explanation of an honorable personality norm of the judge of the Republic of Indonesia is not found.

#### **4.3.3. Legislation Concerning the Constitutional Court**

The Art 15 of the The Act No. 24 of 2003 concerning the Constitutional Court, has regulated an honorable personality norm of the judge of the Constitutional Court of the Republic of Indonesia. Then this Act was amended by the The Act No. 8 of 2011, an honorable personality norm is not editorial change, but changes in location, from Art 15 of the The Act No. 24 of 2003 becomes Art 15 (1) in the The Act No. 8 of 2011. In the second amendment by the The Act No. 4 of 2014, an honorable personality norm did not get any changes, nor explanation of the norm.

#### **4.3.4. Legislation Concerning General Courts**

3 (three) Act concerning General Courts, as follows: The The Act No. 2 of 1986 (in Art 14 (1)), The The Act No. 8 of 2004 (in Art 14 (1)) and the The Act No. 49 of 2009 (in Art 13B (1) and in Art 14 (1)) has regulated an honorable personality norm of the judge of General Courts, but the an honorable personality norm of the judge did not get an explanation.

#### **4.3.5. Legislation Concerning Religious Courts**

3 (three) Act concerning Religious Courts, as follows: The The Act No. 7 of 1989 (in Art 13 (1)), The Act No. 3 of 2006 (in Art 13 (1)) and The Act No. 50 of 2009 (Art 12 B (1) and in Art 13 (1)) has regulated an honorable personality norm of the judge of Religious Courts, but the an honorable personality norm of the judge did not get an explanation.

#### **4.3.6. Legislation Concerning Military Courts**

The Art 18, Art 19 and Art 20 of the The Act No. 31 of 1997 has regulated an honorable personality norm of the Military Judges and High Military Judges, but this norm did not get an explanation.

#### **4.3.7. Legislation Concerning State Administrative Courts**

3 (three) Act concerning State Administrative Courts, as follows: The The Act No. 5 of 1986 (in Art 14 (1)), then in The Act No. 9 of 2004 (in Art 14 (1)) and The Act No. 51 of 2009 (in Art 13B (1) and in Art 14 (1)) has regulated an honorable personality norm of the judge of State Administrative Courts, but an honorable personality norm of the judge did not get an explanation.

#### **4.3.8. Regulation of Judge's Professional Code of Ethics**

The 2006 Judicial Code of Conduct fourth paragraph states that: The Judge's Code of Conduct is an elaboration of the 10 (ten) guiding principles to behave fairly, behave honestly, behave wisely and wisely, be independent, have high integrity, be responsible, upholding self-esteem,

being highly disciplined, behaving humbly, and being professional.<sup>7</sup> Then the 2009 Code of Conduct for Judges restated the ten principles of the judge's code of conduct.<sup>8</sup>

Of the ten principles of the Judicial Code of Conduct with the provisions of Art 24A (2) and Art 24C (5) of the 1945 Constitution of Republic of Indonesia, it can be concluded that those included in an honorable personality norm are seven principles, as follows: honest, wise and discreet, independent, responsible, high self esteem, high discipline, and humble.

## **5. Legal Impacts of the Absence of an Honorable Personality Meanings of the Judge**

Legal benefits (*zweckmassigkeit*) that obtained after discovering the meanings of an honorable personality of the judge of the Republic of Indonesia are protecting them from allegations of violations of an honorable personality norm with special objectives is justice for the judge of the Republic of Indonesia and the general goal is justice of all citizen of the Republic of Indonesia.

The absence of formulation of an honorable personality meanings of the judge is the limitation of legal texts as vague norms which distort the principle of legal certainty for the position of the judge which causes uncertainty in law enforcement carried out by the judge. This is to avoid the law being used as a sub-ordination of interests, both the interests of the authorities or some of citizen and this is contrary to the mandate of the constitution.

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7 Supreme Court of Indonesia, *Decree No. KMA/104A/SK/XII/2006, December 22, 2006, concerning the Judicial Code of Conduct.*

8 Supreme Court and Judicial Commission, *Joint Decree No. 047/KMA/SKB/IV/2009 and 02/SKB/P.KY/IV/2009, April 8, 2009 concerning the Code of Ethics and Code of Conduct for Judge.*

## 6. Conclusion

The analysis shows that the meaning of an honorable personality is a specific features of someone (the judge of Republic of Indonesia) along with their interaction with others in the perfect environment, honorable, sensible, honest, wise and discreet, independent, responsible, high self esteem, high discipline, and humble.

Meanwhile, the absence of formulation of an honorable personality meanings of the judge is distorting the principle of legal certainty for the judge which causes uncertainty in law enforcement carried out by the judge.

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## SAFETY MEASURES OF THE OIL PIPELINE TRANSPORTATION BUSINESS<sup>\*</sup>

*Napth Krutnui<sup>\*\*</sup>*

### Abstract

This article explores the problems on the safety measures of the oil pipeline transportation which is mainly controlled under the Fuels Control Act, B.E. 2542. However, currently, there are neither ministerial regulations that indicate the engineering standards of the oil pipeline system nor the qualification of an inspector. Moreover, the Act does not require the operators to demonstrate the economic feasibility and the financial information. This article studies the National Energy Board Act, 1985 of Canada and the fuels related business laws of Thailand to apply a comparative study. The analysis demonstrates that Thailand can adopt reliable engineering standards to be the regulation under the Fuels Control Act. Moreover, there should be a ministerial regulation determining the qualification of an inspector. Lastly, the article agrees with the consideration on the economic and financial matters in the criteria of granting a license under the law of Canada.

**Keywords:** Oil Pipeline, Safety Measures, Transportation, Fuel

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<sup>\*</sup> This article is summarized and rearranged from the thesis “Safety Measures of the Oil Pipeline Transportation Business” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## 1. Introduction

In the past, oil transportation mostly used trucks to pick up the petroleum products and transport them to various regions in Thailand. However, the transportation by trucks for such large quantity of oil is likely to cause the traffic congestion, rising of environmental pollutions and increasing the likelihood of accidents that effect on the public and national security. In the year 1988, the government has issued the urgent policy related to development of oil pipeline transportation to solve the mentioned problems.<sup>1</sup> Moreover, in 2015 the National Energy Policy Council had resolution to extend the oil pipeline system to the North and Northeast where customers have bought oil products at the higher price.<sup>2</sup> This expansion might cause a greater responsibility for the supervision of the relevant authorities, in monitoring, controlling and enforcing the laws governing the pipeline business operation. Therefore, this requires legal measures to control the pipeline transportation in various aspects to prevent the possible problems from the occurring in the future.

## 2. Problems on Safety Measures of Oil Pipeline Transportation Business

In Thailand, oil transportation by pipeline is mainly governed by the Fuels Control Act, B.E. 2542 which was amended by the Fuels Control Act (No. 2), B.E. 2550 (hereinafter referred as “**Fuels Control Act**”). It is defined as the controlled business under category 3 and no one is entitled to conduct such operation unless receiving a license from the Department of Energy Business.<sup>3</sup>

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<sup>1</sup> Natthaporn Buaphut, ‘Oil Distribution to Northern Thailand through Extended Oil Pipeline under Single Tariff Policy’ (DPhil dissertation, University, Thai Chamber of Commerce 2014) 4

<sup>2</sup> Department of Energy Business, *Oil Plan 2015 Report* (2016) 12

<sup>3</sup> Ministerial Regulation on Fuels Business Operation B.E. 2556, s 44 (9)

Another important law is the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535. The oil pipeline transportation system is required to submit the Environmental Impacts Assessment Report (EIA report) for all sizes of the projects. The EIA report shall be submitted to and approved by the Office of Natural Resources and Environmental Policy and Planning (“ONEP”) prior to being considered to issue the oil pipeline transportation license. However, it is found that there are some defects in the current safety measures of the oil pipeline transportation as follow.

## **2.1 Insufficiency of Technical Standards that Control the Safety of Oil Pipeline Transportation**

According to the licensing system under the Fuels Control Act and the Ministerial Regulation on Fuels Business Operation, B.E. 2556, an oil pipeline operator has to carry out the operation safely in compliance with Section 7 of the Fuels Control Act. Section 7 authorizes the Minister of Energy to issue the ministerial regulations to determine the guidelines and the matters of technical details for the safety purpose. However, until now (2018), there have been no such regulations issued under Section 7 coming into force yet.

At this time, the EIA report is the preventive measure that controls the safety system of oil pipeline transportation. It is because, in order to get EIA approval, the pipeline operators are required to seek reliable technical standards to satisfy that the project has the efficient safety systems for the mitigation of the environmental impacts.

However, the absence of the ministerial regulations that determine the engineering standards causes the uncertainties because the EIA reports are initially prepared by the pipeline companies and the government does not determine of minimum requirements. Any industry standards can be selected by the certified EIA preparers from the operator’s side. Therefore, the standards and measures are likely to be varied to the pipeline operators and the ONEP committee’s discretion. Currently, we may not apparently

see the problems arising from the lack of specific safety standards because there are only a few companies that operate the oil pipeline business and they apply the acceptable western standards. However, if there are the extensions of the oil pipeline in the future, there might be a variety of safety standards applying with the construction, operation, maintenance and abandonment. Therefore it would be difficult for the government agencies to work and control the safety if a variety of safety standard are applied and no standards are legally established as the minimum standards.

Even though, at this time, the Department of Energy Business has drafted the “Ministerial Regulation: Oil Pipeline Transportation System, B.E....” which adopts the ASME B31.4 of the American Society of Mechanical Engineers as the standard for the design, construction, test and inspection and maintenance, it has disregarded the measures as to the abandonment of the pipeline. When a pipeline is no longer in use, if it is left in the ground without adequate safety and protection of the environment, it may cause the potential environmental impacts which could become the burden of the government to take care of the abandoned pipes including to bear the cost of maintenance.

## **2.2 Lack of Regulation on the Qualification of the Inspector**

Once the pipeline has been constructed and the systems are ready to be operated, there shall be the test and inspection, by the Director-General of the Department of Energy Business as a grantor, to ensure that the construction and installation of the oil pipeline system together with their equipment are completed and in compliance with the engineering standards.<sup>4</sup> In fact, the officials have assigned this duty to the private professionals. It means the owner of the oil pipeline project is required to seek the qualified private inspector to conduct the test and inspect before obtaining the license.

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<sup>4</sup> Ibid., s 53

However, until now (2018), there has been no ministerial regulation concerning the qualification of the inspectors. How does it affect the safety? It means that there is none of control over companies or professionals who will conduct the inspection of oil pipeline transportation system. The lack of rule on the qualifications of inspector has impacts on the trustworthiness of the granting license procedure since the key criteria for granting license consisting of a safety operating system and proper arrangement of environment protection

### **2.3 Lack of Consideration of Economics and Financing for Granting License**

The third issue in the article is that the Fuels Control Act does not require the applicant or operator to demonstrate the economic feasibility and present the financial information. However, without the stable financial status, the oil pipeline operator is hardly able to carry on the business safely and efficiently. The problems might lead to the abandonment of pipeline which could cause the environmental impacts and become the burden of the government to handle the abandoned pipes and facilities. It also might cause the lack of budget in case the facility will not be functioning. Furthermore, there might not be enough funds to deal with an unintended or uncontrolled release.

## **3. Analysis and Recommendations**

### **3.1 Safety Standards of Oil Pipeline Transportation.**

As until now (June 2018), Thailand has no specific regulations to determine the technical standards of oil pipeline transportation, the article has studied the provisions concerning safety standards of oil pipeline transportation in Canada and found that the pipelines that connect among provincial borders are regulated by the National Energy Board under the National Energy Board Act 1958. The Board has power to make regulations governing the design, construction, operation and abandonment of a

pipeline as well as the protection of property and the environment.<sup>5</sup> Pursuant to Section 48 (2) of National Energy Board Act 1985, the Board makes regulation by the adopting the CSA standard Z662 to control oil pipeline systems.<sup>6</sup> The CSA standard Z662 has been developed by the Canadian Standards Association because Canada has a large network of pipelines operated in the country.

Even though Thailand does not have any particular standards for oil and gas pipelines developed by ourselves like Canada, we can adopt reliable engineering standards including CSA standard Z662 by issuing the ministerial regulation under Section 7 of the Fuels Control Act to determine the safety measures of design, construction, test and inspection for oil pipeline, the industry standards of equipment as well as the measures regarding the abandoned pipeline to control the whole cycle of a pipeline project in order to strengthen safety and security of the pipelines.

Regarding the measures as to the abandonment, in Canada, a company is not allowed to abandon the operation of a pipeline without the permission of the National Energy Board.<sup>7</sup> Moreover, the Board has the power to impose any terms and conditions that it considers appropriate for the safety and security.<sup>8</sup> Furthermore, the abandonment of an existing pipeline (if at least 40 km of the pipe is removed from the ground) is subject to an environmental assessment (EA).<sup>9</sup>

Therefore, the ministerial regulation to be issued under Section 7 should include the measures regarding the abandoned pipeline in order to strengthen safety and security of the whole cycle of an oil pipeline. Moreover, the government shall expedite to issue the draft soon in order that it can control the safety of the expanding projects.

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<sup>5</sup> National Energy Board Act 1985, s 48 (2)

<sup>6</sup> Onshore Pipeline Regulations 1999, s 4 (1)

<sup>7</sup> National Energy Board Act 1985, s 74 (1)

<sup>8</sup> Ibid., s 74 (2.1)

<sup>9</sup> Regulations Designating Physical Activities 2012, s 47

### 3.2 The Qualifications of an Inspector.

Regarding the lack of the rule to determine the qualified inspectors of the oil pipelines, the article explores the domestic laws on other fuels related business and finds the Ministerial Regulations Re: Qualifications of Oil Testers and Inspectors, Worker as to Oil Test and Inspection and Rules, Procedures and Conditions of Oil Test and Inspection, B.E. 2556 (**“Ministerial Regulations on Oil Test and Inspection, B.E. 2556”**) which was issued under Section 7 (4) of the Fuels Control Act to govern the inspection of the premise used for oil business. However, it does not include the oil pipeline transportation. An inspector under this regulation means a company who provides engineering services on inspection and then reports the result to the Department of Business Development.<sup>10</sup> The regulation classifies the qualification of inspectors into 3 classes depending on volume of the containers. Each class of inspector is determined by the paid up registered capital, number of the senior engineers, engineers and tools used for the test and inspection.

According to the exploration of such Ministerial Regulation, the author proposes that the Minister of Energy should exercise power under the Section 7 of the Fuels Control Act to issue the ministerial regulation to determine the qualifications of the inspector to resolve the lack of regulation on the qualification of the inspector. The regulation may contain the followings:

- (1) Minimum requirements on tools which are used for the inspection,
- (2) Qualifications and prohibitions of the inspector e.g. level of engineers, numbers of engineers, their experience and certification.
- (3) Procurement of insurance for person who has suffered damages to lives, bodies or properties.

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<sup>10</sup> Ministerial Regulation on Qualifications of Oil Testers and Inspectors B.E. 2556, s 2

### 3.3 Criteria of Granting License

The third issue is to analyze the appropriation of the criteria of granting license or licensing conditions. At present (2018), the Fuels Control Act does not require the applicant or operator to demonstrate the economic feasibility and present the financial information.

In Canada, the economic and financial matters are the key factors that will be taken into account by the National Energy Board before making recommendation or decision of approval.<sup>11</sup> The overall purpose of reviewing the economic and financial factors are to demonstrate the necessity of the project whether the applied-for pipeline will be used and useful and to ensure that the company has ability to finance the whole project. The National Energy Board demands the pipeline company to provide the information on economics and financing at the time of application submitting. The information includes the followings:

(1) Supply - The information should indicate the existing or potential supply over their expected economic life to support the use of the pipeline;<sup>12</sup>

(2) Transportation – The information should indicate that the volumes to be transported are appropriate and the pipeline is likely to be utilized at a reasonable level over their economic life;<sup>13</sup>

(3) Markets - It is required to determine that the market demand will be sufficient to support the economic feasibility of the pipeline;<sup>14</sup>

(4) Financing - The National Energy Board would demand the descriptions of the intended methods and sources of financing the proposed facilities, any financing already in place, any restrictive provisions concerning future financing and the ownership structure.<sup>15</sup>

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<sup>11</sup> National Energy Board Act 1985, s 52

<sup>12</sup> National Energy Board, 'Filing Manual' (The Publications Office National Energy Board 2017) 4A-63

<sup>13</sup> Ibid., 4A-65

<sup>14</sup> Ibid. 4A-67

<sup>15</sup> Ibid., 4A-71

The review on the economic and financial feasibility also enhances strengthening the safety measures. If the demand or necessity of a pipeline route is high, it will lessen the probability of the abandonment of a pipeline. In case of being permanently retired, if a pipeline is left in the ground without adequate safety and protection of the environment, it may cause the potential environmental impacts such as oil spill, soil and groundwater contamination and soil erosion.<sup>16</sup>

Regarding the exploration of Thai laws on fuels related business, the consideration of economics and financing aspects can be found in **the Energy Industry Act, B.E. 2550** (hereinafter referred as “**Energy Industry Act**”) The energy industry consists of the electricity industry, the natural gas industry and the energy network industry.<sup>17</sup> The transmission of natural gas through pipelines is one of businesses under the scope of the natural gas industry.<sup>18</sup> Having sufficient financial and technical potential to construct and operate the project is designated as one of the qualifications of the natural gas pipeline applicant.<sup>19</sup> The applicant shall provide some documents to satisfy the requirements on qualification such as a certificate of financial status issued by a financial institution, an investment plan and a service plan which ensures efficient service and readiness for operation, details on operating cost, construction plan and necessity and project objectives.<sup>20</sup>

The qualification of the natural gas pipeline applicant to have the sufficient financial and technical potential under the Energy Industry Act is similar to the factor to consider the oil pipeline license under the National

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<sup>16</sup> Danielle Forbes, ‘What Happens When Pipeline Is Shut Down’ (2003). <<https://communic.ca/what-happens-when-a-pipeline-is-shut-down/>> accessed 15 August 2017

<sup>17</sup> Energy Industry Operation B.E. 2551, s 5

<sup>18</sup> Ibid.

<sup>19</sup> Regulation of the Energy Regulatory Commission on Application for License and Permission for Energy Industry Operation B.E. 2551, s 5 (2) (a)

<sup>20</sup> Ibid., s 6 (1) (b)-(d) and s 7 (2)

Energy Board Act of Canada. Both legislations recognize the necessity of the project and financial ability of the applicant.

Even though no one can indicate that the lack of consideration on the necessity and financial information causes the failure to provide the safety measures to oil pipeline transportation, the request of evidence regarding economic feasibility, financial information, investment plan and background of performance of pipeline business can preliminary screen that whether an operator has sufficient financial and technical potential to construct and operate the pipeline. If there is no proof of the demand or necessity of the pipeline route, there might be a high level of risk associated with the decommissioning and the abandonment of pipeline which will affect the safety and protection of the environment.

Therefore, the author proposes two solutions for the Department of Energy Business as follows:

(1) The Director-General of the Department should exercise power of Section 49 of the Ministerial Regulations, B.E.2556 to amend the application form for oil pipeline transportation system by requiring more documents regarding the economics and financial aspects in the same concept with the National Energy Board Act of Canada and application for natural gas pipeline business under the Energy Industry Act of Thailand. The proposed application form may require the applicant to indicate the necessity and project objectives of oil pipeline. This information might include the source of oil, market, expected volumes to be transported same as the requirements in the Filing Manual of the National Energy Board.<sup>21</sup> The information is important to demonstrate the economic feasibility of the project.

The application form should also contain details on financial potential in order to demonstrate that the pipeline company has ability to finance the proposed project. This demand is adopted from the Law of

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<sup>21</sup> National Energy Board, (n 12) 4A-64

Canada.<sup>22</sup> The application form might request the applicant to attach the intended methods and sources of financing or investment plan, any financing already in place or certificate of financial status issued by a financial institution as well as the ownership structure.

(2) In order to conform to the first recommendation, there should be an amendment to the qualification of the applicant for oil pipeline transportation. At this time it allows anyone to file an application for a license to operating oil pipeline transportation.<sup>23</sup> The article proposes to exercise Section 21 of Fuels Control Act to amend Section 49 of the Ministerial Regulation on Fuels Business Operation B.E. 2556 and add Section 49/1 as follows:

Section 49

“Subject to Section 49/1, anyone who would like to operate the third-type control business according to article 44 shall submit the application form together with evidence as prescribed by the Director-General.”

Section 49/1

“Anyone who would like to operate oil pipeline transportation system shall have sufficient financial and technical potential to construct and operate pipeline transportation system”

In conclusion, the recommendations to request more documents regarding the economics and financial aspects and to amend to qualification of the applicant are adopted from the concepts of the National Energy Board Act of Canada and licensing system of the natural gas pipeline business under the Energy Industry Act of Thailand in order to encourage the effectiveness of safety measures of oil pipeline operation in all aspects.

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<sup>22</sup> National Energy Board Act 1985, s 52 (2) (d)

<sup>23</sup> Ministerial Regulation on Fuels Business Operation B.E. 2556, s 49

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## LEGAL MEASURES FOR THE CONTROL OF MARINE POLLUTION BY DUMPING \*

*Thirada Pachonaripai* \*\*

### Abstract

Marine pollution by dumping is one of the six sources of marine pollution under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). UNCLOS requires the parties to have national laws to deal with such dumping as well as to cooperate on a regional and international levels. Thailand as a party to the UNCLOS has international obligations to implement the provisions of the UNCLOS. However, Thailand does not have domestic laws dealing with marine dumping, not to mention the fact that Thailand is not a party to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (1996 Protocol) which deals specifically with marine pollution by dumping. In addition, on a regional level among ASEAN members nine of which except Cambodia are also parties to the UNCLOS and have the same obligations to implement the UNCLOS, there is no specific regional agreement or arrangement on the prevention and control of marine pollution by dumping.

It is the purpose of this doctoral dissertation to analyse the problems of marine pollution by dumping, the lack of Thai laws on this issue as well as the lack of regional cooperation among ASEAN members on the matter. This dissertation thus takes a holistic approach by focusing on the obligatory measures required by articles 210 and 216 of the UNCLOS to prevent and control marine pollution by dumping on a national as well as

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\* This article is summarized and rearranged from the thesis on “Legal Measures for the Control of Marine Pollution by Dumping” Doctor of Laws Program, Faculty of Law, Thammasat University, 2017.

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regional levels. Such obligatory measures under the UNCLOS have been predicated by the 1996 Protocol on which obligations of Thailand under the UNCLOS would be based.

The study reveals that Thailand lacks domestic law to deal with marine pollution by dumping. Therefore, it is recommended that Thailand adopts law on the issue based on the provisions of the UNCLOS and the 1996 Protocol regardless as to whether Thailand intends to become a party to the 1996 Protocol. The study also indicates that there is no regional cooperation among the ASEAN members to prevent and control marine pollution by dumping despite the existing problem of marine dumping in the ASEAN region and the obligations under the UNCLOS requiring regional cooperation among the parties to the UNCLOS to which nine members of ASEAN except Cambodia are parties. It is thus recommended that the ASEAN members consider adopting a regional agreement or arrangement through such existing regional mechanism as the ASEAN Socio-Cultural Community Blueprint 2025 dealing with marine pollution by dumping on a regional basis.

**Keywords:** Legal Measures, Dumping, Marine Pollution, Dumping of Wastes and Other Matter, UNCLOS

## 1. Introduction

Seas have been used for a long time by human as dumping grounds for such wastes and matters as radioactive substances,<sup>1</sup> sewage<sup>2</sup> and toxic substances from pesticides<sup>3</sup> from human land-based and marine activities. Such dumping has been carried out without regulations and consideration of its effects on the marine environment. Long and continuing practice of such dumping has caused accumulation and proliferation of marine pollution affecting marine environment including human health on a worldwide basis.<sup>4</sup> Having realized the gravity of effects of such dumping practice on the marine environment and human health, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 was adopted to provide global measures for the prevention and control of dumping of wastes and other matter. The Convention has undergone several amendments and finally superseded entirely by the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (1996 Protocol) which entered into force on March 24, 2006. The underlying concept of the 1996 Protocol is to prohibit dumping of wastes and other matter from vessels, aircraft, platforms and other man-made structures at sea unless permitted by the states concerned as contemplated in Annex 1 of the Protocol.<sup>5</sup>

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<sup>1</sup> United States Environmental Protection Agency, 'What was dumped into the Ocean Before 1972?' <<http://www.epa.gov/ocean-dumping/learn-about-ocean-dumping#prohibited>> accessed 15 August 2017

<sup>2</sup> Ibid.

<sup>3</sup> Daniel Suman, *Regulation of Ocean Dumping by the European Economic Community*, 18 Ecology L. Q. 559 (1991) <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1400&context=elq>> accessed 18 December 2017

<sup>4</sup> Planet Aid, *How Ocean Pollution Affects Humans* <<http://www.planetaid.org/blog/how-ocean-pollution-affects-humans>> accessed 20 April 2018

<sup>5</sup> 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (entered into force 24 March 2006) 1046 UNTS 120 (1996 Protocol), Art 4.

Before the 1996 Protocol was adopted, the UNCLOS, following the provisions of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, also adopts as general measures for the prevention and control of marine pollution by dumping of wastes and other matter in Part XII. Thus, the provisions relating to dumping in Part XII of the UNCLOS are in line with those of the 1972 Convention. Thailand is not a party to the 1996 Protocol but is a party to the UNCLOS.<sup>6</sup> Therefore, Thailand has international obligations to adopt and implement measures for the prevention and control of marine pollution by dumping at least as provided for in the UNCLOS. Specifically, article 210 of the UNCLOS requires states parties to the UNCLOS to adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.<sup>7</sup> Paragraph 6 of the same article provides that such national laws, regulations and other measures as may be necessary shall be no less effective in preventing, reducing and controlling such marine pollution by dumping than the global rules and standards. Certainly, such global rules and standards for the prevention, reduction and control of marine pollution by dumping can be found in the 1996 Protocol. It is thus important that the measures contemplated in the 1996 Protocol be addressed and analyzed as the proper guidelines for Thailand to adopt and implement the obligations to prevent, reduce and control marine pollution by dumping required by the UNCLOS.

## 2. Meaning of “Dumping”

Although definition of “dumping” is provided for in article 1 paragraph 1(5) of the UNCLOS, this definition derives from the same term in

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<sup>6</sup> Oceans & Law of the Sea,

<[https://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)>  
accessed 1 August 2018

<sup>7</sup> United Nations Convention on the Law of the Sea, 1982 (entered into force 1 November 1994) 1833 UNTS 397 (UNCLOS), Art 10 para 1.

the 1972 Convention which has been superseded and replaced by the new definition in the 1996 Protocol. Thus, the current meaning of “dumping” is found in article 1 paragraph 4 of the 1996 Protocol. According to paragraph 4 of article 1 of the 1996 Protocol, “dumping” means

*“1. any deliberate disposal into the sea of wastes and other matter of vessels, aircraft, platforms or other man-made structures at sea;*

*2. any deliberate disposal into the sea of vessels, aircraft, platforms and other man-made structures at sea;*

*3. any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircrafts, platforms or other man-made structures at sea; and*

*4. any abandonment of toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal.”<sup>8</sup>*

However, dumping does not include:

*“1 .the disposal into the sea of wastes or other matter incidental to or derived from the normal operation of vessels, aircraft, platforms or other man-made structures at sea and their equipment other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or other man-made structures;*

*2. placement of matter for a purpose other than the mere disposal thereof provided that such placement is not contrary to the aims of this Protocol; and*

*3. notwithstanding paragraph 4.1.4, abandonment in the sea of matter (e.g. cables, pipelines and marine research devices) placed for a purpose other than the mere disposal thereof.”<sup>9</sup>*

According to the above definition, the wastes or other matter or vessels, aircraft, platforms or other man-made structures at sea constitute

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<sup>8</sup> 1996 Protocol, Art 1 para 4.1.

<sup>9</sup> 1996 Protocol, Art 1 paras 4.2 and 4.3.

“dumping” only when such wastes or other matter or vessels, aircraft, platforms or other man-made structures are deliberately or intentionally disposed of into the sea regardless of the actual effect of such dumping on the marine environment.<sup>10</sup> Thus, a mere deliberate dumping of wastes or other matter is sufficient to constitute “dumping” in accordance with the definition in article 4 of the 1996 Protocol.

While dumping is generally prohibited under both the UNCLOS and the 1996 Protocol, certain wastes or other matter may be allowed for dumping subject to permission therefor by the states concerned.<sup>11</sup> Annex 1 of the 1996 Protocol lists the wastes or other matter that may be considered for dumping<sup>12</sup> taking into consideration of the objectives and general obligations set forth in articles 2 and 3 of the Protocol. Such wastes or other matter under Annex 1 include (a) dredged material (b) sewage sludge (c) fish waste or material resulting from industrial fish processing operation (d) vessels and platforms or other man-made structures at sea (e) inert, inorganic geological material (f) organic material of natural origin (g) bulky items primarily comprising iron, steel, concrete and similarly unarmful material for which the concern is physical impact and limited to those circumstances where such wastes are generated at locations such as small islands with isolated communities having no practicable access to disposal options other than dumping (h) carbon dioxide streams from carbon dioxide capture processes for sequestration.<sup>13</sup>

The 1996 Protocol also requires the states parties to prohibit incineration at sea of wastes or other matter<sup>14</sup> and export of wastes or other

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<sup>10</sup> จุมพต สายสุนทร, *กฎหมายสิ่งแวดล้อมระหว่างประเทศ การคุ้มครองและรักษาสีงแวดล้อมทางทะเล*, (พิมพ์ครั้งที่ 3, วิญญูชน 2556) 240 (Jumphot Saisoonthorn, [*International Environmental Law : Protection and Preservation of the Marine Environment*] (3<sup>rd</sup> edn, Winyuchon 2560)

<sup>11</sup> UNCLOS, Art 210(3) and 1996 Protocol, Art 4 para 1.

<sup>12</sup> 1996 Protocol, Annex 2.

<sup>13</sup> 1996 Protocol, Annex 1

<sup>14</sup> 1996 Protocol, Art 5.

matter to other countries for dumping or incineration at sea<sup>15</sup> whether or not such countries are parties to the 1996 Protocol.

### 3. Thailand's Environmental Policies

Thailand's environmental policies can be found in the Constitution B.E. 2560, the Twenty Year National Strategies (B.E. 2561-2580), the Policy and Plan for the Enhancement and Preservation of the Environmental Quality B.E. 2560-2579, the Twelfth National Economic and Social Development Plan (B.E. 2560-2564) and the Management Plan for Environmental Quality B.E. 2560-2564. However, the environmental policies of Thailand do not specifically focus on the prevention and control of marine pollution by dumping or from other sources. The policies merely focus on the conservation and management of marine and coastal resources on a sustainable basis. Since prevention and control of marine pollution from all sources including dumping are quite significant and urgent under the provisions of the UNCLOS, Thailand should consider adopting environmental policies which include specifically the prevention and control of marine pollution from all sources in order to reflect Thailand's preparation for the serious prevention and control of marine pollution not only on the worldwide but also on the regional ASEAN bases. Insofar as ASEAN is concerned, ASEAN environmental policy which relates to marine pollution merely focuses on marine pollution resulting from sea litter from land-based.<sup>16</sup> The policy does not cover marine pollution by dumping of wastes and other matter according to articles 210 and 216 of the UNCLOS.

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<sup>15</sup> 1996 Protocol, Art 6.

<sup>16</sup> ASEAN Conference on Reducing Marine Debris in ASEAN Region, <<http://environment.asean.org/wp-content/uploads/2017/12/Summary-of-ASEAN-Conference-on-Marine-Debris-26-Dec-2017.pdf>> accessed 10 July 2018

#### **4. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Vessels**

Currently, Thailand does not have a national law which directly implement the measures for prevention and control of marine pollution by dumping as contemplated in the 1996 Protocol. The Navigation in Thai Waters Act B.E. 2456 and the Fisheries Decree B.E. 2558 fail in major parts to prevent and control marine pollution by dumping due to lack of definition of "dumping" as found in the 1996 Protocol, insufficiency of spatial scope of application of the laws which do not cover "dumping" in the exclusive economic zone and continental shelf, lack of responsible agencies and punishment for violation.

#### **5. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Aircraft**

There is no direct law of Thailand dealing with dumping from aircraft. Specifically, the Air Navigation Act B.E. 2497 and the International Air Carriage B.E. 2558 fail to have the provisions dealing with dumping of wastes or other matter from aircraft. Nor does the Enhancement and Conservation of the National Environmental Quality Act B.E. 2535 have any provision dealing with dumping of wastes or other matter from aircraft both in terms of definition of "dumping" and of spatial scope of application.

#### **6. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Platforms**

Although sections 74 and 75 of the Petroleum Act B.E. 2514 deal with measures for the protection and preservation of the marine environment from pollution resulting from petroleum operation, their application is limited only to normal operation of the platforms. They do not deal with dumping of wastes or other matter from platforms.

However, sections 80/1 and 80/2 together with regulations prescribed pursuant thereto require the concessionaires to remove the platforms after termination of the concession. This requirement may be regarded as a measure towards prevention of abandonment and toppling of the platforms.<sup>17</sup> It remains unclear whether such removal must be made entirely in order to prevent abandonment or toppling of such platforms.

#### **7. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Other Man-Made Structures at Sea**

Man-made structures at sea may be subject to section 117 of the Navigation in Thai Waters Act B.E. 2456 which is limited to those structures located within the 12 nautical mile territorial sea of Thailand. Therefore, application of this act is not extended to the exclusive economic zone and the continental shelf of Thailand. Dumping from other man-made structures at sea under Thai law is thus limited especially in terms of spatial scope of application.

#### **8. Cooperation among ASEAN Countries for the Prevention and Control of Marine Pollution by Dumping**

The ASEAN has ten member states, there are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Since nine ASEAN members except Cambodia are parties to the UNCLOS, they have the common obligations under the UNCLOS to cooperate among themselves for the prevention and control of marine pollution from all sources including dumping. Such cooperation may include, among other things, formulation and elaboration of international rules,

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<sup>17</sup> International Marine Organization, "Guidelines and standards for the removal of offshore installations and structures on the continental shelf and in the economic zone" <[http://www.imo.org/blast/mainframe.asp?topic\\_id=1026](http://www.imo.org/blast/mainframe.asp?topic_id=1026)> accessed 1 August 2018

standards and recommended practices and procedures consistent with the UNCLOS for the prevention and control of marine pollution by dumping,<sup>18</sup> notification to other States deemed likely to be affected by pollution when becoming aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by dumping,<sup>19</sup> elimination of effects of dumping and prevention on minimization of the damage resulting therefrom,<sup>20</sup> an undertaking of programs of scientific research and encouragement of the exchange of the information and data acquired about pollution by dumping.<sup>21</sup>

Currently, marine environmental cooperation among ASEAN countries is found in the ASEAN Socio-Cultural Community Blueprint 2025<sup>22</sup> as a regional policy which is the guideline of ASEAN Working Group on Coastal and Marine Environment (AWGCME). However, the ASEAN Socio-Cultural Community Blueprint 2025 merely specifies a broad policy on protection and preservation of the environment. There is no specific agreement or arrangement on dumping has been established among ASEAN members. This Blueprint and AWGCME focus on the priority of sea litter especially plastic from land-based as well as from other bases in the seas of the ASEAN region.<sup>23</sup> Even though the marine environmental cooperation among ASEAN countries has not yet covered all areas of marine pollution, initiation among ASEAN countries regarding plastic litter in the sea is one significant step towards further regional environmental cooperation including marine pollution by dumping in the ASEAN region in the future.

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<sup>18</sup> UNCLOS, Art 197.

<sup>19</sup> Ibid, Art 198.

<sup>20</sup> Ibid, Art 199.

<sup>21</sup> Ibid, Art 200.

<sup>22</sup> Association of Southeast Asian Nations, ASEAN Socio-Cultural Community Blueprint 2025, <<https://asean.org/storage/2016/01/ASCC-Blueprint-2025.pdf>> accessed 10 July 2018

<sup>23</sup> Supra note 16.

## 9. Conclusion

Insofar as pollution of the marine environment by dumping is concerned, Thailand has no specific law dealing directly with such pollution despite the fact that Thailand became a party to the UNCLOS seven years ago. The existing laws of Thailand lack both substantive measures and enforcement mechanism for the prevention and control of the marine environment by dumping. No definition of “dumping” can be found in any law of Thailand despite the same is provided for in article 1 paragraph 1(5) of the UNCLOS to which Thailand is a party. In addition, most laws of Thailand dealing with prevention and control of marine pollution do not extend beyond the territorial sea or the continuous zone. Virtually, Thai laws on the prevention and control of marine pollution do not apply in the exclusive economic zone and the continental shelf.

As required by the obligations under the UNCLOS especially articles 210 and 216 dealing with prevention and control of marine pollution by dumping, Thailand is obliged to implement such obligations by adopting measures for the prevention and control of marine pollution by dumping. To this end, it is perhaps appropriate to adopt a specific law dealing directly with marine pollution by dumping on the basis of the 1996 Protocol. In so doing, it is not necessary for Thailand to become a party to the 1996 Protocol if Thailand considers that it is not ready for any international obligations imposed by the 1996 Protocol. It is quite sufficient for Thailand to adopt certain provisions of the 1996 Protocol as measures for the prevention and control of marine pollution by dumping such as definition of dumping, spatial scope of application of such measures to cover the exclusive economic zone and the continental shelf of Thailand, enforcement organ, penalty for violation of the law.

Looking outside Thailand, regional cooperation among ASEAN countries towards prevention and control of all kinds of marine pollution imposed thereupon by the obligations under the UNCLOS is also significant, the ASEAN Socio-Cultural Community Blueprint 2025 provides a practical

tool for environmental cooperation among the ASEAN countries. Thailand and AWGCME should play a more active role in initiating any possible environmental cooperation to prevent and control marine pollution by dumping of wastes and other matter in the region.

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## LEGAL MEASURES IN RELATION TO THE OBESITY IN THAILAND<sup>\*</sup>

*Rungruch Kosakarika<sup>\*\*</sup>*

### Abstract

This article presents new challenge for Thai government, the obesity epidemic, and the measures that government implemented in order to curb the obesity growth. Even though Thai government has added an excise tax on sugary beverages and introduced compulsory regulation of nutritional labelling for some products. Yet obesity still rise. This shows that current legal measures are ineffectual to deal with the epidemic. Extending the ranges of unhealthy food products that are subject to excise tax might be useful and supportive to the current measures. Hence, the first step might be to tax all products containing nutritional labelling, providing exact information about content, such as snack products. In addition, new food label regulation, especially signpost, is necessary. With effective fiscal measures and non-fiscal measures adapted to Thai cultures and society patterns, the obesity growth rates may decrease, more or less, which will bring the benefits to our society.

**Keywords:** Obesity, Legal Measures, Fiscal and Non-fiscal Measures and Excise Tax

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<sup>\*</sup> This article is summarized and rearranged from the thesis “Legal Measures in Relation to the Obesity in Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## 1. Introduction

Nowadays, the obesity is globally recognised as an inevitable national crisis due to its consequence, in directly way, which produces higher risks having the non-communicable diseases or NCDs in human.<sup>1</sup> Apart from personal health problems, having obese people tend to generate the higher public expenses in public health budget that becomes government's and public's burden.<sup>2</sup> For example, If most people are overweight and obese, they could affect not only the economic status in human development but also labour performance of such country. Consequently, the quality and efficacy of labour, which is the driving force of the economic system in the country, will decrease unfortunately.

Many counties focused on using consumption tax to curb the consumption of all of the unhealthy diet. For instance, Denmark,<sup>3</sup> Japan,<sup>4</sup> or India<sup>5</sup> applied either sales tax or excise tax on unhealthy diet which is collected from either beverage or diet like snacks, but only in Japan where tax is derived from obese people. Such law is called "Metabo law". The main certain goal is to reduce the growth of obesity while on the other hand, the government can also generate additional revenue back to society for not only the health care purposes but for other fields of state

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<sup>1</sup> World Health Organisation, Overweight and Obesity: Fact Sheet (2011) [online]<[http://www.searo.who.int/entity/noncommunicable\\_diseases/media/non\\_communicable\\_diseases\\_obesity\\_fs.pdf](http://www.searo.who.int/entity/noncommunicable_diseases/media/non_communicable_diseases_obesity_fs.pdf)> Accessed 16/07/2017

<sup>2</sup> Gray, Barbara Bronson, Obesity Might Slow You Down at Work (2014) [online] <<http://www.consumer.healthday.com/vitamins-and-nutrition-information-27>> Accessed 16/07/2017

<sup>3</sup> Am J Public Health, Taxing Junk Food to Counter Obesity (2013) [online] <doi: 10.2105/AJPH2013.301279> Accessed 23/07/2017

<sup>4</sup> Robin Hanson, Japan's Fat Tax (2011) [online] <<http://www.overcomingbias.com/2011/11/japans-fat-tax.html>> Accessed 16/07/2017

<sup>5</sup> Basu S, Vellakkal S, Agrawal S, Stuckler D, Popkin B,) Averting Obesity and Type 2 Diabetes in India [online]<e1001582> Accessed 23/07/2017

management, for example, in the field of public utilization or education budget.

In Thailand, both growth of obesity prevalence and the diabetes rate keep continuously increasing. The growth tends to climb up wildly to the higher rate assumed by OECD report, 2017.<sup>6</sup> Fiscal measures and non-fiscal measures were implemented to enhance the healthy lifestyle in Thai society, however, it turns out that the existing measures are still inappropriate shown by the growth rate both in obesity and NCDs rising up.

## **2. The Difficulties of Enforcing Fiscal Measures in Order to Discourage the Obesity**

### **2.1 Implementation of Tax on Unhealthy Food Products**

First and foremost, there is none of the exact definition of unhealthy diet, it depends on each country. Different nations have different quantity for its population's nutrition needs. People in the Western can consume more fat because of their weathers and circumstances, while people living in the tropical countries need less fat.

Although, unhealthy food can cause or lead people to NCDs or other diseases from overconsumption, the certain amount of "Over or Too much" cannot be defined yet. It depends on each person. With this argument, it brings the problem to the government whether this tax is justified or discriminating treatment. Nowadays, the sugary beverages (SSBs) are the only products, out of all unhealthy diets, that are widely accepted as products that should be levied, while the other food products are recognised only in some countries. Due to the reluctant of taxing on a meal, the government proposed tax on snacks instead with the reason that snacks are unnecessary food products. With scientific supports and surveys, snacks

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<sup>6</sup> OECD, Obesity Update (2017) [online] <[www.oecd.org/els/health-systems/ObesityUpdate-2017.pdf](http://www.oecd.org/els/health-systems/ObesityUpdate-2017.pdf)> Accessed 23/07/2017

are part of the cause of obesity in children.<sup>7</sup> Snacks are sold everywhere, serving in small amount in accessible price. People usually are not aware of the quantity which they have consume.

Most importantly, increasing tax rate may affect differently between the low-to-middle-income earners and the high-income earners because the power of purchase is different. In countries where healthy food is more expensive than unhealthy food, tax measures become tax burden to their lives which can be double or more sanction compared to other people who have better financial status. This problem is one of the other reasons leading the government of Denmark, Mexico, and India to rethink about the tax rate. Some rescinds the fiscal measures, some reduces the rate which is still higher than normal rate, and some turn back to general rate.

In Thailand, only sugary drinks are subject to excise tax in which the tax rate and tax base were amended in more details, in consistent with the amount of sugar content in 2017. Amount of tax depends on the amount of the sugar contained in beverage while the tax rate also rises upon the time. Meanwhile, the other unhealthy food products, including snacks, have not yet been implemented in excise tax. In Thailand, healthy food is actually not expensive that everybody can afford it. An increase of tax on unhealthy food will not create extreme financial sanction for poor people like Western countries. Unhealthy food products may cause high risk of health problem similar to alcohol beverages, tobacco and SSBs. Therefore, the most suitable type of tax for unhealthy food is undoubtedly the excise tax because of its effects leading to the health problem, just like alcohol beverages. The later question is what type of unhealthy food we should implement tax on. It might be impossible to levy tax solely on primary ingredients in Thailand because there is no specific organisation to take care of. Therefore, taxing on the final products which contain the excessive

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<sup>7</sup> Sahoo K and others, 'Childhood Obesity: Causes, Consequences and Solutions' (2016) [online] Accessed 16/07/2017

amount of saturated fats, sugars, salts and calories for human need in one serve will be the way out. It may be hard to identify which menu to be taxed when the standard recipes of Thai food are different in each restaurants and regions. Even though some menus are to be taxed, the enforcement will reach only the registered restaurant, while the local restaurants might not be taxed because they are not required to register. With this problem, it can lead to unfair treatment for entrepreneurs who follow the laws.

What can the government do? Starting with food products by fixing compulsory nutrition label requirements, such as snack products, which may be the only way that would bring results. When the nutrition label is required, it will be easy for government to implement and calculate the tax. Firstly, what will be qualified as unhealthy snack products? According to foreign countries which imposed tax on unhealthy diets, Denmark pointed out that any food product which contains saturated fat over 2.3 % per weight or 5.2 g per 100 g are subject to Fat Tax Act or known as improper food products. Likewise, in Mexico, any non-essential food products with energy density equal or greater than 275 kcal per 100 g are subject to tax. Hence, unhealthy snack products can also be defined as products that contain saturated fat over 2.3 % per weight or 5.2 g per 100 g or/and have energy density equal or greater than 275 kcal per 100 g.

Where should the tax go after collection? In Denmark, the money from levying tax from unhealthy food goes to the extra-budgetary fund according to the special purpose, earmarked tax because the Fat Tax Act was specially enacted to discourage unhealthy consumption represented in saturated fat form. The money is well spent on the public health care services and other activities related to public health issues. Meanwhile in other countries, the tax on unhealthy food products are not earmarked enough. Therefore, the money goes directly to annual budget where the government can adjust the way of money and to specific fund.

To look more closely on the problem of earmarked tax in Thailand, even though the earmarked tax is prohibited according to

section 35 of Thai State Financial and Fiscal Discipline Act B.E. 2561, any revenues can be earmarked if the laws allow. Moreover, the objectives of state enterprise need to be written to be able to accept the money, according to section 36 of Thai State Financial and Fiscal Discipline Act. Recently, earmarking tax on sin tax was the issue that was raised to the MLA, which is the Commission who drafted the Constitution, whether or not it is valid and lawful. Eventually, the Commission (MLA) announced that Thai Health Promotion Foundation (Thai Health) is able to receive the subsidies from earmarked tax objective. However, the limit amount of money shall be certainly imposed. For example, 2% from levying excise tax but not more than four billion a year is subject to Thai Health.<sup>110</sup> For unhealthy snack products, the government should consider about the percentage of earmarked tax in order to support the objective. When unhealthy snack products are treated as equal as tobacco and alcohol products which generate the higher risk of health issues in the future after consumption. Therefore, excise tax levying on unhealthy snack products should be earmarked directly to Thai Health at 2% but not more than four billion a year, as the same percentage used for sin tax. The money from earmarking will return to society on specific purposes which are to promote healthy lifestyle such as providing mass media campaigns to help people get away from obesity. It is a way to raise people's awareness and this money comes from people who may cause any further expenses. The appointed budget from government will reduce consequently which means it can reduce financial burden for government. This is the suitable approach for this problem.

## **2.2 Implementation of Tax Incentive to Food Products**

Implementing tax incentives whether exemption or deduction on healthy diet is usually applied in the countries that are not suitable for cultivation, believing that is what they can do to create more power to purchase for those people. Price of healthy food products are more expensive that only small group of people can afford it. In Thailand, the tax

incentives for healthy food products are unnecessary since they are affordable and easily accessed. Tax incentive might create the bigger gap between the price of unhealthy food and healthy food.

### 2.3 Implementation of Tax on People

Japan is the only country that implemented tax directly on people who cause the risks of future expense to government, especially on health care cost. The particular regulation called Metabo law is applied on citizens the ages between 45 to 74 years old to have their waistlines measured annually.

Under section 27 of the Constitution of the Kingdom of Thailand states that *“Unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view which is not contrary to the provisions of the Constitution, or on any other grounds shall not be permitted”*, addressing tax on obese people is an unjust discrimination on the ground of physical condition, hence, taxing on obese people violates Thai constitutional law under section 27.<sup>8</sup> Although, this measure might be effective and give positive result to obesity growth prevention, the ground of that tax is prohibited in Thailand.

## 3. The Difficulties of Enforcing Non-fiscal Measures

Non-fiscal measures, such as food labelling or food advertising regulation, are often adopted in order to support the fiscal measures. In the belief of the most effective way to achieve the goal. Non-fiscal measures have duty to raise people's awareness as the second step, after the cost of goods, by sending the messages to people. The obvious example is food label attached on the product that can make people

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<sup>8</sup> Thai Constitution Law, section 27

rethink whether or not to buy such product. The main reason is that it wastes time to consider the amount of ingredients that they do not know how much would be deemed unhealthy consumption. Many countries solved this problem by using either the colours representing the level of recommendation for consumption or signpost like “Keyhole logo” that is shown on the healthy products.

Moreover, food advertising regulation is the tool that many countries use to discourage unhealthy consumption by banning the advertisement of unhealthy food during the children’s programming. Many people argue that banning does not help reducing unhealthy consumption among kids, they still love eating junk food. The problem is there is no evidence showing that it relates to the reduction of unhealthy consumption in children.

#### **4. Conclusion**

Due to the obesity impacts in society, being obese is not personal issue anymore. The further expenses that might occur because of obesity tend to rise continuously in the immoderate way. This leads to government intervention to the people’s right. Each country has its own way to curb the obesity growth rate. Some may implement fiscal measures to food that may cause or lead to obese condition in human. Some may point to obese people that need to be responsible for further society expenses that might happen. According to an enormous increase of obese people in Thailand, the government shall not ignore to this issue. With effective fiscal measures and non-fiscal measures adapted to Thai cultures and society patterns, the obesity growth rates may decrease, more or less, which will bring the benefits to our society

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## ONLINE PROFILING AND DATA PROTECTION IN THAILAND<sup>\*</sup>

*Isaravadee Wongphasukchot<sup>\*\*</sup>*

### Abstract

Online profiling has a major influence on global business opportunities. The use of online profiling primarily benefits digital advertising company as they can study users' behavior and other sensitive factors that could motivate the user to purchase, or show interest in products. It helps digital advertising company understands users' needs thoroughly and to distribute advertisements to target groups successfully. Online profiling might be used for encouraging, arousing or alerting users to buy, however, it could also be used to trick people by intruding on their personal privacy. This article examines the existing Thai law applied to the case of online profiling, significantly under the term which is not available in Thailand data protection bill, for example the definition of profiling, the concept of privacy impact assessment (DPIA), data breaches notification period and data protection officer. This article applies a comparative study and a comparison of existing approaches based on the General Data Protection Regulation (GDPR) and the American self-regulation Principles.

**Keywords:** Online Profiling, Personal Data Protection

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<sup>\*</sup> This article is summarized and rearranged from the thesis "Online Profiling and Data Protection in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## 1. Introduction

With the digital opportunities available to business marketing nowadays, there are a variety of online methods for marketers and entrepreneurs to use mass media to deliver and promote their products or services to customers. The way they communicate and attract people's attention is called "advertising". Although there is a wide range of advertising methods, the most effective method, and the one that has the least limitation, in order to reach potential consumers is digital advertising (internet advertising). Digital advertising evolves from delivering random products or services (random advertising) to a form of targeted advertising. The digital advertising that employs the method of behavioral targeting is called Online Behavioral Advertising (hereinafter "OBA"). OBA is a form of direct advertising typically associated with Internet users through various sources, for example profile information and social media or social networking websites. Online profiling is the primary step of OBA; refers to the digital advertising practice of collecting and predicting information with the main purpose of delivering advertising tailored to the user's interests, it is used before delivering the advertising to Internet users.

## 2. Overview of Online Profiling

Online profiling has been intensively used in advertising since the late 1990s. Many of the companies engaged in online profiling are so-called "advertising networks" or "network advertisers" (ad network). To demonstrate, on one side there is the website publisher looking to sell advertising impression space on a website, and on the other side is the advertiser who is looking for a channel to deliver ads. An ad network can also be called a broker (a neutral intermediary) between a group of publishers and a group of advertisers. The ad network applies technology to aggregate audiences, sells a packaged inventory to target customers (advertisers) and charges advertisers for serving their ads. Regarding the

relationship between the ad network and the publisher, the publisher allows the ad network to supervise the advertisements on the websites and decides on behalf of the publishers which ads should be placed there. Large ad networks typically work with thousands of different publishers<sup>1</sup>, creating their own network, or list of partners, and occasionally the ad network and the publisher are the same entity. There are 5 stages explained the practice of online profiling: (1) installation of the technology; (2) tracking of the users; (3) collection of the data in private databases; (4) aggregation of the data; and (5) use of the profiles created after the aggregation of the data.<sup>2</sup>

### 3. Privacy Concern of Online Profiling

Based on their online behavior, a person will receive advertisements related to their activities or their preferences, for example a person may receive diet products or gym membership in the popup ads online, as a result of the ad network wanting to spur them to join an exercise class and improve their fitness levels, but this could also make them feel that they are unhealthy or need to lose weight,<sup>3</sup> which resulting in low self-esteem. On the contrary, profiling is unwanted if a personalized offer tempts a user to buy chocolate and they are trying to resist this because they have just started a diet. Another example is the discrimination issue, when a network advertiser offers a discount for a toy to one user but not to another user,

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<sup>1</sup> Eric Siu, '53 Alternative Ad Networks to Open up New Channels of Growth in 2018' <<https://www.singlegrain.com/blog-posts/pay-per-click/44-ad-networks-will-help-open-new-channels-growth/?cv=1>> Accessed 15 July 2018

<sup>2</sup> Laura Garcia Vargas, 'Do They Want to Regulate Online Profiling?' (2017) Canadian Journal of Law and Technology (15 C.J.L.T.) P.2

<sup>3</sup> Information Commissioner's Office, 'Feedback Request – Profiling and Automated Decision-making' (V1.0, 06 April 2017) <<https://ico.org.uk/media/2013894/ico-feedback-request-profiling-and-automated-decision-making.pdf>> Accessed 15 February 2018

because the first one had bought a similar toy the week before. The network ad might also use profiling to determine prices and terms for goods and services, which could lead to unfairly discriminate pricing by offering some certain people who have more ability to pay products or services at a higher cost that are less favorable than others.

The complexity of online profiling create a loopholes for demining the damages and remedies as it does not appear until it is in targeting on OBA, and even it does not use in targeting, does not mean the harm is not occur for example if the users does not receive the targeted ads or opt out from targeting advertising, it only prevents from seeing targeted ads, not prevent tracking itself. The reason behind data protection legislative and self-regulation is taking measures to prevent personal data. Data protection law shall create more practical matters to prevent people from being tracked and bombarded with unwanted marketing material from digital ads business.

#### **4. Online Profiling in Foreign Countries**

The practice of online profiling has been attentively discussed through various aspects in foreign counties. Data protection in the United States provides a friendly data protection to the marketing, rather than considering the rights of the data subject. The United States does not have a comprehensive law governing personal data in general; instead, it regulates sector-specific laws and highlights a combination of legislation, regulation and self-regulation, but in terms of Online profiling, they mostly encourage companies to create self-regulation. The FTC and several organizations attempted to create new practices in order to strengthen the data protection in online profiling, and the advertising industry continues to develop its self-regulatory program for online profiling and applies it to most companies doing business in the US such as Self-Regulation Principles for Online Behavioral Advertising, The NAI code of Conduct and etc.

Meanwhile, the concept of profiling has been recognized in the EU data protection law for a long period, both explicitly or implicitly defined until recently, The General data protection (hereinafter GDPR) become effective on 25 May 2018, and it was designed better protect data subjects, which had an impact on the digital advertising field and the concept of profiling is strongly prescribed and applied under this regulation. The major change of the GDPR affecting the “Online profiling” context is as follows. (1) GDPR introduce a new definition “Profiling” (2) GDPR increased territorial scope to any ad network provider whether inside the European Union or outside, which processes European data without considering the location or the nations of the company. (3) GDPR introduces mandatory data breach notifications, any breaches which are risky to the rights and freedom of individuals, the processor is responsible for sending the notification to the data controller and regulators within 72 hours from the time such breaches occur. (4) Data protection impact assessment (hereinafter “DPIA”) shall be carry out regard to the processing which cause high risk for the fundamental rights of the data subject (5) Data protection officers (Hereinafter “DPO”) is responsible for informing any activity of processing or profiling of personal data to the Data privacy agent (DPA).

## **5. Online Profiling in Thailand**

Thailand’s existing laws provide protection to personal data in quite specific circumstances, for example; Credit Information Business Act (B.E. 2549) applied in case of banking and financial businesses, the Broadcasting and Telecommunications Services B.E. 2553 provides a protection against telecommunications, Computer Crime Act B.E. 2550 deals with the processing of personal data which is collected in computer systems.

The current problem in Thailand is the limitation of an existing applicable law that can be applied to a case of online profiling. Most of the law focuses on civil remedy, which compensates an injured person after the damage, by bringing the lawsuit to the court, such as breaches under article

420 of the Thai Civil and Commercial Code. Most of the data breaches cases are not protected under Thai CCC. Significantly, tort law provides tortious liability which solves the problems at the final stage.

The matter of online profiling is in the stage of a preventive measure whereby tort law and contracts under the Thai Civil and Commercial Code cannot reach. Thailand has no consolidated law to govern personal data protection in general. After the attempts to pass data protection law for almost 3 years, the enforcement of the Bill will enable Thailand to have data privacy in compliance with higher standard of data protection. However the concept of online profiling remains largely unregulated. The bill may need some changes, especially in the definition cover to online profiling, the requirement of data protection officer and the recitals term describing statements of fact that help to clarify and explain the reason for each section. With Regard to the fact that online profiling carries out particular processing of data operations; it is a useful way in implementing the bill to comply with the GDPR, and enacting it into a binding law. Due to the GDPR is a comprehensive law that emphasizes the proper context, specified and characterized in a general term, it could be said that comprehensive privacy laws can facilitate the Internet of things by establishing a uniform set of rules and potential regulations. As a result, the data protection is potentially developed under the GDPR. The most important fact is the EU law's enforcement definitely has consequences for Thailand related to the business field. The GDPR increased territorial scope to any ad network provider whether inside the European Union or outside, which processes European data without considering the location or the nations of the company. Therefore Thailand's companies will have to follow the GDPR inevitably.

## **6. Conclusion and Recommendation**

The revised 2018 data protection bill has introduced certain concepts similar to those in the GDPR and quite well aligned to the GDPR

that play in shaping data protection. However, in the online profiling context, the bill does not regulate the definition of profiling and criteria related to online profiling are missing; the privacy impact assessment (DPIA) and the data protection officer (DPO). From the study, self-regulation has not yet been proven sufficient to fully protect the interests of users with regard to behavioral advertising according to lacking effective enforcement. However, the collaboration between the legislative law and self-regulation may be considered as a better solution. However, as a result, this will cause other ineffective consequences, such as an overlapping authority between the organization that supervise self-regulation and other main legal enforcers who enforce the data protection law. In the United States, the industry has been almost untouched by oversight. From the study, we have recognized that the core of Thailand's personal data protection bill aims to update the framework with international standards and to be consistent with the GDPR. The bill adopted many articles of the GDPR it shall be deemed that the situation of data protection law in Thailand is expected to comply with the GDPR.

A legislative approach to online profiling is not discreet at this time; taking the GDPR as a model provides a huge benefit for internet users. Even though Thailand is not a European Union member state, Thai digital ads companies may serve customers in the EU. Thailand must have a protection rule equivalent to, or greater than, the GDPR. If Thailand does not establish a higher standard of data protection, this could mean the losing of business opportunities for Thailand with any EU companies. In order to close the privacy gaps in Thai regulatory frameworks, there is a need of creating a supplementary legal framework to support online profiling operations; the following terms shall be a new requirement and provided in the Bill,

**6.1 Data Protection Impact Assessment (DPIA):** Online profiling takes place with regard to risks arising from the operation and have an effective impact on the data subject. A DPIA provides an efficiency preventive measure before online profiling takes place. A DPIA should be

prescribed in the bill consistent with the GDPR. Online profiling takes place with regard to risks arising from the operation and have an effective impact on the data subject. A DPIA provides an efficiency preventive measure before online profiling takes place. A DPIA could be required the controller to seek advice from the Thai data protection commission and they should monitor the performance of the DPIA.

**6.2 Data Breaches Notification period:** If personal data is obtained indirectly, the users shall be informed in suitable time or on the first communication with them, "without undue delay where feasible, not later than 72 hours after having become aware of a breach(under GDPR). It requires a notice when an organization collects personal information from individuals in online contexts.

**6.3 Data Protection Officer:** This roll of the DPO is important, especially for companies that process a large amount of personal data. The concept of a DPO does not appear under the Thai Bill, but it is necessary to add a separate section for the requirement and responsibility of DPOs.

DPOs shall be appointed by the online ad company who uses the technique of profiling or automated processing of personal data without regards to the company size matter. Therefore, digital advertising companies are struggling to position a data protection officer. However, for a company that does not use technology that would pose a high risk to the rights of a natural person does not need a DPO, such as a local bakery that processes data like e-mail addresses.

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## LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING (COPYCAT)\*

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### Abstract

Some business operators use lookalike product packaging to entice consumers to purchase their product. This lookalike packaging contains false information that confuses consumers and leads them to make an erroneous purchase because they are misled to believe that the false product is made by the same manufacturer as the genuine one. Moreover, this practice also affects the competition in the market. Since the results of this study indicate that Thai law does not contain any obvious legal measure to control lookalike product packaging, it will be suggested that a legal measure should be added to the Thailand Consumer Protection Act B.E. 2522 to address this omission and the legal measures related to consumers' rights to redress under the Thailand Consumer Case Procedure Act B.E. 2551 should also be improved.

**Keywords:** Lookalike Product Packaging, Copycat Product, House Brand Products, Unfair Trading Practice, Free-riding, Passing-off, Consumer Protection Law

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## 1. Introduction

The legal measure to protect consumers from lookalike product packaging in Thailand is studied in this article and compared with the United Kingdom Law, German Law and Australian Law to determine the most appropriate legal measure to protect consumers in Thailand from lookalike product packaging. A documentary analysis will be used to compare the legal problems related to protecting consumers from lookalike product packaging in the following four aspects;

### 1. Effect of Lookalike Product Packaging

When a business operator unfairly uses lookalike product packaging, it not only damages consumers, but also has a negative effect on other business operators. The similar packaging misleads consumers into thinking that the quality or nature of the copycat product is comparable to that of the original brand, or at least, more comparable than they might otherwise have assumed.

### 2. Characteristics of Lookalike Product Packaging

The problem related to the characteristic of lookalike product packaging has not been addressed in the Thai legal system; hence, it is proposed that Thailand should examine certain foreign legal measures and court decisions to adopt some guidelines for legal measures to prevent lookalike product packaging, specifically those of the United Kingdom, Germany, and Australia.

According to the Consumer Protection from Unfair Trading Regulation of the United Kingdom, lookalike product packaging has the following features;<sup>1</sup>

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<sup>1</sup> Department for Business Innovation and Skills, *'Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging'* (2014) < <https://assets.publishing.service.gov.uk> > accessed 5 June 2018.

(1) It contains false information<sup>2</sup> or its overall presentation in any way deceives or is likely to deceive the average consumer so that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>3</sup> or

(2) It concerns any marketing of a product that creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, so that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>4</sup> or

(3) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.<sup>5</sup>

The German Act against Unfair Competition provides protection against unfair imitation in Section 4 (3) and a blacklist of illegal commercial practices within the meaning of Section 3 (3); although lookalike products are not expressly mentioned in the legal code, their meaning has been developed by the German court, as follows;<sup>6, 7</sup>

(1) The manufacturer of the original product must show the individual and distinctive character of the original

(2) Imitator's knowledge of the original

(3) Similarity between original and imitation

(4) Protection even if the Trademark is changed

(5) All claims require an "unfair element"

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<sup>2</sup> *Consumer Protection from Unfair Trading Regulations* (2008) reg 5 (4), (5) and (6)

<sup>3</sup> *Ibid.*, reg 5 (2)

<sup>4</sup> *Ibid.*, reg 5 (3)

<sup>5</sup> *Ibid.*, SCHEDULE 1, Para 13

<sup>6</sup> European Brands Association, '*Parasitic Copying : Trading on Innovation and creativity of others*', (2010) <<http://www.aim.be>> accessed 5 June 2018.

<sup>7</sup> Angela Fox and Michael Nielen, 'Fighting unfair competition in the UK and Germany: An Anglo-German Perspective' (2016) <<http://www.managingip.com>> accessed 5 June 2018.

The Australian Consumer Law also prohibits any person in trade or commerce engage in conduct that is misleading or deceptive, or is likely mislead or deceive in Section 18 (1) and Section 29 (1) (a) (g) (h) (k).

Moreover, the Australian court<sup>8</sup> provides the factors to be considered to determine if consumers are likely to be misled or deceived, as follows;

- (1) Strength of the applicant's reputation, and the extent of distribution of its products
- (2) Strength of the respondent's reputation, and the extent to which the respondent has undertaken any advertising of its product;
- (3) Nature and extent of the differences between the products, including whether the products are directly competing;
- (4) Circumstances in which the products are offered to the public; and
- (5) Whether the respondent has copied the applicant's product or intentionally adopted prominent features and characteristics of the applicant's product.
- (6) Any evidence of confusion

Therefore, the characteristic of lookalike product packaging is that it is visually similar, but not identical, to a recognised branded product.

### **3. Legal Measure Related to Consumer Protection and the Control of Lookalike Product Packaging**

It was found from the results of this study that the consumer protection law related to general products in Thailand's Consumer Protection Act B.E. 2522 and the legal measure concerning specific products contain no obvious legal measures to protect consumers from lookalike product packaging, as well as no enforcement authority and no specific penalty. After studying and analysing the existing Thai laws by comparing them

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<sup>8</sup> Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd (2017) FCA 403 (Federal Court of Australia).

with foreign laws, it is also evident that the Thailand Consumer Protection Act B.E. 2522, the Thailand Trade Competition Act B.E. 2560, the Thailand Trademark Act B.E. 2534 and the Thailand Criminal Code B.E. 2499 also do not provide obvious legal measures to control the use of lookalike product packaging.

In the United Kingdom, Part 3 of Regulation 9, Offences of the Consumer Protection from Unfair Trading Regulations 2008, provides that traders are guilty of an offence if they engage in a commercial practice that is misleading based on Regulation 5 otherwise than by reason of the commercial practice satisfying the conditions in Regulation 5 (3) (b) shall be liable, on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both under Regulation 13.

The German Act against Unfair Competition does not impose a criminal penalty in the case of lookalike product packaging, but it does provide for the Federal budget to profit in Section 10.

Civil penalties and criminal sanctions do not apply in Section 18 of the Australian Consumer Protection Act.

In my opinion, the United Kingdom provides the most effective penalty for traders who are guilty of an offence that is a misleading action by imposing a fine or prison term not exceeding two years or both. I believe that this penalty will deter business operators from committing a continuous offence. Therefore, I think that imposing a penalty of imprisonment in Section 47 of the Thailand Consumer Protection Act will be appropriate to control lookalike packaging.

#### **4. Legal Measure Related to Remedying Consumers from the Effect of Lookalike Product Packaging**

The United Kingdom provides legal measure related to remedying consumers from the effect of lookalike product packaging in Part 4A of the Consumer Protection (Amendment) Regulation 2014, consumers' right to redress from misleading actions and aggressive conduct can be found in the Consumer Protection from Unfair Trading Regulation 2008.

Consumers have a private right to redress<sup>9</sup> by unwinding the relevant contract<sup>10</sup> or a discount<sup>11</sup> or damages<sup>12</sup>.

The legal measures related to remedying consumers from the effect of lookalike product packaging in Germany can be found in the Act against Unfair Competition, UWG) as follows:

- (1) Right to sue for elimination, cessation and desistance<sup>16</sup>
- (2) Right to claim compensation for damages<sup>17</sup>
- (3) Right to sue for the surrender of profits<sup>18</sup>

The legal measures related to remedying consumers from the effect of lookalike product packaging can be found in the Australian Consumer Law, as follows;

- (1) Right to sue for the court to grant an injunction<sup>19</sup>
- (2) Right to claim for pecuniary penalties<sup>20</sup>
- (3) Right to claim for damages<sup>21</sup>
- (4) Right to claim for compensatory and preventative orders<sup>22</sup>
- (5) Orders for non-party consumers<sup>23</sup>

In my opinion, the legal measures related to remedying consumers from the effect of lookalike product packaging under the special law in Thailand are inadequate to protect consumers. Moreover, the legal measures related to remedying consumers from lookalike product packaging

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<sup>9</sup> The Consumer Protection (Amendment) Regulations 2014, reg 27A

<sup>10</sup> Ibid., reg 27E

<sup>11</sup> Ibid., reg 27I

<sup>12</sup> Ibid., reg 27J

<sup>16</sup> The German Law of Act Against Unfair Competition, s 8(1)

<sup>17</sup> Ibid., s 9

<sup>18</sup> Ibid., s 10(1)

<sup>19</sup> The Australian Consumer Law, s 232

<sup>20</sup> Ibid., s 224

<sup>21</sup> Ibid., s 236

<sup>22</sup> Ibid., s 237 (2)

<sup>23</sup> Ibid., s 239

in the Civil and Commercial Code does not provide an obvious remedy, but relies on interpretation. Furthermore, the remedial measure is inappropriate and does not cover the damages of consumers. However, the legal measures related to remedying consumers from the effect of lookalike product packaging under the special law of the United Kingdom has many advantages in that it provides redress for consumers, as well as obviously awarding consumers with the appropriate right to directly complain to the trader before take action in the court due to a civil recovery for this practice being difficult.

### **Conclusion**

In response to the legal problems related to protecting consumers from lookalike product packaging, it is suggested that the Thailand Consumer Protection Act B.E. 2522 and the Thailand Consumer Case Procedure Act B.E. 2551 should be amended to control lookalike product packaging and increase consumers' rights by giving them the right to redress for damage caused by lookalike product packaging, as follows;

## **1. Legal Measures to Control Lookalike Product Packaging in Thailand**

### **1.1 Pre-Market Control Measure**

This measure should provide that business operators may send the Committee a sample of packaging if there is doubt about whether it looks like another product in the market or not for their consideration and an opinion on this matter before use.

### **1.2 Post-market Control Measure**

In terms of a post-market control measure, the Committee on labels and packaging should be given the power to order businessman to stop using or revise any labels or packaging that may cause consumers to misunderstand the material facts concerning these goods.

## 2. Legal Remedies for the Effect of Lookalike Product Packaging in Thailand

It is suggested that the legal remedy should be developed by adding a new provision in the Thailand Consumer Case Procedure Act B.E. 2551 for consumers' right to redress, as follows;

- (1) Right to Unwind the Contract
- (2) Right to a Discount
- (3) Right to Claim Damages to Compensate

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FCA 403 (Federal Court of Australia)

**LEGAL PROBLEMS ON THE INJUNCTION OF INAPPROPRIATE CONTENTS  
PURSUANT TO THE COMPUTER-RELATED  
CRIME ACT B.E. 2550 (2007)<sup>\*</sup>**

*Fahrudee Songluck<sup>\*\*</sup>*

**Abstract**

This article explores the problems on the interpretation of inappropriate content or illegal information under the CCA and prohibitive injunctions. This concern is a major problem in Thailand because consumers are increasingly exposed to digital content through online advertising. The law grants a competent official power to suspend or block dissemination of data that they consider against public order or good morals. With unclear definitions and a lack of case history, abuses may exist when competent officials exercise personal discretion. Businesses using this content may in turn lose business opportunities indefinitely.

Because of this problem, this article studies to a comparative approach to computer content control practices in the United States and People's Republic of China is also featured, with appropriate recommendations for Thailand that the regulators may apply. For example, amending the definition of the illegal content to be more concise and clearer, and applying the method to control media content in the most efficient but the least affect to the freedom of expression, including creating a remedial mechanism to handle with the abused practices caused by officers. The goal was to resolve discrepancies in enforcing the CCA, while

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<sup>\*</sup> This article is summarized and rearranged from the thesis "Legal Problems on the Injunction of Inappropriate Contents pursuant to the Computer-Related Crime Act B.E. 2550 (2007)" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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effective, uniform practice would resolve legal enforcement concerns and public abuses of power.

**Keywords:** Computer data, Inappropriate content, Illegal information, Freedom of expression, Public order

## 1. Introduction

Over the courses of human innovation, technology has seen numerous developments worldwide, and as a result the means of communication and delivery of content has evolved rapidly and constantly. While this development provides a more convenient channel for interaction and collaboration between society members, it is also apparent that the easier data is produced and distributed on the network, the more possibility the channel will be maliciously used.

Various types of contents were generated and exchanged not only by the publisher, but also the media which plays a role in its distribution. As more and more people can easily gain access the contents, it is more likely that there are more people who may use such contents notwithstanding their knowledge that the information is false or inaccurate. It is thus necessary to be aware that the connectivity nature of the internet could make the information received worldwide causes the damage due to the media's role in content distribution. Concerns are also raised among numerous countries that the contents published throughout internet may be used for abusive purposes, prejudicial to the rights of person or even lead to the social issues. To counter this issue, many laws and regulations are enacted as one of the control measures; other measures that are being used to deal with the case against the computer users who may produce, use or share the harmful information.

## 2. Development of the Thai Computer-Related Crime Act B.E. 2550

In Thailand, the Computer Crime Act B.E. 2550 (2007) ("CCA"), which has recently been amended by the Second Amendment and put into effect in 2017,<sup>1</sup> provides a mechanism on enforcing the prohibitive injunction of

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<sup>1</sup> มานิตย์ จุ่มปา, คำอธิบายกฎหมายว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (พิมพ์ครั้งที่ 2, วิญญูชน 2554) (Manit Jumpa, *Explanation of Thai Computer-Related Crime B.E. 2007*

inappropriate contents in Article 20. However, this authority has been debatable on the extent of power granted to the Competent Official who may request for an order to block the inappropriate contents in case that they find some content in contrary with the CCA. Another issue is the extent of the mechanism that should be enforced to people, taking account to the freedom of expression. Also, according to the principle of criminal law which applies to criminal infractions in the CCA, the enforcement of the CCA requires strict interpretation and application and should not be universally construed.<sup>2</sup>

### 3. The Problems on the Enforcement of Content Control under Computer Related Crime Act B.E. 2550 in terms of business

The freedom of expression is deemed as a basic right of civic engagement that enables them to enhance and fulfill all other human rights.<sup>3</sup> What shall be considered as a trigger of suppression offensive contents under Computer Crime Act or favor to a broad speech side. Generally, it depends on the ideology of the social implications and law which are various upon each country. Since it is difficult to determine the extent of restriction, the clear-cut criterion whether it matters the businesses should be uniformed as reference.

Injunction is a very sensitive issue which requires a strike of balance between freedom of expression and content restriction, and thus could only be used in the mutual interest of the society without exaggeratedly

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(2<sup>nd</sup> edn, Winyuchon 2017))

<sup>2</sup> ไพบุลย์ อมรวิญญูเกียรติ, คำอธิบาย พ.ร.บ. คอมพิวเตอร์ พ.ศ.2550 ( พิมพ์ครั้งที่ 2, โปรวิชั่น, บจก. 2553 ) ( Paiboon Amonpinyokeat, *Explanation of Thai Computer-Related Crime B.E. 2007* (2<sup>nd</sup> edn, Provision Ltd. 2010))

<sup>3</sup> Leitner J. M, 'To post or not to post: Korean criminal sanctions for online expression' (2011) 25(1) Temple International Comparative Law Journal, 43-78 < <https://sites.temple.edu/ticlj/files/2017/02/25.1.Leitner-TICLJ.pdf> > accessed 2 July 2018

affect the freedom of expression. If the free flow of information is restricted, commercial enterprises relying on business outcome from the free and restriction will be severely affected, particularly advertisement on the internet. This, in turn, will render the economy of the country, in particular the business environment accessibility, to become less competitive due to two reasons.

Firstly, any injunction imposed will reduce the opportunity to perform online marketing, obstructing the access to Thai market. Secondly, the uncertainty of the interpretation exercised by the official. Most investors do not want to risk anything that is likely to be in contrary with the law. If the law is enforced uncertainly and strictly, it may cause the investors not to conduct a business in Thailand as the competent official may exercise their consideration over any contents and regarded it as an offensive material under the Computer-Crime Act, which leads to other problematic issues for the businesses afterward.

#### **4. Conclusion**

The computer and internet have been used as means of networking and data-exchanging. It has expanded the power to exercise the freedom of expression for individuals. Everyone possesses the right to create, post, or share the contents they are interested in. However, the faster the content goes out, the more it could impact the community with both positive and negative aspects. They provoke the call for the limitation of freedom of expression via inappropriate contents. Therefore, the state may interfere with freedom to online content access, although many oppose this idea.

The legal measurement of the injunction of inappropriate contents on computer is regarded as urgent and important worldwide. This issue is an international concern, which represents different perspectives for the balance between social values and the freedom of expression upon the culture and nature of each country. Nonetheless, both public and private sectors who would like to enjoy the cyberspace in such jurisdiction must

embrace any kind of restrictions proposed by law in that country. It is a result from diverse social experience.

The amended provisions in Thailand empowered the authorities to impose the criminal liabilities.<sup>4</sup> In order to increase the proficiency of such law and its enforcement in a business practices, the author would like to make recommendations on solutions to prevent and control users to publish illegal contents as well as legal measures dealing with such contents in case that they have already been circulated on the computer or internet platform hereby;

## 4.1 Substantive Law

### 4.1.1 Code of Conduct Regarding the Common Concept of Limited Content

The code of conduct or guidance for businesses parties must be written as all corporations are playing an important role in monitoring the activities on **computers**, particularly the internet service provider. People would rather accept the result, even if it goes against them, if they can be a part designing the rules that apply to them.<sup>5</sup>

### 4.1.2 Regulations on enforcement of limited content interpretation

The prohibited content shall have a certain scope that is universally accepted as a rational ground to limit the freedom of expression. Thailand can adapt the ideas from the limitation in the laws of the US and the PRC which provides the definition of the illegal content rather clearer, such as teacher insult statutes under Arizona statute, stating that “[a] person who knowingly abuses a teacher or other school employee on school grounds or

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<sup>4</sup> Computer Related Crimes Act B.E. 2550 (2007), s 20

<sup>5</sup> Murphy, S. D, ‘Taking Multinational Corporate Codes of Conduct to the Next Level’ (2005) GW Law Scholarly Commons <  
[https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1900&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1900&context=faculty_publications) > accessed 2 July 2018

while the teacher or employee is engaged in the performance of his duties”<sup>6</sup> is included in an insult speech. This will also help in narrowing the prohibited contents scope and providing the clear definition based on the acceptable ground following both legal principle and moralities of the society.

#### **4.1.3 The Computer Data Screening Committee**

The Computer Data Screening Committee can offer the consultation to any parties who want to ensure the legality of their information or contents. This way will definitely relieve the loss that may be caused from the blocking or removal of the contents. In particular, business operators who have to invest for the advertisement which relates to contents.

### **4.2 Procedural Law**

#### **4.2.1 The Caution**

The blocking order might be deemed as a prior process before the trial, similar to criminal warrants in terms that the suspected person has no right to argue with the official’s action to submit the request for blocking to the court. The final decision, whether the contents should be removed, must ensure the due process of law<sup>7</sup>. People should have an alternative way to prepare their evidence to the court to challenge the block request in the timely fashion after receiving the warning as a notice. And, this is the conditional procedure for the competent official before submitting the request for blocking the content to the court.

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<sup>6</sup> The Arizona Revised Statutes 1989, s 15-507

<sup>7</sup> Peter Strauss ‘Due Process’ <[https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process)> accessed 2 July 2018

#### **4.2.2 The Right to Challenge the Block**

This is the procedure that allows the content contributors to challenge the case by presenting their supporting evidence to the court so that the court can consider the case with both sides of evidence and make a fair order to all involved parties.

#### **4.2.3 Remedy and Compensation System**

In case of the unjustified act under the Computer Crime Act of the competent official has been made and caused the damages to the injured person, the remedies shall be executed and calculated fairly based on the loss and damages caused since the contents were taken down according to a wrongful use of discretion causing the act to be nullified under Liability for Wrongful Act of Officials Act B.E. 2539.

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## PARTIAL RESCISSION OF CONTRACTS<sup>\*</sup>

*Kitisak Suksumran<sup>\*\*</sup>*

### Abstract

The principle of partial rescission of contracts allows the innocent party to partially rescind the contract. Since a contract is not rescinded as a whole, the performance that has already been performed before rescission will be unaffected.

According to the study, many countries, including European Contract Laws, have developed the principle of partial rescission of contracts. Principally, where obligations of the contract are divisible, and a counter-performance can be apportioned to a specific part which is to be rescinded, a contract may be partially rescinded.

According to the Thai Civil and Commercial Code, the general provisions of contract law do not expressly allow the innocent party to partially rescind a contract. Thus Thailand should introduce the principle of partial rescission of contracts by amending the Thai Civil and Commercial Code in order to encourage the continuity of commercial activities.

**Keywords:** Partial Rescission of Contracts, Partial Performance, Divisible Obligation

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<sup>\*</sup> This article is summarized and rearranged from the thesis “Partial Rescission of Contracts” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## **1. Introduction**

The principle of partial rescission of contracts has been developed in many countries, for example, England, the United State of America, Germany, and Netherland, and also stipulated in European Contract Laws, for example, the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principle of European Contract Law (PECL), the Common European Sales Law (CESL), and the Draft Common Frame of Reference (DCFR).

Under the Thai Civil and Commercial Code, there is no general provision that expressly prescribes a unilateral right of a party to partially rescind a contract. Therefore, generally in practical, when a party has the right to rescind a contract, rescission of contract as a whole shall be applied.

## **2. Partial Rescission of Contracts in the Thai Civil and Commercial Code**

According to Section 386 paragraph one,<sup>1</sup> the innocent party may unilateral rescind the contract by two means. The first is rescission of contract by provisions of law. The second is rescission of contract by clauses of contract. In this regard, Section 386 does not indicate that rescission of contract must be in whole or in part.

### **2.1 The Possibility of Partial Rescission of Contracts according to the General Provisions of Contract Law**

Principally in order to enable the right of partial rescission of contract, the obligation of the contract must be divisible.

In the Thai Civil and Commercial Code, the problem concerning divisible obligation is in the case that there are several debtors or several

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<sup>1</sup> Thai Civil and Commercial Code, s 386 paragraph 1

creditors within the contract according to Section 290,<sup>2</sup> where the obligation is divisible, and there are several debtors or several creditors.<sup>3</sup> Principally, the principle of divisible obligation does not apply to the general provisions for rescission of contract. If there is a ground for rescission of contract whether it is breach of contract or impossibility of performance, the innocent party may rescind the contract as a whole, so there is no need to consider whether the obligation of contract is divisible or not.

In order to comprehend the provisions of law for the purpose of applying such provisions to the fact, the provisions must be interpreted based on logic and righteous conscience.<sup>4</sup> Such interpretation is subject to the principle of Juristic Method under Section 4 of the Thai Civil and Commercial Code. According to Section 4 paragraph one;<sup>5</sup> the provision must be interpreted according to the wording used and the spirit of the provisions concurrently.

Section 387,<sup>6</sup> Section 388<sup>7</sup> and Section 389<sup>8</sup> do not stipulate that the rescission must be in whole or in part. However, if we read these sections

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<sup>2</sup> Ibid., s 290

<sup>3</sup> จีต เศรษฐบุตร, *หลักกฎหมายแพ่งลักษณะนิติกรรมและสัญญา* (6th edn, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2010) (Jeet Serttabud, (*Lak Khodmai Phaeng Laksana NitiKham Lae Sanya [Civil Principle of Juristic Acts and Contracts]* (6th edn, Duentula Printing House 2010)) 119

<sup>4</sup> สมยศ เชื้อไทย, *ความรู้กฎหมายทั่วไป คำอธิบายวิชากฎหมายแพ่ง : หลักทั่วไป ความรู้พื้นฐานเกี่ยวกับกฎหมายและระบบกฎหมาย ความรู้พื้นฐานทางนิติศาสตร์* (21st edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2015) (Somyos Cheuthai, *Khwanroo Khodmai Tuopai Kham Athibai Wicha Khodmai Phang : Lak Tuopai Khwanroo Puentan Kiewkub Khodmai Lae Rabob Khodmai Khwanroo Puentan Thang Ni Ti Sart [Knowledge of General Law, Explanation of Civil Law Subject : General Principle, Basic Knowledge concerning Law and Legal System, Basic Knowledge related to Legal Science]* (21st edn, Winyuchon Publication House 2015)) 168

<sup>5</sup> Thai Civil and Commercial Code, s 4, paragraph 1

<sup>6</sup> Ibid., s 387

<sup>7</sup> Ibid., s 388

<sup>8</sup> Ibid., s 389

thoroughly, it can be seen that the provision does not concern whether or not the ground for rescission is separated between the case of a part or a whole of contract. They only provide the principle that if there is a ground for rescission, the innocent party may rescind the contract. Thus, it can be said that the intention of these provisions proposes that rescission must be made against the whole contract although there is a ground for rescission for each part of contract or for the whole contract.

Furthermore, other than the meaning of the wording, we must also seek the meaning of the spirit of the provision concurrently. The spirit of the provision may be sought by considering the relating provisions because the provisions in the Code are linkable as a system.<sup>9</sup> In this regard, we may consider the provision concerned with rescission of the specific contract.

According to Section 465<sup>10</sup> and Section 466,<sup>11</sup> the buyer has the right to reject the property, or even rescind the contract under Section 466 paragraph two. The term ‘rejection’ and ‘rescission’ are different. ‘Rejection’ is not considered as the cessation of contract, the contract is not extinguished as consequences of rescission. The seller still has the duty to deliver the property in accordance to the contract agreed. Thus ‘rejection’ in these provisions only gives the right to the buyer to reject the property which is not accordance to the contract agreed. On the contrary, ‘rescission’ operates to cease the contract. The buyer has no duty to deliver the property anymore.<sup>12</sup> Thus, it means that these two sections do not allow the buyer to partially rescind the contract. If the buyer wants to rescind the contract, he has to rescind the whole contract, not in part.

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<sup>9</sup> Somyos Cheuthai (n 4) 183

<sup>10</sup> Thai Civil and Commercial Code, s 465

<sup>11</sup> Ibid., s 466

<sup>12</sup> ศันนักรณ โสทธิพันธุ์, *คำอธิบาย ซื้อขาย แลกเปลี่ยน ให้* (6th edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2013) (Sanunkorn Sotthibandhu, *Kham Athibai Suekai Lakpleaun Hai [Explanation of Law concerning Sale, Exchange and Gift]* (6th edn, Winyuchon Publication House 2013)) 164

These provisions show that rescission of contract under Thai contract law system tends to be rescission of contract as whole. So, the general provision for rescission of contract should be interpreted to be rescission of contract as a whole in accordance to this attitude.

Hence, since the wording and the spirit of Section 387, Section 388 and Section 389 indicate that the innocent party may rescind the contract as a whole and does not recognize partial rescission of contract. It may be concluded that there is no principle of partial rescission of contract under general provisions of contract. Thus, the innocent party may not choose to partially rescind the contract, he may only rescind the contracts as a whole.

As for the continuing contract, it is different. The continuing contract is a contract that has the continuing performance over a period of time such as the lease contract, the hire-purchased contract and the employment contract.<sup>13</sup> The obligation of the continuing contract can be divided into several performances in consistence with the counter-performance in fixed rate of payment for each performance. Moreover, when the party has performed a part of his obligation, such performance shall be concluded and completed by itself and shall not affect to or be affected by the other parts of contract. When the innocent party rescinds the continuing contract, rescission operates prospectively. It does not affect the performance that has already completed before the rescission, because the performance that has already performed is completed.<sup>14</sup> Thus for the continuing contract, it may be said that the law allows the innocent party to partially rescind the contract by the nature of the continuing contract.

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<sup>13</sup> ศนันท์กรณ โสทธิพันธ์, *คำอธิบายนิติกรรม-สัญญา* (19th edn, วิญญูชน 2015) (Sanunkorn Sotthibandhu, *Kham Athibai NitiKham-Sanya [Explanation of Juristic Acts and Contracts]* (19th edn, Winyuchon Publication House 2015)) 470

<sup>14</sup> จิตติ ติงศภัทัย, *คำอธิบาย ประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วยสัญญา* (โรงพิมพ์ เดือนตุลา 2009) (Jitti Tingsapat, *Kham Athibai Pramuan Khodmai Phaeng Lae Panich Reang Martra Waduy Sanya [Explanation of Civil and Commercial Code concerning Contracts]* (Duentula Printing House 2009)) 173

## 2.2 Possibility of Partial Rescission of Contracts according to Clauses of Contracts

According to Section 386 paragraph one,<sup>15</sup> the parties may rescind a contract by a clause of the contract. This section expresses that rescission of contract is not the law concerning the public order or good moral according to Section 151.<sup>16</sup> Thus the parties may agree to determine the right to rescind the contract differently from the provisions of law.<sup>17</sup>

Hence in the author's opinion, the parties may agree to stipulate the clause for partial rescission of contract and rescind the contract as such.

## 3. Conclusion

According to the Thai Civil and Commercial Code, the general provision of rescission of contract does not allow the innocent party to partially rescind the contract. As for the right of rescission according to the clauses of contract, the parties may agree to put a clause for partial rescission of contract in the contract and may legitimately use this clause to partially rescind the contract. However, in practice, many contracts do not have the clause for the partial rescission of contract, the innocent party has to rescind the contract by relying on the general provision of rescission of contract. So, he cannot rescind the contract in part, and only has the right to rescind the contract as a whole. Thus, the author proposes that the principle of partial rescission of contract should be developed in Thai law as well.

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<sup>15</sup> Thai Civil and Commercial Code, s 386 paragraph 1

<sup>16</sup> Ibid., s 151

<sup>17</sup> อัครวิทย์ สุมาวงศ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย นิติกรรม สัญญา (5th edn, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2009) (Akarawit Sumawong, Kham Athibai Pramuan Khodmai Phaeng Lae Panich Waduy NitiKham Sanya [The Explanation of Civil and Commercial Code concerning Juristic Acts and Contracts] (5th edn, Thai Bar Association 2009)) 342

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**FIRST LOSS POLICY ON NON-LIFE INSURANCE CONTRACT:  
COMPARATIVE STUDY OF NEW ZEALAND, JAPAN AND THAILAND**

*Tidatip Saengyokkun*<sup>\*\*</sup>

**Abstract**

According to the proportion of under-insurance products has been demanded and provided in the present market. In case of partial loss, the compensation will be sensitively deducted upon the components of the Average Clause. The compensation will be decreased once there is any alteration upon the formula. The actual value of the insured asset is the most problematic fact in accordance with the failures of the insured and insurer, and also other relevant issues. These factors currently lead a number of insufficient compensation claims in Thailand.

This article presents the First Loss methodology that make the insured accurately understand and simply access the coverage. As it is the most suitable tool in order to raise the sustainable awareness of sharing risks amongst the people. For raising certainty to the people, Thailand should enact concrete regulations as same as in New Zealand. In the same way of Japan, the laws have been altered to be fit into the current situation. Additionally, an effective enforcement is another factor to support the insurance market in the country.

**Keywords:** Insurance, Compensation, Indemnity, First Loss, Under-Insurance

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<sup>\*</sup> This article is summarized and rearranged from the thesis “First Loss Policy on Non-Life Insurance Contract: Comparative Study of New Zealand, Japan and Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## 1. Introduction

The under-insurance has been applied into the various types of insurance on the ground of the decline of financial situation and the downgrade of the total loss occurrence. It has a low premium compared to the full valued insurance; however, there are many concerned issues due to the application of Average Clause when the partial loss occurred. The application of the formula of average in under-insurance consisted of many factors which may cause to the insureds not to receive the sufficient amount of compensation.

It could be additionally clarified in the fact that: Mr. A owns the insured asset values at THB 1,000,000 at the commencement of contract, in the meantime of the insurance there is the actual loss from flood at THB 300,000. The compensation upon the under-insurance will be calculated following the Average Clause formula. Although the maximum sum for flood loss in the policy is set at THB 300,000, but he will receive the compensation in the amount of less than that. The calculation of  $\left( \text{Loss} \times \frac{\text{Amount of Sum Insured}}{\text{Actual insurable value at risk}} \right)^1$  as  $300,000 \times \frac{300,000}{1,000,000}$  equals at only 90,000. Therefore, Mr. A will receive the compensation of the loss is at THB 90,000 due to the application of Average Clause and in accordance with the burden of THB 210,000 for self-indemnity of the loss.

The actual value of subject matter is the easiest factor to be altered when the loss occurred. The inflation or deflation of the amount of the value will impact to the compensation. The more actual value has changed, the more compensation will be reduced. The point is that

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<sup>1</sup> Financial Ombudsman Service, 'Under Insurance in household insurance complaints' <[https://www.financialombudsman.org.uk/publications/technical\\_notes/under-insurance-household.html](https://www.financialombudsman.org.uk/publications/technical_notes/under-insurance-household.html)> accessed 3 March 2018

there are a number of insureds who do not understand this unique concept of under-insurance. As a result of the claims, many complaints had been brought into the dispute procedures on the matter that they did not receive enough amount of compensation as they should receive.

In Thailand, many problems have continually occurred in the present such as the claim of the inadequacy of compensation due to the under-insurance policy, ranked one of top 5 in 2015 through the Office of Insurance Commission of Thailand (OIC). However, there is an alternative methodology to deal with this concern which called First Loss.

## **2. What is First Loss?**

First Loss is an insurance condition that the policyholder and the insurer agree to receive the insured coverage being lower than the actual value of the insured property by accepting a maximum Sum Insured per a loss for a certain module of an insurance. The essence is that the calculation of compensation under the First Loss policy will be excluded an Average Clause when the loss occurred. To explain clearly about the difference of compensation between the First Loss policy and the normal under-insurance policy could be clarified upon the same partial loss fact of Mr. A prior. If Mr. A has an insurance under First Loss for flood loss at THB 300,000, he will be compensated at the amount of THB 300,000 explicitly without any applications of Average Clause. If damages overs the Sum Insured, Mr. A has to bear for the exceeded amount by himself.

## **3. Status of First Loss and Under-insurance under Thai Laws**

The scheme of insurance has presented in the narrow aspects due to the insufficient knowledge and loop hole of laws. A number of

consumers as being insureds have claimed for the unfair compensation though the Office of Insurance Commission of Thailand. The occurrence of this issue has shown as it is one of the most claims of non-life insurance in 2015.<sup>2</sup> Besides, the notable flood disaster in 2011 in Thailand, the study<sup>3</sup> shows that there was only 7% of 600 interviewees from the disaster area, had the insurance for the loss. Surprisingly, although they believe that the severe disaster will reoccur in 5 years, there was only less than 50% of each, they would be willingly to purchase an insurance for disaster.

#### 4. Directory of First Loss and Under-insurance

In regard to the complicated technical terms and applications of insurance, the exclusion of Average Clause in First Loss policy will help the insureds be able to easily understand the coverage and the amount of compensation that they will exact receive when the loss occurred. To support this benefit, it has shown in Section 15 of the Insurance Law Reform Act 1985 of New Zealand that stipulates the prohibition on inclusion of condition of average in contract of insurance relating to dwelling.

In the terms of First Loss policy, the insured is also the self-insurer to himself in some proportion of the sum insureds. The more actual loss occurred the more amount, the insured has to self-indemnify, the maintenance of the insured subject is the method to

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<sup>2</sup> The Office of Insurance Commission, 'News' (2015) <[www.oic.or.th/th/consumer/news/releases/85268](http://www.oic.or.th/th/consumer/news/releases/85268)> accessed 26 April, 2018

<sup>3</sup> Orapan Nabangchang, Hermi Francisco and Aini Zakaria, 'Thailand's 2011 Flood: Household Damages, Compensation and Natural Catastrophe Insurance' (2014) Vol. 13 CUBR <<http://www.davidpublisher.org/Public/uploads/Contribute/5508ef6ba38d2.pdf>>

manage the risk. This interaction of the insureds will therefore support the insurer to control the loss not to be severe.

In the fact that the premium cost of First Loss policy is not expensive as full value insurance, this product will help the pool of insurance to be strengthened by providing the alternative coverage to the consumers especially for the low and middle population who earn limit income. Furthermore, the cost of survey in order to calculate the actual loss will be more easily handled than the other insurance due to the simple and exact amount compensation scheme of First Loss per se. The insurer limits the expenses in order to hire the adjuster within the shorten time. The compensation will therefore indemnify to the insureds in the fair period and get rid of the claims of the delayed compensation afterwards.

## **5. Analysis of First Loss Application**

According to the study, it could be concluded that the Average Clause is not a taint by itself; instead, the lack of the information and misunderstanding of the insureds are the issues to be concerned. It could be said that the communication and the access of the information in the present between the parties are considerably impaired. The Theory of Contract by Oliver Hart and Bengt Holmström emphasizes that the most problematic factor that raises a number of disputes on unfair contracts caused by the asymmetric information amongst the parties. There is none of the equal reciprocal contracts in this modern era since the well-designed contracts are exposed to be as the credit agreement that specify the payment and decisive rights by prejudicial protecting the

lenders, Likewise, the insurance contracts have forcedly pushed the deduction to the insureds in order to undertake the risk.<sup>4</sup>

The application of First Loss condition in the policy will support the insureds in order to access the protection and receive the impartial compensation. The amount of the compensation will be explicitly stated at the first time of making a contract. The potentiality to improve the insureds understanding could raise by enforcing of scheme as to prohibit the Average Clause into the household dwellings insurance and promote the First Loss condition into the policy instead of the aforementioned normal under-insurance.

Regarding to the provisions of Thai law relating to non-life insurance and enforcement do not adequacy protect the insureds; the authority of the Office of Insurance Commission of Thailand (OIC) should be liable to enact the regulation to enforce the determent of Average Clause upon the household premises. Likewise, in New Zealand, Section 15 of Insurance Law Reform 1985 is the prohibition on pro rata condition or the Average Clause into every household's policy in order to control the calculation of compensation not to be injustice to the people in majority. The policy that against the provision shall be voidable automatically afterwards.

The OIC shall proclaim this concept upon the Non-Life Insurance Act B.E. 2535 according to the authority on Chapter 2 Supervision of the Company, Section 29 in accordance with Section 4 in references to control the condition into the non-motor policies and the scope of authority of the registrar. The prohibition should be firstly enforced to the dwellings upon the natural disaster insurances as the Japan has

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<sup>4</sup> Oliver Hart and Bengt Holmström, 'Contract Theory' (10 October 2016) KVA <<https://www.nobelprize.org/uploads/2018/06/advanced-economicsciences2016-1.pdf>> accessed 3 March 2018

applied the First Loss concept into the earthquake insurances to support and improve the protection of loss i.e. windstorm and flood according to the disaster of flood in 2011 and the monsoon catastrophe in Thailand.

## **6. Conclusion**

As being an alternative choice to the customers in the market rather than the normal under-insurance, First Loss insurance has an uncomplicated and understandable concept that will strengthen the pool of risk for people in majority by persuading more people to involve into the insurance market. When the damages occurred, the power of the pool has the potential to partially insure the risks to the insureds in order to receive the full amount of agreed compensation without the Average Clause basis, with the proper premium rate which subsequently cheaper than full-valued insurance price. The aforesaid basis depends on the benefits of both of parties as the reasonable premium for the reasonable advantage under the reasonable agreement.

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LEGAL ISSUES WITH SECTION 56 OF THE PROTECTION OF  
A CHILD BORN BY MEDICALLY ASSISTED REPRODUCTIVE  
TECHNOLOGY ACT B.E. 2558 (2015)<sup>\*</sup>

*Apapohn Pinsakol Saengsin*<sup>\*\*</sup>

**Abstract**

Parental recognition of surrogate children born of unqualified intended parents or non-compliant surrogacy falls right in the gap of both public and private laws. Section 56 of the Protection of a Child Born by Medically Assisted Reproductive Technology Act was incorporated to protect the rights of surrogate children born prior to the enactment of the law. Due to its rigid wordings, it limits the rights of some intended parents to file for the child legitimation and jeopardizes the rights of the child to have proper parentage.

By viewing the child's right as paramount, true and honest intent of the intended parents together with the principle of the best interests of the child should be jointly applied when determining parentage of surrogate children. To prevent the children from exploitation, intended parents must prove their parental capability and inspection by government authorities should take place after the court has issued the order.

**Keywords:** Surrogacy, Parentage, Parental Power, Citizenship, Parental Recognition, Birth Registration, Statelessness, Children Rights, Human Rights

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<sup>\*</sup> This article is summarized and rearranged from the thesis "Legal Issues with Section 56 of the Protection of a Child born by Medically Assisted Reproductive Technology Act B.E. 2558 (2015)" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## 1. Introduction

The Protection of a Child Born by Medically Assisted Reproductive Technology Act (ART Act) was published in the Royal Thai Gazette on 1 May 2015 and has been in effect since 30 July 2015. Prior to the enactment, Thailand was considered as one of the most popular destinations for surrogacy, as some called ‘the womb of Asia’.<sup>1</sup> Surrogacy is one of the commonly sought methods by intended parents from all over the world. Associate Professor Dr. Kamthorn Pruksananonda, a former chairman of the Royal Thai College of Obstetricians and Gynecologists said that in 2014 there were approximately 7,000 couples who received ART services in Thailand and the success rate was 35%.<sup>2</sup>

Due to the fact that Thailand did not have any legislation governing surrogacy, previous arrangements had involved paid, commercial surrogacy. In order to prevent exploitations and keep up with the ART advancement, the ART Act was enacted to regulate surrogacy practice in Thailand. Section 56 has been incorporated as a transitory provision to the ART Act to resolve issues of legal parentage of the surrogate children who were born prior to the ART Act, but it seems that this provision has raised many doubts in terms of its practicality and implementation.

Firstly, the terms used in referring to the persons who are eligible to file a petition to the Juvenile and Family Court to issue parentage order for surrogate children are limited to four persons, which are (i) the person born through surrogacy arrangement, (ii) a husband undertaking surrogacy, (iii) a

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<sup>1</sup> Henk Ten Have, *Global Bioethics* (Taylor and Francis 2016)

<sup>2</sup> เอ็มพกา เตชะอภัยคุณ บุญมี, การเรียกค่าเสียหายจากการใช้วิธีผสมเทียมที่ผิดพลาดในประเทศสิงคโปร์ คดี ACB V Thomson Medical Pte Ltd And Others, รพี, พิมพ์ครั้งที่ 1, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2560. (Aimpaga Techa-apikun Boonmee, Karn Riek Khasiahai Chak Karn Chai Withi Pasomthiam Tii Pidplad Nai Prathet Singapore Khadi ACB V Thomson Medical Pte Ltd and Others [Claiming for Damages from Error in IVF in Singapore, ACB v Thomson Medical Pte Ltd and Others] (1st edn, Faculty of Law, Thammasat University 2017))

wife undertaking surrogacy, and (iv) a public prosecutor. This right does not extend to intended parents who are not a husband or a wife under the law.

Secondly, the factors in determining legal parentage of the surrogate children are not defined as to whether it should rest upon genetic relationship, the intention of the intended parents, or the best interests of the child.

Thirdly, it is a concern whether the parental power would have automatically been established to the intended parents as soon as the legal parentage has been granted, whether the court has the right to terminate the parental power of the intended parents if they are not suitable for the best interests of the child while their legal status remains as lawful parents, and whether the surrogate mother still has any legal right over the child. This would further reflect on how to register the birth and recognize citizenship of the surrogate child.

## **2. Legal Parentage**

The term ‘parent’ is not expressly defined under the Civil and Commercial Code (CCC), but its intrinsic meaning has been embedded and implied that ‘parent’ is someone who has naturally conceived a child through sexual relationship as husband and wife and it is understood by nature that the child is the biological child who has the genetic materials of the parent.

### **2.1 Parentage under Thai Laws**

The CCC stipulates several presumptions on parentage of a child. A child born to an unmarried woman is presumed to be her legitimate child.<sup>3</sup> A child born to a woman during wedlock is presumed to be the legitimate child of the woman and her husband.<sup>4</sup> A child born to a woman within 310

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<sup>3</sup> Civil and Commercial Code, s 1546

<sup>4</sup> Ibid., s 1536

days after the dissolution of the marriage is presumed to be the legitimate child of the ex-husband.<sup>5</sup> A child born to a woman who re-marries within 310 days from the date of the dissolution of marriage is presumed to be the legitimate child of the new husband.<sup>6</sup> A child born to a woman in an extramarital affair during her marriage is presumed to be the legitimate child of the latest husband who registered marriage to the said woman.<sup>7</sup>

Such presumptions are rebuttable unless it has been proven otherwise. However, some presumptions are irrefutable by statute or by statutory period or by court order. For instance, the husband or the ex-husband who presumed to be the father of the child is not permitted take action for repudiation after 10 years from the child's date of birth.<sup>8</sup> The husband or the ex-husband cannot take any action for child's repudiation if he registered himself as the father in the child's birth register.<sup>9</sup> A presumed father would become a lawful father of a child by section 1547 of the CCC. Section 1547 provides that a presumed father can become a lawful father of a child once (i) he registers marriage to the woman who gives birth, or (ii) he submits a child legitimation application and the application is granted by the local registrar, or (iii) he obtains the court order. In case that the father does not wish to register marriage to the birth mother, the second alternative is a simpler way to legitimize the child; however, the process of child legitimation by application requires consent from the birth mother and the child. If the child is too young or the birth mother dies, this alternative would not be possible and the father would need to seek the court order for child legitimation.

Legal parentage of surrogate children does not fall under the presumptions under the CCC as the ART Act specifies that the surrogate children would become legitimate children of the intended parents. In case

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid., s 1537

<sup>7</sup> Ibid., s 1538

<sup>8</sup> Ibid., s 1542

<sup>9</sup> Ibid., s 1541

that the ART process uses gametes from donors, the child would be the legitimate child of the intended parents whilst the donors would have no rights or responsibilities over the child.<sup>10</sup> It may be presumed that the intent of the intended parents is a factor used to determine parentage of surrogate children under the ART Act.

## 2.2 Parentage under Foreign Jurisdictions

Under the United States Uniform Parentage Act 2017 (UPA), there are several presumptions set out in relation to parent and child relationship. For example, an individual who gives birth to a child is presumed to be the child's parent.<sup>11</sup> An individual is presumed to be a parent of a child if the said individual and the woman who gave birth to a child are married and the child is born during the marriage, regardless of the validity of the marriage<sup>12</sup> or the child is born no later than 300 days after the marriage is terminated.<sup>13</sup> An individual who marries the woman who then gives birth to a child and agrees to be named as a parent of the child is presumed to be the child's parent<sup>14</sup> or the said individual has lived in the same residence with the child for two years after the child is born.<sup>15</sup> These presumptions are based on the idea of natural conception, which varies from the child born through surrogacy process. Article 8 of the UPA stipulates how the parentage over surrogate children can be determined. The principle to determine parentage for both gestational surrogacy and genetic surrogacy is that each of the intended parents is the parent of the child where the law

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<sup>10</sup> The Protection of a Child Born by Medically Assisted Reproductive Technology Act, s 29

<sup>11</sup> Uniform Parentage Act, s 201

<sup>12</sup> *Ibid.*, s 204(a)(1)(A)

<sup>13</sup> *Ibid.*, s 204(a)(1)(B)

<sup>14</sup> *Ibid.*, s 204(a)(1)(C)(ii)

<sup>15</sup> *Ibid.*, s 204(a)(2)

made it clear that neither the surrogate nor her spouse is the child's parent.<sup>16</sup>

In Australia, the surrogacy laws presume that the surrogate and her husband (or partner) are lawful parents of the surrogate child.<sup>17</sup> The intended parents who may have the same genetic relationship with the child are presumed not to be the legal parents of the child unless such intended parent registers in a birth register or acknowledges parental status.<sup>18</sup> The intended parent(s) and the surrogacy arrangement itself must satisfy the conditions set out under the legislation of their applicable jurisdiction in order to request the court to grant the transfer of parentage from the surrogate parents to them. Otherwise the parental status would be determined by the general law.<sup>19</sup>

### 3. Parental Power

The definition of parental power, as described by Thierry Garé,<sup>20</sup> is 'the center of rights and duties legally granted to the parents to protect the child'. The parents and the child both have the rights to demand the other party to act or refrain from certain action. Generally, parental power is attached to the parents of the child based on biological relationship that extends from the parents to the child. Parental power is established by the government as a tool to ensure that the person who has not attained the age of maturity is protected; therefore, parental power is related to good

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<sup>16</sup> Ibid., s 809

<sup>17</sup> Mary Keyes, 'Australia', *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013)

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> ไพโรจน์ กัมพูสิริ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ครอบครัว (พิมพ์ครั้งที่ 9, มหาวิทยาลัยธรรมศาสตร์, 2554) (Pairoj Kampusiri, Kham Athibai Pramuan Khodmai Paeng Lae Panich Bab 5 Krobkrua [Explanation of Book V of the Civil and Commercial Code Regarding Family] (9th edn, Thammasat University 2011))

morals and public order and it cannot be surrendered, limited, transferred, terminated or otherwise agreed beyond the law.

### 3.1 Parental Power under Thai Laws

Under the CCC, parental power is jointly exercised by the parents and the parents can make decisions on the child's place of residence, discipline the child, require the child to work to suit his ability and condition, and demand the child to be returned from a person who unlawfully detains him.<sup>21</sup> In terms of parental power over surrogate children, the ART Act itself does not provide any provisions on the establishment of parental power; therefore, the provisions relating to parental power as stipulated in the CCC on Family would apply to the extent that it is not contrary to the ART Act.<sup>22</sup> However, the procedure to obtain parental power for children born through pre-commencement surrogacy or non-compliant surrogacy should be treated in a more cautious manner. After the court has considered parentage of the surrogate child based on the true and honest intent and best interests of the child, it is essential to set out factors to review the readiness of the intended parent before granting a sole parental power as well as conducting post-monitoring procedures as a trial period (in consistent with the procedures required for child adoption) to ensure that the intended parents have the ability to raise them and the child is not at risk of being exploited.

### 3.2 Parental Power under Foreign Jurisdictions

In the United States, parental power is often times referred to as custody, visitation right or guardianship and is attached to the parents of the child to give appropriate education<sup>23</sup> and to have custody, care and nurture

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<sup>21</sup> Civil and Commercial Code, s 1567

<sup>22</sup> The Protection of a Child Born by Medically Assisted Reproductive Technology Act, s 34

<sup>23</sup> *Meyer v State of Nebraska*, 262 US 390 [1923] The United States Supreme Court (The United States Supreme Court)

the child.<sup>24</sup> At present, the Court relies on the principle of the ‘best interests of the child’ but the application of such principle may be quite challenging as one factor may favor one party while another factor favors the other.<sup>25</sup> Several factors have been addressed for the court to decide on parental power including gender and primary caretaker, economic superiority, employment stability, sexual conduct, religion, sexual orientation, physical and mental health, child’s preference, unwed father, child abuse history, substance abuse and smoking, relationship quality, etc.

In Australia, the Family Law Act 1975 (as amended) governs matters relating to child custody. In all court proceedings, it is emphasized that the principle of the best interests of the child is of the utmost importance.<sup>26</sup> The best interests of the child are determined by the child’s right to enjoy a meaningful relationship with both parents, child’s safety, the child’s point of view, quality of relationship, parental involvement in the child’s future, effect of the change towards the child, difficulty in engaging in communication, ability to provide for child’s needs, parent’s attitude, records of family violence and other factors.<sup>27</sup>

#### 4. Recommendations and Conclusion

For the best interests of the child, Section 56 of the ART Act should be amended to incorporate non-compliant surrogacy. The right to file petition for child legitimation should be drafted in a broader perspective, which allows anyone involved in the surrogacy process to file a petition for child legitimation to the court. It should incorporate an exit strategy for surrogacy that is not conformed with the requirements under the ART Act

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<sup>24</sup> *Prince v Massachusetts*, 321 US 158 [1944] The United States Supreme Court (The United States Supreme Court)

<sup>25</sup> Scott E Friedman, *The Law of Parent-Child Relationships* (Section of Family Law, American Bar Association 1992)

<sup>26</sup> Family Law Act 1975, s 60CA

<sup>27</sup> *Ibid.*, s 60CC

so that the right of the child born through non-compliant surrogacy will be recognized.

**Parentage Order** To determine legal parentage of children born through pre-commencement surrogacy or non-compliant surrogacy, the intended parent must demonstrate their true and honest intent and each of the intended parents must provide appropriate reasons to the court as well as their situations and circumstances. The proposed factors include their motives during the time of surrogacy arrangement, details of the ART process, proof of genetic materials and reasons for not using their own genetic materials in the process, criminal records of the intended parents, marital status, employment history, annual income, sexual orientation, physical and mental health evaluation by licensed physician, two witnesses or references, any other reasons as the intended parents view appropriate to prove their true and honest intent. However, intent should not override the right of the surrogate who has the same genetic relationship with the child. The surrogate should have the right to give consent whether or not to keep or waive her right over the child.

In addition to the intent of the intended parent, the best interests of the child must be considered and the court may weigh the following factors to decide whether the parentage order would benefit or endanger the child including the child's age, length of time the child stays with any party, quality of relationship, possible physical and emotional impact towards the child, and any other reasons that would be for the best interests of the child.

**Parental Power** The court may request the intended parents to submit a plan to raise the children, which comprises the information on the intended residence of the child, number of total family members, neighborhood, surrounding environment, education plan, and information about the main caretaker of the child. In case of doubt, the court may by himself visit or request the officer of the Ministry of Social Development and Human Security (MSDHS) to visit the potential residence of the child at the expenses of the intended parents.

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**JUDICIAL ASSISTANCE FOR ARBITRATION UNDER SECTION 14 OF  
THAI ARBITRATION ACT B.E. 2545<sup>\*</sup>**

*Pataramon Pimpapatanayotin<sup>\*\*</sup>*

**Abstract**

International Commercial Arbitration has become one of the most favored dispute resolution methods in this era with an increasingly globalized world economy. One of the most significant benefits is the neutrality of the forum, which means the ability to stay out of the other party's court.

Judicial assistance is proven to be crucial to every aspect of the arbitral proceeding. Although arbitration is a private system of justice in which parties may design their own arbitral proceeding, it is still governed by law, usually by the law of the seat of the arbitration, or the law chosen by parties to govern the agreement.

The question of what law applies to determine the validity of the international arbitration agreement is still debatable among practitioners and academics. However, in order to promote international arbitration in Thailand, under section 14 of Thai Arbitration Act B.E.2545 courts should exercise their judicial power by applying Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1959) to the case.

**Keywords:** International Commercial Arbitration, Arbitration, Thai Arbitration, Judicial Assistance for Arbitration

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## 1. Introduction

In recent decades, international commercial arbitrations have increased significantly due to foreign investments, based on a contract and treaty. Thailand has come to play a greater role in world trade and investment. This has resulted in a dramatic rise in the number of international commercial arbitrations in Thailand.

Arbitration is a private system of adjudication. Parties often choose arbitration because they do not want their dispute to be subject to a State's judicial system. In arbitration, the parties can control the process that will be used to settle potential disputes.<sup>1</sup>

However, the support of a court can prove crucial. Unlike arbitration tribunals, courts have coercive powers - the ability to compel a party to do something. Parties tend to call on the court for assistance when they are seeking to enforce an agreement to arbitrate, to compel a party to carry out an order, to render an award, etc.<sup>2</sup>

### 1.1 Validity of the Arbitration Agreement

Many national laws and states do not adopt the model laws uniformly leaving national courts determine the validity issue. When a court makes a ruling on the validity of an arbitration agreement in its jurisdiction, it must be determined which jurisdiction's law shall be applied to a particular issue. Additional complications develop when more than one national's laws may properly apply to the arbitration.<sup>3</sup> In such a scenario, the parties may agree that the seat of the arbitration is to be in country A, but the arbitration procedure is to be governed by the law of country B. If one of the parties to the agreement commences litigation in country C, an opposing party might ask a court to dismiss the case. This then raises the

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<sup>1</sup> Moses, Margaret L. *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press, 2012.

<sup>2</sup> Ibid.

<sup>3</sup> Moses, 'The Principles and Practice of International Commercial Arbitration' (n 1)

issue of which law should apply in making determination to dismiss? Country C's court, using its own law, might rule that the arbitration agreement is null and void, and permit the litigation to continue. On the other hand, if country B's laws were applied, a court may find the arbitral clause to be valid and enforceable.<sup>4</sup>

## 1.2 Thailand as an Arbitration-Friendly Country

Foreign investment has played a significant role in the economic development of Thailand. It can provide a source of capital, new technologies, and employment opportunities.<sup>5</sup> Foreign investors concerned about exposure to the differences in a host state's political and social environment, its legal system and possible interference by the host state, seek fair and equal treatment between the parties.<sup>6</sup> They may find themselves entangled in costly and time-consuming legal proceedings. Because the best solution to settle the disputes; is often the solution that costs the least amount of money and time, arbitration's popularity as an alternative dispute resolution mechanism is increasing.<sup>7</sup>

Professor George Bermann of Columbia University School of Law has defined and outlined the characteristics of an arbitration friendly jurisdiction such as it promoted international arbitration's efficiency aspirations in terms of time and cost, it enabled party autonomy and supported the general

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<sup>4</sup> ธวัชชัย สุวรรณพานิช ‘กฎหมายที่ใช้บังคับแก่สัญญาอนุญาโตตุลาการตาม พ.ร.บ. อนุญาโตตุลาการ พ.ศ.2545 มาตรา 14 ฉบับที่ 17 วารสารกฎหมาย คณะนิติศาสตร์ มหาวิทยาลัยอุบลราชธานี (2559) (Thawatchai Suvanpanich, ‘Law Applied to the Arbitration Agreement under the Thai Arbitration Act B.E.2545’ 17 Ubon Ratchathani University Law Journal 79 (2016))

<sup>5</sup> Anan Chantara-opakorn, ‘Investment arbitration: remarks for Thailand’ 39 Thammasat Law Journal 859 (2010)

<sup>6</sup> Ibid 860.

<sup>7</sup> Greenwood L, ‘The Rise, Fall and Rise of International Arbitration: A View from 2030’ Chartered Institute of Arbitrator 436

principle of consent, it reduced as reasonably as possible the intervention of national courts etc.<sup>8</sup>

Hong Kong and Singapore are the examples of the nations which use arbitration to develop and obtain economic growth. The international Court of Arbitration of the International Chamber of Commerce (ICC) has located their Asian offices in both Hong Kong and Singapore. This gives both countries opportunities to continue promoting their respective jurisdictions as pro-arbitration and business-friendly communities<sup>9</sup> and helps to bring increasing foreign investment into the countries.

## 2. Regulatory Framework

Many countries including Thailand have adopted UNCITRAL Model Law<sup>10</sup> as a model for their arbitration laws on International Commercial Arbitration.<sup>11</sup> The primary source of Thai arbitration law is the Arbitration Act of 2002, the Act was drafted to be congruent with the standards of the UNCITRAL Model law for Arbitration as well as the New York Convention<sup>12</sup>, with minor variations. The Act came into force on April 30, 2002 replacing

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<sup>8</sup> Nilar NN, 'What does it mean to be 'pro-arbitration'?' *CI Arb News* (24 November 2017) <<http://www.ciarb.org/news/ciarb-news/news-detail/news/2017/11/24/what-does-it-mean-to-be-pro-arbitration>> accessed 15 March 2018.

<sup>9</sup> Prasad P, 'Arbitration in Singapore and Hong Kong' Chicago Unbound, University of Chicago Law School 3

<sup>10</sup> The UNCITRAL Model Law for Arbitration was prepared by the United Nations Commission on International Trade Law (UNCITRAL) to promote international commercial arbitration by assisting states in reforming and modernizing their arbitration laws. Its structures contain all areas of arbitral process from the commencement of the arbitration agreement, to the last stop of enforcing the award

<sup>11</sup> *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (UNCITRAL)

<sup>12</sup> the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

the Arbitration act B.E.2530 (1987), it governs both domestic and international commercial arbitration under the same rules.

### 3. Judicial Assistance for Arbitration

Court assistance in arbitration has been seen as filling gaps in arbitration's power.<sup>13</sup> The role of national courts through various forms of support in arbitration is very important. The issues when the judicial assistance from courts is needed always dealing with the arbitral procedure, because of the fact that courts have *coercive powers*<sup>14</sup> while arbitrators do not. Under Thai arbitration act 2002, section 14 has required courts to enforce an arbitration agreement when there are specific circumstances. The act states that if a party to an arbitration agreement commences proceeding in court against the other party to the agreement without submitting the dispute to arbitration in accordance with the agreement, the party against whom the case is commenced may apply to the court to strike down the case. The application must be made no later than the date of filing the defense or within the period allowed by law for filing a defense.<sup>15</sup>

### 4. Determining Applicable Law on the Validity of the Arbitration Agreement under the New York Convention

Article II(3) of the New York Convention states that ‘...*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this*

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<sup>13</sup> Jack J. Coe, *International Commercial Arbitration: American Principle and Practice in a Global Context* (1997)

<sup>14</sup> **Coercive power** is the ability to influence someone's decision making by taking something away as punishment or threatening punishment if the person does not follow instructions.

<sup>15</sup> Michael J. Moser JC, *Asia Arbitration Handbook* (Oxford University Press 2011)

*article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'* The Article, allows national courts of Contracting States to deny the stay of court proceedings in the presence of an arbitration agreement where the validity of such an agreement is affected, but does not provide which law shall be applied to the validity issue.<sup>16</sup>

However, **Article V(1)(a)** provides that *'...recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made...*' Under Article V (1) (a), recognition and enforcement of the award may be refused by the enforcing court (the competent authority) if one of the grounds in the article is alleged and proven by the resisting party.<sup>17</sup>

Although both articles have mentioned the validity of the arbitration agreement issue, but while Article II (3) deals with the first step, or the step of recognizing the arbitration agreement, Article V (1) (a) deals with the last step, or the step of recognizing the award. Furthermore, Article II (3) is silent on the applicable law to determine the validity of the arbitration agreement, but Article v (1) (a) provides that the applicable law is the law [to] which the parties have subjected it or the law of the country where the award was made. Thus, it is suitable to apply Article V(1)(a)

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<sup>16</sup> Loukas A. Mistelis SLB, *Arbitrability International & Comparative Perspectives* (Kluwer Law International 2009)

<sup>17</sup> Loukas A., *'Arbitrability International & Comparative Perspectives* (Kluwer Law International 2009' (n 16)

*mutatis mutandis*<sup>18</sup> to the validity issue at the arbitration commencement stage, because to have an award set aside, annulled, or enforced at the post-award stage, the court would have to make validity determination again. If the court decides that the award cannot be enforced because it was not valid under the applicable law, a great amount of expense and time will have been lost.

#### 4.1 Courts Apply Article V of the New York Convention *Mutatis Mutandis*

In Japanese Supreme Court decision 1994, *Japan Education v. Kenneth J. Feld*,<sup>19</sup> the issue was whether the president of a company was bound by an arbitration agreement entered by his company.<sup>20</sup> The court applied New York law, which had been chosen by the parties as the governing law, to the interpretation of the arbitration agreement.<sup>21</sup>

The German Supreme Court came to a similar conclusion, in *German (F.R.) manufacturer v. Dutch distributor* (1973). The court ruled that parties have the freedom to choose the law applicable to the arbitration agreement and, absent any indication of applicable law by the Parties, the law of the country in which the award "will be made" applies.<sup>22</sup>

#### 4.2 Court Apply the Substantive Rules Approach

A "substantive rules" approach is when national arbitration laws are regulated for the purpose of promoting international arbitration, and there is explicit language specifying which law to apply to the validity of

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<sup>18</sup> Means that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.

<sup>19</sup> *Japan Education Co. v. Kenneth J. Feld*, 1499 Hanrei jiho 68 (Tokyo High Ct., May 30, 1994)

<sup>20</sup> *Arbitration in Asia* (Moser MJ ed, 2nd edn, 2017)

<sup>21</sup> Inoue A, *International Arbitration 2012: Japan* (Global Legal Group 2012) <[https://www.amt-law.com/asset/res/news\\_2012\\_pdf/120831\\_2945.pdf](https://www.amt-law.com/asset/res/news_2012_pdf/120831_2945.pdf)> accessed 30 May 2018

<sup>22</sup> 8 U 129/72, 1973 (Germany, Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe))

international arbitration agreements issue. Domestic courts can apply such rules in their jurisdiction without any conflict of laws issues arising.

The Swiss Law on International Arbitration is set out in Chapter 12 of the Private International Law Act 1987 (PIL Act).<sup>23</sup> Article 178(2) of IPL provides “...Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.” This Swiss rule goes beyond any of the traditional conflict of laws approaches in upholding the validity of an arbitration agreement. By this provision, when an arbitration agreement is invalid under the law chosen by the parties, Swiss courts will still enforce an agreement considered to be valid under Swiss law or the law governing the main contract. This judicial assistance is extremely pro-arbitration but it can cause an enforcement issue under the New York Convention since the invalidity of an arbitration agreement according to the law chosen by the parties can justify refusal of enforcement.<sup>24</sup>

French arbitration law was codified in 2011. The main source of legislation on arbitration is Book IV of the Code of Civil Procedure.<sup>25</sup> It was developed by the Court de Cassation<sup>26</sup> in the *Dalico*<sup>27</sup> decision in 1993. The dispute in this case arose out of a contract for the construction of a water supply between the Libyan municipal authority and a Danish contractor.

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<sup>23</sup> *Swiss International Arbitration Law* (Swiss Chambers' Arbitration Institution 2017) <<https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws>> accessed 30 May 2018

<sup>24</sup> Swiss International Arbitration Law (n 23)

<sup>25</sup> French Arbitration Law 2011, embodied in Articles 1442 through 1527 of the French Code of Civil Procedure (CCP)

<sup>26</sup> The **Court of Cassation** (French: *Cour de cassation*) founded in 1804 is one of France's courts of last resort having jurisdiction over all matters triable in the judicial stream with scope of certifying questions of law and review in determining miscarriages of justice.

<sup>27</sup> French *Cour de cassation*, 20 December 1993, *Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors*, 121 Clunet 432 (1994)

The Court of Appeals rejected the application finding that both parties abided by the arbitration agreement without determining which law was applicable to the arbitration agreement.<sup>28</sup>

## 5. Conclusions and Recommendations

Thai courts do not have the substantive rules approach to resolving disputes over the conflict of laws determining the validity of the international commercial arbitration, because section 14 of the Thai arbitration Act is silent on such issue. Additionally, there is still no guidance from the Supreme Court on the issue. Despite many advantages of the substantive rules approach to international arbitration, there are also some disadvantages. For example, under Swiss rules, either the Swiss rule or the law governing the main contract can be applied on the validity of an arbitration agreement. This can raise an argument during the award enforcement stage that the arbitration was invalid since it was not in accordance with the law chosen by the parties.

Since Thailand is a contracting state to the New York Convention<sup>29</sup>, and the language and concept of law in section 14 was adopted from Article II of the Convention, it would be a solution for Thai courts to apply the Convention on the validity issue. Considering there is an attempt to project Thailand's image as an arbitration-friendly jurisdiction, judicial assistance on this issue is significant in determining the validity issue. When courts have standards of practice on international arbitration agreements that are flexible and favorable to international arbitration, then the country would have explicit factors demonstrating itself as an arbitration-friendly country.

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<sup>28</sup> Julian D M Lew LAM, Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)

<sup>29</sup> The accession to the convention on December 21, 1959

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## LEGAL PROBLEMS OF TRAVEL AGENCY BUSINESS AND TOUR GUIDE IN THAILAND\*

*Sureeporn Huengwattana\*\**

### Abstract

The most important strategy according to UNWTO framework to approach sustainable tourism is safeguarding tourists while traveling. Thailand follows this policy by enforcing Travel Agency Business and Tour Guide Act B.E.2559 (2016) where standards of travel agency business and tour guide professional and tourist protection measures against unfair practice caused by tourism service providers are introduced.

However, this Act doesn't allow foreigners to operate travel agency business and to register for tour guide license by economic reason. In fact, travel agency business operator and the tour guide professional need to be developed by special knowledge and skilled labors from foreign countries. Additionally, the problem of zero-dollar tour is also intensified by the unclear scope of travel agency business in this Act where transportation provider who arrange service for touring has never been classified as the travel agency business and being out of control of registration system. The mentioned problems create substandard tourism service, unfair practice toward legal right and benefit of tourists, economic impact and unfavorable tourism image.

This study aims to find new solution to resolve the difficulties arising from Travel Agency Business and Tour Guide Act by comparing with Chinese and South Korean laws which are considered as the sufficient tourist protection laws. The proposed new legislative solutions include addressing all types of transportation provider to an explanation of travel agency business, permitting

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\* This article is summarized and rearranged from the thesis "Legal Problems of Travel Agency Business and Tour Guide in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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foreign investment in travel agency business and permitting foreigner to engage in tour guide professional that may regulate the whole tourism industry and benefit to all parties.

**Keywords:** Travel Agency Business, Tour Guide, Zero-Dollar Tour

## 1. Introduction

Tourism industry, plays an important role in both economic and social development in many countries. It is considered as a significant factor to overcome the poverty and influences social revenues and job opportunities increasing among the local community. Tourism also raises the living level of local people to be self-employed, sell their local products and services.<sup>1</sup> Additionally, a cooperation of Association of South East Asian Nations (ASEAN) in economy, social and cultural development, tourism was designated by the members countries to be promoted as the main goal in the AEC's strategy. As a result, the country has launched tourism law and legal measures applicable to any movements in tourism sector in order to create the best image of tourism industry and to improve an efficiency of tourism market among international competition. Travel Agency Business and Tour Guide Act B.E.2551 (2008) was enacted and became effective for the benefits of all parties involved in the tourism industry in order to satisfy the following purposes:<sup>2</sup>

- 1) To develop the standards of tourism services and conditions of tourism attractions to be complied with the law and international standards;
- 2) To preserve travel agency business operation and to preserve tour guide as a career for Thai nationals only and;
- 3) To improve protection measures against any unfair practice of service providers and tour operators toward tourists.

In this regard, this Act is not fully efficient to tackle with the legal problems of zero-dollar tour and scope of travel agency business, problem of use of a Thai national as a nominee in travel agency business, and problems of tour guide.

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<sup>1</sup> Aslan Jashi, 'Role of Tourism for Developing Social and Economic Conditions' *Business Week* (U.S.A., 15 June 2017)

<sup>2</sup> Remark of Tourism Business and Guide Act B.E.2551 (2008)

## 2. Tourism Industry in Thailand

Recently, tourism industry approximately creates more than 30 million international arrivals and generate more than 1.5 trillion baht each year.<sup>3</sup> Generally, the tourism industry includes every sector of providing infrastructure and services for tourists and produce direct impact to the economy such as hospitality, transportation, catering, communication, retail, attraction and recreational activities etc. The tourism industry also need supports from government authorities and private sectors in connecting of all tourism factors. Tourism industry in Thailand is large size service industry covering with both direct and indirect tourism services that needs capital skillful workers and special techniques to organize every factor in the industry.

Moreover, tourism business, a business sector in tourism industry, is an activity of operating tourism services for making profit from businesses including with transportation service, accommodation service, food and travel agency business and others. The tourism business plays an important role to support the operation of related businesses in service sector. Tourism business can be identified as the main driven in tourism industry.

### 2.1 Importance of Tourism Industry

Tourism industry has advantages over economy structure of the nation with its higher competitive potential on both demand and supply than other industry.<sup>4</sup> Moreover, productivity of the tourism industry offering to tourist is the beauty of nature, man-made architectures, traditions and customary way of life which are concrete and sustainable. Tourism business does not need a lot of capital like other heavy industries, but its prosperity comes from individual

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<sup>3</sup> Department of Tourism, Statistic Review (January 2017) <<http://www.tourism.go.th>> accessed 25 January 2017

<sup>4</sup> Terdchai Chuaybumrung, 'TAT Tourism Journal' (2014) 4 <<http://www.etatjournal.com/web/menu-read-web-etatjournal?catid=0&id=615>> accessed 10 November 2016

satisfaction on quality of service providing. The country and communities gain benefit from this industry in many ways as states below.

### **2.1.1 Source of Foreign Exchange Earning**

Tourism industry has contributed to the balance payments of the country by generating foreign income into the economic system. Tourists around the world are regarded as exports, while residence of a country travelling abroad is regarded as an import that causes foreign currency exchanging.<sup>5</sup>

### **2.1.2 Employment Opportunity**

Tourism industry a limitless industry that needs man-service, has provides benefit on employment opportunities of both business operators, local people and other industries.<sup>6</sup> Direct employment includes all jobs that directly result from tourist expenditures. Indirect employment means to jobs resulting from the effects of the tourist expenditures. The secondary businesses related to tourism such as real estate, automobile services and repair, and shipping also require for greater employment. The tourism income from both primary and secondary sources has stimulate the high production of so-called multiplier effect on tourism industry also in related industries.

### **2.1.3 Source of Public and Private Income**

Tourism industry is a source of income for public, private and government sector. Income from tourism lead to the gross national product of the country. The government revenue received from tourism in three ways: direct taxation on employees as well as goods and service; indirect taxation such as customs duties; and from revenue generated by government-owned businesses which are known as the income of public. For private sector such as

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<sup>5</sup>Robert Christie Mill, *Tourism : The International Business* (1<sup>st</sup> edn, Prentice-Hall International Editions 1990) p.29

<sup>6</sup> Charles R. Goeldner, Brent J.R. Rotchie, and Robert W. McIntosh, *Tourism: Principles, Practices, Philosophies* (12<sup>th</sup> edn, Wiley & Sons 2011) p.13-15

business owners, local businesses, selling arts and handicrafts can make profit through their businesses called private income.

#### **2.1.4 Cultural Exchange and Publicity of the Nation**

Travelling is an initiative of cultural exchange in societies. In other words, the cultural diversity spreads to other regions when people travel. The tourism is a significant key showing an identity of the country expressed through people's lifestyle, languages, foods, arts, architectures, folks, and cultures. Tourism encourages people to preserve the country's legacy inherited from the past to new generation as cultures show prosperity of the past. Other than cultural exchange, tourism contributes to publicize different parts of the nation to the world through the tourists. When people travel within the country, the result is the harmony of national unity likewise international tourism will help strengthen the harmony of national unity and lead to stable relationship between countries.

#### **2.2 Problems of Travel Agency Business and Tour Guide in Thailand**

Normally, when a tourist thinks about travelling on a package tour arranged by travel agency, a business of providing travel and tourism related services to tourists, the tour guide always become a necessary figure who plays an important role towards both the travel agency and the foreign tourists. The main purpose of travel agency business is making revenue from these tourism products and services. Meanwhile, in providing services for tourists, the travel agency needs the tour guide to be its representative to create a friendly relationship among local community. The identities of the country have expressed through the knowledge about history, art, culture and traditions performed by the tour guide.

Although Thailand has laws and regulations relating tourism industry, the existing laws fail to tackle unfavorable impacts of zero-dollar tours, the use of nominee and the problems of tour guide that are summarized below.

### 2.2.1 Zero-Dollar Tour

Phenomenon of Zero Dollar Tour mostly exists among Chinese inbound tourists who travel with group tour to several destinations in Thailand where they are tricked to buy cheap package tour in their country, but their expenses become greater upon arrival.<sup>7</sup> These foreign tourists, however, are not accompanied by the travel agencies that they initially deal with. They are instead transferred to other companies operating in Thailand who are associated with the zero-dollar counterparts. The tourists will be later pressured into misinterpretation of product information, purchasing expensive products or services, defects on contracted service by these secondary companies, in an attempt to extract unreasonable sums and profits.

Zero-dollar tour begins from the fierce competition for Chinese tourists among Thai travel agencies (inbound) who battle for the tremendous Chinese tourists. They will offer the various package tours for the tour operators (outbound) in China to sell for the tourists in China who want to visit Thailand. The attempt to get tremendous Chinese group tours causes very low-price package tours including airfare and low-cost accommodation offered in large quantities for the Chinese agencies to resell. Because of the high competition among Thai travel agencies in Chinese inbound tourism market, somehow the offer price of package tour is reduced to be lower than its cost (tour fare) to persuade the Chinese agencies who have the tourists in hands to receive more profit. The demand for the Chinese tourist will be increased until the offer price of package tour touches down to zero dollar which is the beginning of the process called “zero-dollar tour”. It means the Chinese tour operators have no costs for package tour price, unlike the tour operators in Thailand who have to pay for the whole program tour, facilities and services. In this circumstance, Chinese tour operators earn profit in two ways, but not for Thai tour operators who pay for those tourists and need to earn profit therefrom.

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<sup>7</sup> ทีมเศรษฐกิจ, 'เปิดโปงภัยร้าย 'ทัวร์ศูนย์เหรียญ' บั่นทอนท่องเที่ยวไทย' ไทยรัฐ (กรุงเทพ 6 กรกฎาคม 2558) < <http://www.thairath.co.th/content/509538> > accessed 6 September 2016 (Team Sethakit, 'Perdpong Pairai Tour Soon Rein Buntorn Tongteaw Thai' [Zero-Dollar Tour, A Dangerous to Thailand Tourism Industry] Thairath (Bangkok 6 July 2015)).

It seems like the tour operators in Thailand have their benefit lost, and one question may arise as well that “How the Thai tour operators get profit from operating Zero Dollar Tour?”. The answer is that more numbers of tourists makes more profit for them because the Chinese tourists have the highest spending ability during their trip. The tour operators seek advantages by setting up program tour limited on where they would take the tourists to visit within their network shops and restaurants. Many business tactics have been used while touring with the purpose to retake the money from the tourists’ purchases including selling optional tours. Restaurants, jewelry stores, leather goods shops and entertainment venues often charge the tourists exorbitant prices. Even the group tour needs a tour guide, the tour guide will be influenced by paying commissions as much as the tourists spend if they take the tourists to these places. This activity would be benefit for the business entrepreneurs in term of commerce, shorten cost and receiving more profit.

### **2.2.2 Problem of Use of a Thai National as a Nominee in Foreign-owned Travel Agency Business**

Thailand is considered as a charming spot for visitors from the mainland of China, the business-people who are expected to establish business in the country. Many of them are interested to operate tourism business and service sector as it generates major revenue, which comes from Chinese tourists’ spending. When the profit captured in tourism global value chain (GVC) comes from the same national, the Chinese business-people use this opportunity to set up consortium of nominee companies in Thailand for returning benefits to themselves.<sup>8</sup> It is found that a number of tour operator businesses have Thai nationals being their agents to register tour operator license, and numerous souvenir shops are owned by the foreign agencies. The misconduct of being nominee in foreign tour operator seems to be a further violation of law resulted from the zero-dollar tour that is now wide spreading among the

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<sup>8</sup> Richard Westra, Taylor & Francis, ‘*The Political Economy of Emerging Markets: Varieties of BRICS in the Age of Global Crises and Austerity*’ (16 March 2017) p.171

Chinese inbound tourism markets without registration system of the government authorities.

Causation of this problem comes up with an intention to control the payment of Chinese group tours by Chinese capitalists while they are travelling in Thailand. In their aspect, being the tour operators are easier to manage the route of group tour to the specific places where the tour operator can get higher benefit. The situation begins when the Chinese business-people who operate as a tour operator and other businesses relating tourism start to open up brunches in Thailand by representing Thai nationals as the owner of such businesses. In practice, the nationals who represent as an individual tour operator, or nominee shareholders in a travel company have no management power within the firms that controlled by the principle foreign capitalists. Once the zero-dollar tour occurs, the foreign capitalists normally also invest in restaurants, man-made tourist attractions, souvenir shops, and some accommodations called “tourist checkpoints”. These checkpoints are organized in package tour that the Chinese group tours are taken to visit for purchasing goods or services. As a result, the income from the group tours at these checkpoints directly goes to the foreign agencies, rather than contributes to taxation system and Thai local tourist businesses.

### 2.2.3 Problems and Difficulties of Tour Guide in Thailand

Nowadays, there are about 70,000 Thai nationals have registered as legal tour guides but only 20% of them are actually performing this job.<sup>9</sup> Due to the growing numbers of inbound tourists, especially tourists who do not speak English, it results the high demand for tourist guide in foreign languages. Thailand needs an additional 7,758 tour guides speaking Chinese, 4,014 speaking Malay, 1,176 speaking Russian, 1,148 speaking Korean, and 845 speaking Hindi.<sup>10</sup> Some travel agencies decide to take a risk by hiring illegal tour

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<sup>9</sup> Om Jotikasthira, ‘Tour guides: ‘Savage’ foreign criminals steal our jobs’ *Bangkok Post* (Bangkok, 10 July 2017)

<sup>10</sup> *Ibid.*

guides to serve their tourists with lower paid and poor quality. In addition, the large amount of revenue from being zero-dollar tour operator has influenced to the problem of using illegal tour guide who has shortage knowledge about Thai history, culture, tradition and tourist attractions. These illegal tour guides also cause improper behaviors and unfair practice towards tourists including forcing the tourists to buy goods, souvenirs, optional tour or other service in order to receive commission.

Moreover, a legal relation between a tour operator and a tour guide is mostly under a hire of work contract whereby an amount of wage is paid by quantity of work and not guarantee to receive stable wages every month. Unlike a labor contract that has more stable income and labor protection. The following problems are remained from the enforcement of some provisions of Travel Agency Business and Tour Guide Act that require all tourist guides to be Thai nationality and characteristic of the hire of work contract:

- 1) Lack of legal tour guide in some foreign languages;
- 2) Increasing substandard tour guides and;
- 3) Shortage welfare and unstable protection

### **2.3 Tourism Industry and Foreign Direct Investment**

Foreign direct investment (FDI) seems to contribute positive economic development to Thailand's tourism industry by being source of foreign capital earning to the government and influencing the quality and quantity of capital formation into our country.<sup>11</sup> It also enlarges an employment of skilled-workers in tourism field and increases the total income of local people. Additionally, multinational corporations (MNCs) are regarded as beneficial agents for the international transfer of technology and knowledge that improve infrastructure and the level of social well-being of the host country. Moreover, FDI has a positive function to the economic stability of the host country by increasing capital accumulation which is achieved through introduction of new inputs to businesses and new technologies in productions. In this respect, the new

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<sup>11</sup> Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (1<sup>st</sup> edn, Ashgate 2002) p.10

contributions of FDI allow domestic firms to adopt the utilization of these methods to improve their domestic production performance.<sup>12</sup>

Foreign Direct investment (FDI) refers to a physical investment made by a company or individual in one country in business interests in another country, in the form of either establishing business operations or acquiring business assets, such as ownership or controlling interest in a foreign company. It reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor.<sup>13</sup> The foreign direct investors have got benefit from the customary international law and treaty that their physical properties and other assets invested are protected under the principles of diplomatic protection and state responsibility.<sup>14</sup> As more foreign investment comes into a country, it can lead to the greater investments because others see the country as economic stability.

### 3. Comparative Legal Measures and Solutions to Problems in Thailand, China and South Korea

From studying on tourism laws in China and South Korea where the laws are effective to apply with their tourism industry, tourism industries of both countries are similar to Thailand where tourism is promoted as a national agenda. Tourism in China is promoted for the Chinese traveling within the country because of the large scale of area, whereas inbound tourism is targeted for South Korea. Chinese and South Korean laws are considered to be the most comprehensive legislation in every aspect of tourism industry compared to other countries in Asia.

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<sup>12</sup> Albiman, Masoud Mohammed, 'What Are the Impact of FDI to Economic Growth?', (2014) 4 p.80

<sup>13</sup> OEDC, *Main Concepts and Definitions of Foreign Direct Investment* (4<sup>th</sup> edn, OECD 2008)

<sup>14</sup> Marc Mancini, *Access: Introduction to Travel and Tourism* (2<sup>nd</sup> edn, Delmar Cengage Learning 2012) p.3

Law of the People's of Republic of China on Foreign-Funded Enterprise allows foreign investment in two types of travel agency business which are domestic and inbound where the spending of foreign tourists is created within the country and contribute to the local. Foreigners can legally apply for tour guide license in China if they complete the qualifications and standards required by Chinese laws. The travel agency who want to employ a tour guide must be agreed upon a labor contract. Additionally, travel agency business in Chinese law includes all kinds of transportation service provider.

Additionally, China has the responsive Tourism Act and Regulations on Travel Agency 2009 to protect its tourism industry and tourist rights based on the idea of harmonizing social and economic. The tourism laws of China apply to all parties and activities involved in its tourism industry including tour operator, tour guide, service provider, leisure activities and other forms of tourism activities organized within the territory of China, and the business operations providing relevant tourism services. The country gives awareness on the important of economic cooperation and technical exchange with foreign countries that will beneficial to it economic results. The legitimate rights and interests of foreign enterprises is protected by the relevant laws and regulations of China. The travel business and services operation are allowed for the foreigners when they completed the requirements by laws that is helpful to avoid the problem of using nominee in the business operation, not only tourism business but other business also.

Meanwhile, South Korean laws also have the same objective as the Chinese laws in the context of tourism promotion and tourist protection. According to Tourism Promotion Act, establishing travel agency business by foreign investors in South Korea is widely supported by Korean government in two types of corporations including local corporation and private business. All foreigners have equal rights to apply for a tour guide license at the same qualifications and requirements as the Korean people according to the principle of liberalization. When a travel agency needs a tour guide to facilitate the tourists, a labor contract must be signed between the two parties as to protect the tour guide under minimum standard of labor law. Lastly, South Korean

tourism laws classify transportation as sub-sector of tourism business and identify transportation service provider as a travel agency if it conducts transportation facility for tourists by arranging a package tour. Thus, the transportation providers who involved in the package tour have to apply for travel agency business license.

Eventually, Korean laws improve its tourism industry and approach new development and technologies to the country based on liberalization and foreign investment promotion. Opportunities of the foreigners to participate in tourism business are interweaved with identities expression of the locals result sustainable tourism in Korea. Tourist protection policy of both countries leads to an interception of any private transportation providers to engage in zero-dollar tour. This solution causes benefits to the tourists and brings the tourism income directly to the governments.

In case of Thailand, scope of travel agency business does not include transportation providers as travel agency business, while all types of transportation providers. Additionally, the rights of foreigners to participate in tourism-related business and tour guide professional in Thailand are limited under the laws with an undeveloped reason that Thai people are not yet ready to compete in tourism business professional with the foreigners.<sup>15</sup> Moreover, the restriction on nationality of tour guide leads to a lack of legal tour guide in some foreign languages, increase of substandard tour guide, using illegal tour guide to reduce cost. The legal relation between tour guides and tour operators are mostly under hire of work contract, whereat the tour guides have shortage welfare and stability in the career.

#### **4. Recommendations**

Travel Agency Business Act of Thailand should adopt the idea of grouping tourism-related business from South Korean Tourism Law. Where travel business is a subcategory in tourism business that refers to an agent for

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<sup>15</sup> Foreign Business Act B.E.2542 (1999) Section 6, 8, 7, 10 and 12

traveler or business operator who arrange the mentioned tourism services or other facilities required in travelling. Tourism laws of China can also be the model of Thai laws for anybody who arranges transportation service for tourists when soliciting, organizing and receiving tourists is concluded as travel agency. Both foreign laws undertake all types of transportation providers who facilitate the tourists in associate with tourism as travel business.

In order to increase well-being of people and improve many of technologies and knowledge into tourism service, it is necessary to allow foreign investment in tourism industry or as travel agency business. Registration and taxation system shall be applied to the foreign businesses as to make the efficient tourism industry and easier for tourism authorities in charge to oversee the foreign travel agency business operations. Moreover, the problem of shortage tour guide will be decreased by adopting the concepts of freedom in occupation and applying labor contract to fulfil the relationship between tour operator and tour guide. Allowing foreigners to participate in tour guide professional also be the solution to solve the problems of substandard tour guide in Thailand

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**THAI LEGAL CONTROL AND LIABILITY OF LIVING MODIFIED ORGANISMS:  
A CASE STUDY OF LMO PRODUCTS\***

*Kanokpan Cholchawalit\*\**

**Abstract**

Nowadays the modern biotechnology has a significant role in several fields. However, despite of several advantages, there are also concerns about the risks of Living Modified Organisms (LMOs) to the environment and human health. Accordingly, the Cartagena Protocol on Biosafety (CPB) and the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (Supplementary Protocol) were issued. Since Thailand is the Party to the CPB and is considering to ratify the Supplementary Protocol, Thailand has the obligation to provide necessary and appropriate legal control and liability regarding all operations associated with LMOs. Yet, Thailand still has no specific law regulating LMO products, but relying on the existing regulations which resulting in an unsystematic control system. Therefore, this article will point out the drawbacks and obstacles to the application of current regulations and propose the adequate legal control and liability on LMO products in Thailand.

**Keywords:** Living Modified Organisms (LMOs), Biosafety, Cartagena Protocol, Nagoya-Kuala Lumpur Supplementary Protocol

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## 1. Introduction

While the world population has significantly increased and agricultural areas are limited, there is a belief that LMO products will resolve a food shortage. However, since a genetically modified technology is considered as a very new technology and, still, no scientific evidence affirming that LMOs are safe, there are some concern about ‘safety’ of LMO products whether LMO products will cause any risks to human health, the environmental contamination, etc.

Moreover, there is also a controversial that some countries may use such concern as a tool of trade barrier.<sup>1</sup> That is to say, some countries may reject to import other countries’ products by alleging that they concern about the biosafety of LMO products. As a result, it will impact not only LMO products, but also traditional agricultural and organic farming products. Accordingly, every sector is of the opinion that there should be the legal control of LMO products.

In Thailand, the adoption of current laws to control LMO products still has several obstacles and drawbacks. Therefore, this article aims to propose adequate legal measures controlling LMO products by studying the relevant factors and contexts more profoundly including the analysis of current legal control on LMO products in Thailand.

## 2. Specific Natures of LMOs

### 2.1 The Capability of Transferring or Replicating Genetic Materials

A term ‘LMOs’ is always used as a synonym of ‘GMOs’, but GMOs seems a broader term. The word ‘living’ emphasizes that LMOs contain an ability of self-reproduce<sup>2</sup> whereas GMOs encompass both living and dead

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<sup>1</sup> Pariyaporn Thengprasert, ‘Legal Measure in relation to Import and Export of Genetically Modified Products’ (Master of Laws, Thammasat University 2008) 21

<sup>2</sup> MoonSook Park, ‘A Comparative Study of GMO Labeling and Liability Systems in the US, EU, and South Korea: The Circumstances and a Future Potential for Harmonization’

organisms. Since the CPB<sup>3</sup> aims at preventing any effects that may occur due to the self-reproduction of living modified organisms, it adopts a term 'LMOs' instead of 'GMOs'.<sup>4</sup>

## 2.2 The Uncertainty of Risks

Until now, no scientific certainty affirms the risks of LMOs. The risks assumed to derive from LMOs are recognized as potentially-but not yet proven to be- harmful. So, LMO products should be subject to the precautionary principle which arises from the concept of avoiding or minimizing the environmental damage by careful planning to prevent potential harms on the environment and human health derived from the future activities.<sup>5</sup>

## 2.3 Serious and Irreversible Damages<sup>6</sup>

This is one reason for a legal control on LMO products. LMOs contain a gene-altered from the original species and capable of reproduction, if LMOs had been released to the environment without control, it might be cross-breeding with the original species resulting in the alteration or extinction of the original ones and the loss may not be restorable or reversible.

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(Theses and Dissertations. Paper 4, Maurer School of Law, Indiana University 2014) 1 <<https://www.repository.law.indiana.edu/etd/4/>> accessed 3 March 2018

<sup>3</sup> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (hereinafter 'the CPB')

<sup>4</sup> IUCN, *Current Knowledge of the Impacts of Genetically Modified Organisms on Biodiversity and Human Health* (2007) 6 <[https://cmsdata.iucn.org/downloads/ip\\_gmo\\_09\\_2007\\_1\\_.pdf](https://cmsdata.iucn.org/downloads/ip_gmo_09_2007_1_.pdf) > accessed 12 March 2018

<sup>5</sup>The Standing Committee on Science, Information Technology and Mass Communication of the National Legislative Assembly, 'Report of the Consideration on "the Draft of Biosafety Act B.E...."' (The Standing Committee's Report) (2016) 6

<sup>6</sup> The Standing Committee's Report (n 5)

## 1. Purpose of Legal Control on LMO Products

Although there is still no scientific evidence affirming the safe or risk of LMOs, LMO products have a very close relation to our daily life; we even consume products having LMOs as an ingredient such as tofu, soy milk, and corn. Thus, the legal control measures of LMO products should be carefully stipulated and encompass every related process with the main objective of preventing the environment and human or animal health from potential adverse effects derived from LMOs.

## 4. International and Foreign Legal Controls on LMO Products

### 4.1 International Standards

The CPB and the Nagoya-Kuala Lumpur Supplementary Protocol<sup>7</sup> have been issued to control the transboundary movement of LMO products. including the control of transboundary, transport, packaging, identification and the safe utilization of Living Modified Organisms (LMOs).

#### 4.1.1 The Cartagena Protocol (CPB)

The CPB is one of the most important international agreement representing the collaboration of the world community to control the transboundary, transport, packaging, identification and the safe utilization of LMO products. The CPB controls all LMOs except LMO pharmaceuticals for humans addressed by other relevant international agreements or organizations.<sup>8</sup> Since LMOs may spread in any area, the transboundary movements of LMOs between Parties and non-Parties to the CPB shall also subject to this Protocol.<sup>9</sup>

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<sup>7</sup> The Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (hereinafter 'the Supplementary Protocol')

<sup>8</sup> CPB, art 5

<sup>9</sup> Ibid. art 24 (1)

The CPB applies the Advance Informed Agreement (AIA) procedure to the first intentional transboundary movement of LMOs for intentional introduction into the environment of the Party of import. The AIA relies upon the “risk assessment”.<sup>10</sup> A risk assessment process is a precautionary approach by studying any potential impacts before the decision of consent to proceed such activity would be taken. The concept of this measure is to prevent the potential damages in advance which is better than to remedy when the damage has already occurred.<sup>11</sup>

#### **4.1.2 The Nagoya-Kuala Lumpur Supplementary Protocol**

The Supplementary Protocol imposes the Parties to provide the domestic law on ‘administrative approach’ and ‘civil liability’ in a case there is a sufficient likelihood of damage to occur as well as when the damage has occurred.<sup>12</sup>

##### **4.1.2.1 Administrative Approach**

In the event of damage, the operators must inform the competent authority immediately, evaluate the damage, and take appropriate response measures.<sup>13</sup> In a case there is a sufficient likelihood of damage, the operators are required to take appropriate response measures to avoid such damage.<sup>14</sup> If the operator fails to do so or the operator of LMOs in question cannot be identified, the competent authority must implement the appropriate response measures to remedy such damage.<sup>15</sup>

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<sup>10</sup> Ibid. art 15

<sup>11</sup> Tanchanok Kongdenfa, ‘Obligation of Thailand regarding Biosafety Control Measures under the Cartagena Protocol on Biosafety to the Convention on Biological Diversity 1999’ (Master of Laws, Thammasat University 2009) 67

<sup>12</sup> Supplementary Protocol, Introduction; art 5

<sup>13</sup> Ibid. art 5

<sup>14</sup> Ibid. art 5, para 3

<sup>15</sup> Ibid. art 5, para 4

#### 4.1.2.2 Civil Liability

Regarding civil liability for damage caused by LMOs, there are 3 alternatives to implement the Supplementary Protocol. Firstly, the Party may apply its general law on civil liability if there is no specific law on this issue. Secondly, the Party may apply or develop civil liability rules and procedures specifically for the damage caused by LMOs. Thirdly, the Party may apply or develop a combination of both general and specific rules and procedures.<sup>16</sup>

### 4.2 Existing Legal Control in Foreign Countries

The different experiences of each state resulting in the different perspectives toward LMO products and causing different levels of LMO products legal control in each country.

#### 4.2.1 European Union (EU)

The EU, one of the Party to the CPB, has established the strictest legal control on LMO products which, sometimes, being criticized as a trade barrier. The EU allows the cultivation, import, or distribution of LMO products only when there is the risk assessment certifying the safety of such product and it has been approved by the EU's authorized entity (EFSA).<sup>17</sup>

A 'zero-tolerance' policy applies to food and feed products; the LMOs contamination level must be 0% for imported food and must not exceed 0.1% for feed products. In addition, food and feed containing LMOs higher than 0.9 % of the food ingredients must be labeled.<sup>18</sup>

#### 4.2.2 United States (U.S.)

The U.S. applies same legislation as conventional products to LMO products because of the perspective toward LMO products is as same as conventional products. For example, the production and distribution of

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<sup>16</sup> Ibid. art 12, para 1

<sup>17</sup> Regulation (EC) 1829/2003 on genetically modified food and feed (22 September 2003)

<sup>18</sup> Ibid

LMO plants will be regulated by the Animal and Plant Health Inspection Service (APHIS) and may be supervised by the Environmental Protection Agency, and LMO food products shall be subject to the review of the FDA according to the Federal Food, Drug, and Cosmetic Act.

However, the U.S. applies a mandatory basis to LMO-labeling control allowing the manufacturers to disclose LMO information on their products by text, symbol, or electronic or digital link.<sup>19</sup> Nevertheless, these alternatives to labeling are criticized as not indeed protect the consumer right to know.

#### 4.2.3 Japan

As the Party to the CPB, Japan enacted the Japanese Cartagena Act to control LMO products. The LMOs used in the opened system such as LMOs for conveyance and cultivation of food or feed shall be supervised by the Ministry of Environment joined with other competent ministries depending on the purposes of use. The approval will be considered by the experts, and the public consultation must be conducted before the approval of the cultivation or distribution of the LMOs in question.<sup>20</sup>

Japan adopts the mandatory basis of LMO labeling when any product has LMO as “the top three ingredients” exceeding 5% of total weight of ‘final product’. The label disclosing the LMOs containment information must display in Japanese.<sup>21</sup> Furthermore, the imported food containing GM DNA or protein between 1% and 5% must label as

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<sup>19</sup> National Bioengineered Food Disclosure Act, 7 USC 1639b, s 293 (b)(2)(D)

<sup>20</sup> Alien species and LMO Regulation office, Ministry of the Environment, ‘Biosafety Regulations in Japan-From Application to Approval of Type 1’ <[http://www.biodic.go.jp/bch/english/cartagena/s\\_04.html](http://www.biodic.go.jp/bch/english/cartagena/s_04.html)> accessed 12 March 2018

<sup>21</sup> Wendan Wang, ‘International Regulations on Genetically Modified Organisms: U.S., Europe, China and Japan’ (2016) <[www.foodsafetymagazine.com/magazine-archive1/junejuly2016/international-regulations-on-genetically-modified-organisms-us-europe-china-and-japan/](http://www.foodsafetymagazine.com/magazine-archive1/junejuly2016/international-regulations-on-genetically-modified-organisms-us-europe-china-and-japan/)> accessed 12 March 2018

“genetically modified organisms not segregated”, and the products containing less than 1% do not need to label.<sup>22</sup>

## 5. The Current Situation of LMO Products Legal Control in Thailand and Recommendations

Nowadays, Thailand seems to have an anti-LMO policy toward LMO products; the government has never allowed the cultivation of LMO plants for commercial purpose in Thailand. Nevertheless, although the cultivation of LMOs for commercial purpose is prohibited, the LMO contamination in agricultural fields has been discovered in our country several times.<sup>23</sup> As a consequence, the agricultural products exported from Thailand were rejected and restricted the importation by the import countries for various cases due to the contamination of LMOs in those products.<sup>24</sup> This matter causes the critical economic problem to Thailand since many foreign countries, ban our agricultural products because of biosafety and human health concerns.

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<sup>22</sup> ‘Status in Japan – the issues of displaying genetically modified food in Japan’ <<http://altertrade.jp/alternatives/gmo/gmojapan>> accessed 11 March 2018

<sup>23</sup> Natwipa Ewsakul, ‘ย้อนรอยจีเอ็มโอ 18 ปี: ภัยคุกคามอับโดยทางอาหารของประเทศไทย 18 years of GMO: Thailand's food sovereignty threat’ (2013) <[www.greenpeace.org/seasia/th/PageFiles/505377/18-year-of-gmo.pdf](http://www.greenpeace.org/seasia/th/PageFiles/505377/18-year-of-gmo.pdf)> accessed 12 March 2018

<sup>24</sup> Ajaree Thavornmas, ‘EU Regulations on food safety: The challenge of Thailand for the export of agricultural and food products to the EU market’ (2013) 27 <[www2.thaieurope.net/wp-content/uploads/2013/10/Food-safety-paper-by-Ajaree-Tavornmas-final-22.08.2013-word97-version.pdf](http://www2.thaieurope.net/wp-content/uploads/2013/10/Food-safety-paper-by-Ajaree-Tavornmas-final-22.08.2013-word97-version.pdf)> accessed 12 March 2018

See also Case Adams, ‘Which Countries Ban GMO Crops or Require GE Food Labels?’ (August 2, 2016) <[www.reálnatural.org/many-countries-ban-gmo-crops-require-ge-food-labels/](http://www.reálnatural.org/many-countries-ban-gmo-crops-require-ge-food-labels/)> accessed 29 November 2017

At the international level, as one of the Parties to the CBD, Thailand has done the accession to be a party to the CPB since 10 November 2005.<sup>25</sup> Thailand, therefore, has to implement the CPB by providing legal measures controlling LMOs.<sup>26</sup> Nevertheless, until now, Thailand does not have a specific law controlling LMO products; the LMOs control is subject to the existing laws as far as applicable. The application of current regulations may not respond to the objective of the CPB and this situation causes several issues in controlling LMO products.

First, no law defines ‘LMO’ as an object controlled under the law resulting in the issue of interpretation whether ‘LMO’ can be an object controlled by such regulation or not.

Second, LMO products have been controlled under different laws. So, the responsible agencies are scattered among various ministries causing the duplicate of law enforcement and the overlap of authority.<sup>27</sup>

Therefore, to standardize LMOs controlling measures, it is recommended to regulate LMO products by providing a specific law. The law should define a term ‘living modified organism’ as the controlled object, and the ‘National Biosafety Committee’ should be established to be in charge of providing suggestions regarding legal control on LMO products.

In addition, the law should regulate the LMOs associated operations as follows;

### 5.1 Measures of Import and Export Control

At present, the import and export of LMO products are regulated under various regulations depending on the type and the intended use of each product. For examples, the *Notification of Ministry of Agriculture and*

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<sup>25</sup> ‘Country Profile’ <<http://bch.cbd.int/about/countryprofile.shtml?country=th>> accessed 12 March 2018

<sup>26</sup> CPB, art 12

<sup>27</sup> Charunwit Wipawin, ‘Legal Measure of Thailand to Protect Agriculture from Genetically Modified Plant Contamination’ (Master of Laws, Thammasat University 2007) 128

*Cooperatives Re: Specification of plants from certain sources as prohibited articles, of exceptions and conditions under the Plant Quarantine Act B.E. 2507 (No. 10) B.E. 2553* prohibits the import of 85 genetically modified plants. However, according to the scope of each law, it cannot cover the import of all LMO products. For instance, no legal control of the imported LMO animals except LMO aquatic animals under the Emergency Decree on Fisheries B.E. 2558.

There is also an opinion to apply the Hazardous Substance Act B.E.2535 to LMO products.<sup>28</sup> However, there may be an argument that LMOs are not hazardous substance because the potential risks derived from LMOs are just a ‘likelihood’ of harms.

To regulate LMO products comprehensively, it is recommended to prohibit the import and export of LMO products unless it has been approved by the competent authority. The Advance Informed Agreement (AIA) should be applied by imposing the importers and exporters to submit a ‘permission request’ together with ‘the risk assessment report’ before the import or export.

## 5.2 Measures of Production and Distribution Controls

Currently, the genetically modified food containing the Cry9C DNA Sequence and the food containing such substance as ingredient shall be prohibited to produce, import, or distribute in Thailand.<sup>29</sup> Besides, the import for commercial cultivation of LMO seeds is prohibited unless it had been scientifically proven on biosafety and food safety.<sup>30</sup> However, the existing regulations seem too narrow and too limit to control LMO products.

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<sup>28</sup> Tanchanok (n 11) 218

<sup>29</sup> The Notification RE: Specification of Food prohibited to produce, import, or distribute imposed that the genetically modified food containing the Cry9C DNA Sequence and the food contained such substance as ingredient shall be prohibited to produce, import, or distribute in the Kingdom of Thailand (No. 345) B.E. 2555 (2012)

<sup>30</sup> The Resolution of the International Economic Policy Committee (IEPC) Conference No. 5/2542 (1999)

It is recommended to specify that production and distribution of LMOs are generally prohibited. Any person who intends to produce or distribute LMO products in the Kingdom must apply for a permission request which must be submitted together with ‘a risk assessment report’ and the plan of appropriate response measures to prevent the contamination of LMOs under his possession into the environment and the neighbor conventional farms. Moreover, in a case that LMO has been considered as safe, the public consultation must be conducted before approval of such LMOs.

### **5.3 Measures of the Traceability and Labeling**

As same as Japan, Thailand applies the mandatory basis of LMO labeling to the products containing LMOs from 5 % up of each top three main ingredients. This measure encompasses only soybean and corn products specified in the regulation whereas there are also other LMO products placing on the market.<sup>31</sup> Therefore, it is recommended to expand the mandatory basis to all products containing LMOs at the level specified by the law.

### **5.4 Measures of Liability and Compensation**

Since Thailand is considering to ratify the Nagoya-Kuala Lumpur Supplementary Protocol, we should prepare the rules and regulations for the forthcoming obligations after the ratification.

The adoption of current civil liability provisions in the cases related to LMO products may not appropriate. For example, the tort liability in Section 420 of Thai Civil and Commercial Code which lies on ‘fault-based’ liability may result in the impossibility to prove the damage because the plaintiff who has a burden of proof cannot access the information and does

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<sup>31</sup> Notification of the Ministry of Public Health Re: Labeling of food obtained through certain techniques of genetic modification / genetic engineering (No. 251) B.E. 2545 (2002)

not have advanced technology and scientific knowledge about such LMOs. Hence, it is considered more appropriate to apply a strict liability to the damage caused by LMOs related activities with some appropriated exemptions such as an act of God or *force majeure*.

It is recommended to provide the specific liability and compensation provisions regarding LMO products both in case of damage and there is a sufficient likelihood of damage to conform with the specific natures of LMOs and correspond with the objective of the Supplementary Protocol. Furthermore, as the operations related to LMOs always involved with many sectors, the author is of the opinion that the provision should determine the operators who must be liable for LMOs related operations to encompass any person in direct or indirect control of the LMOs in question.

Apart from the civil liability, the administrative approach is also a mechanism to prevent or mitigate the potential damage derived from LMOs.

In addition to the event of damage, in order to prevent, minimize, or avoid the adverse effects, it is also necessary to provide response measures in a case there is a sufficient likelihood of damage.

According to the Supplementary Protocol, it is recommended that Thai law should provide the provision addressing the response measures in the event of damage, and in the event that there is a sufficient likelihood of damage as follows;

“In a case of damage to human or animal health, or biodiversity resulting from activities involving the LMOs, the operators shall, subject to any requirements of the competent authority, to take these 3 actions;

- (a) Immediately inform the competent authority;
- (b) Evaluate the damage; and
- (c) Take appropriate response measures.

In a case there is relevant information, including available scientific information or information available in the Biosafety Clearing-House, indicates that there is a sufficient likelihood that damage will result if timely response measures are not taken, the operator shall be required to take appropriate response measures so as to avoid such damage.”

In addition to above recommendations, the author thinks that the causes of the failure of establishing the specific law on biosafety in Thailand are not only the drawbacks of the draft law but also the public perspective toward the LMOs. To date, most of the people that concern about the safety of LMO products does not indeed have sufficient knowledge about the LMOs.

So long as the public does not have enough knowledge, comprised with the lack of confidence and trust on the transparency of the legislative process, the opposition will continue to occur, especially in a case of the legislation involved with the environment or public health.

Therefore, the public participation is essential for the policy-making procedure to assure the transparency of the government and to provide the accurate information to the public. It is recommended that the government should guarantee that everyone has equal right to access the information about LMOs and biosafety including materials and activities relating a severe impact on the environment that may occur or likely to occur.

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## REGULATING FOOD TRUCKS IN THAILAND\*

*Yingyos Soonthornsaratool\*\**

### **Abstract**

At present, food trucks can simply be found in many areas of Thailand. Some food trucks may be operated in private areas but some are operated in public areas without an appropriate control by the local Government officers. Many forms of pollutant such as smoke, dust, garbage, foam boxes, waste water, etc. are generated by food truck activities without suitable control nowadays. In foreign countries, a food truck operator must comply with rules and regulations before starting food truck business; for instance, the entrepreneur must apply for the food truck operator license from the authorized officer, the vehicle to be used as food truck must be registered and pre-inspected by the authorized officer. In Thailand, even though there are some laws and regulations that may be applied with food truck business, there is no specific rule and regulation for controlling and reducing pollutants generated by food truck activities in Thailand.

**Keywords:** Regulating, Food Trucks

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## 1. Introduction

Food truck<sup>1</sup> is a large vehicle equipped with facilities for cooking and selling food. There is no the exactly meaning of food truck is specified in Thai laws, however, after considered the food truck's characteristics, it can be concluded that a food truck is a kind of business which sell foods on any conveyance propelled by mechanism and such conveyance is modified as a kitchen or space for cooking and selling foods.

In the United States of America, it can be said that a Texas man, Charles Goodnight is the beginner of the American food truck. Charles Goodnight was a cattle rancher. In 1866,<sup>2</sup> he needed a way to keep his drovers fed as they trailed cattle from Texas to the North. Charles Goodnight, therefore, bolted a wooden box to the back of an U.S. Army wagon and added compartments to store utensils, bedding, food, and more. In 2005, the Legislature of the State of Texas recognized the importance of the chuck wagon to the state's history and culture and to designate the chuck wagon as the official vehicle of Texas.<sup>3</sup>

Food truck is a new business trend in Thailand nowadays and there are many forms of food truck that operating in Thailand. Some food trucks are modified from mini-trucks, some food trucks are modified from vans and some food trucks operate in form of sidecars which towed by a motorbike. Food truck is a kitchen on wheels that can move from one place to other places easily and quickly. Food truck activities; for instance, cooking foods, preparing foods, selling foods, and so on, generated pollutants in many

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<sup>1</sup> Oxford Dictionaries, Definition of Food Truck in English <[http://en.oxforddictionaries.com/definition/food\\_truck](http://en.oxforddictionaries.com/definition/food_truck)> accessed 23 January 2018

<sup>2</sup> American Chuck Wagon Association, "*The Invention of the Chuck Wagon*" <<http://www.americanchuckwagon.org/chuck-wagon-invention.html>> accessed 28 July 2018

<sup>3</sup> American Chuck Wagon Association, "*Official Vehicle of Texas: SENATE CUNCURRENT RESOLUTION, S.C.R. No.8*" <<http://www.americanchuckwagon.org/texas-vehicle.html>> accessed 28 July 2018

forms such as air pollution, water pollution, garbage. It is very difficult to control pollutants from food trucks because of food trucks can move from one place to other places very quickly; making pollutants from food truck activities are increasing every day without suitable control. Therefore, the laws and regulations regarding food truck license and standard equipment to be installed on food truck should be improved or set up to control and minimize pollutants discharging from food truck activities.

## **2. Food Truck Activities in Thailand**

### **2.1 Food Truck in Thailand**

It can be said that Thai people are familiar with mobile food business such as Wall Ice-cream's mobile vehicle, mobile vehicles who sell sausage and fried meat ball. However, activities of food truck in Thailand are different from food truck activities in foreign countries. Most of mobile food vendors in foreign countries will park their food trucks at the specific area while the mobile food vendors in Thailand will drive their food trucks into villages or communities as the direct sale.

### **2.2 Food Truck Activities and Environment Problems**

There are many kinds of food that are cooked and sold in the food truck business such as sushi, noodles, coffee and beverages, barbecue and steak. Many activities of cooking take place on food truck; for instance, roast, grill, boil, fry, and so on. These activities of food truck generate smoke, bad smell, dust, waste water, garbage that can spread to the environment. Furthermore, many plastic objects for example, plastic bags, foam boxes, plastic cups and straws will be used and discarded by consumers. Therefore, the food truck and food truck activities can be considered as a point source of pollution by virtue of Section 4 of the

Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992).<sup>4</sup>

### **2.3 Laws and Regulations of Thailand to be Applied with Food Truck**

There are many laws and regulations of Thailand that can be imposed on the food truck operator who discharges pollutants to the environment for instance;

- (1) Any food truck operator cause pollutants to the environment must be liable to pay compensation or damages by virtue of Section 96 and 97 of the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992).<sup>5</sup>
- (2) Any food truck operator dump any garbage or dust or any filthy things into any canals or any ditches that can drain the aforesaid things into the canals, such food truck operator must be fined at the amount of Baht 20 or imprisoned not more than 1 month or both by virtue of Section 6 of the Canal Maintenance Act B.E. 2445 (1902).<sup>6</sup>
- (3) Any food truck operator is prohibited from dumping any garbage or any filthy things into Irrigation Canals by virtue of Section 28 paragraph 1 of the Royal Irrigation Act B.E. 2485 (1942).<sup>7</sup>
- (4) Any food truck operator cannot operate food truck activities on public roads or in public places without the approval from the authorized government officer by virtue of Section 20 of the City Cleanliness and Orderliness Act B.E. 2535 (1992).<sup>8</sup> In case of violation, such food truck operator shall be fined not exceeding

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<sup>4</sup> The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), s 4

<sup>5</sup> The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), s 96 and 97

<sup>6</sup> The Canal Maintenance Act B.E. 2445 (1902), s 6

<sup>7</sup> The Royal Irrigation Act B.E. 2485 (1942), s 28 para 1

<sup>8</sup> The City Cleanliness and Orderliness Act B.E. 2535 (1992), s 20

Baht 2,000 by virtue of Section 54 of the City Cleanliness and Orderliness Act B.E. 2535 (1992).<sup>9</sup>

Moreover, the consumer is prohibited from buying any goods that are sold on public places and public roads by virtue of Section 21 of the City Cleanliness and Orderliness Act B.E. 2535 (1992).<sup>10</sup> In case of violation, such consumer shall be fined not exceeding Baht 1,000 by virtue of Section 53 of the City Cleanliness and Orderliness Act B.E. 2535 (1992).<sup>11</sup>

Furthermore, any food truck operator is prohibited from dumping any garbage or any filthy things into waterways or on roads by virtue of Section 33 paragraph 1 of the City Cleanliness and Orderliness Act B.E. 2535 (1992).<sup>12</sup>

- (5) Activities of food truck may cause dust, bad smell, smoke, sound to the environment or vicinity places, such food truck activities can be considered as nuisance by virtue of Section 25(4) of the Public Health Act B.E. 2535 (1992).<sup>13</sup> To stop such nuisance, the local administration has power to order such food truck operator to remove and prevent the nuisance.
- (6) Any food truck operator is prohibited from dumping any solid waste or waste water into any well or pond of the village or community by virtue of Section 237 of the Penal Code of Thailand. In case of violation, such food truck operator shall be imprisoned as from 6 months to 10 years and fined as from Baht 1,000 to Baht 20,000 or both.<sup>14</sup>
- (7) In case that food truck operator caused pollutants to the private person, such food truck operator must be liable to pay

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<sup>9</sup> Ibid. s 54

<sup>10</sup> Ibid. s 21

<sup>11</sup> The City Cleanliness and Orderliness Act B.E. 2535 (1992), s 53

<sup>12</sup> Ibid. s 33 para 1

<sup>13</sup> The Public Health Act B.E. 2535 (1992), s 25(4)

<sup>14</sup> The Penal Code of Thailand, s 237

compensation or damages to such person who get injured or damaged by the aforesaid pollutants by virtue of Section 420<sup>15</sup> of the Civil and Commercial Code of Thailand.

- (8) By virtue of Section 110 of the Land Traffic Act B.E. 2522 (1979),<sup>16</sup> no person shall sell, buy, distribute or donate anything on the road without reasonable cause or in the manner of obstruction traffic. In case of violation, a person who violated must be fined not exceeding Baht 500 by virtue of Section 148 of the Land Traffic Act B.E. 2522 (1979).

It can be summarized that there are provisions of Thai laws which may be applied to food truck activities in Thailand, and the operator or the owner of food truck must be liable if pollutants occurred from his food truck activities. However, the aforesaid laws specify only general principle. There is no specific regulation to control food truck business, and there is no specific regulation to control and reduce pollutants that are generated from food truck activities. As a result, food truck activities in Thailand still generate pollutants without suitable management and controls. Therefore, specific regulations regarding food truck license and standard equipment of food trucks should be set up and enacted in order to control and minimize pollutants discharging from food trucks in Thailand.

### **3. Laws and Regulations in Connection with Food Truck Business in Foreign Countries**

Every country has different laws, rules and regulations regarding food truck business. Therefore, in the case that the food truck operator would like to start his food truck business, the operator must comply with laws,

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<sup>15</sup> The Civil and Commercial Code of Thailand, s 420

<sup>16</sup> The Land Traffic Act B.E. 2522 (1979), published in the Government Gazette, Vol 96, Part 8, dated 29 January, B.E. 2522 (1979), s 110

rules and regulations regarding food truck business that are enforced in such country.

In big cities such as City of Sydney, City of New York, City of Chicago, there are many requirements in which a food truck operator must comply with. However, it can be summarized that there are minimum requirements in which a food truck operator in foreign countries must comply with as follows:

- 3.1 License Requirement: Before starting the food truck business, the operator must obtain the license from the authorized officer authorizing such operator to sell food from a food truck. Furthermore, the operator must complete the food sanitary course provided by the authorized officer.
- 3.2 Permit Requirement: Before starting the food truck activities, such food truck must be permitted by the authorized officer authorizing the use of such food truck as the unit for selling foods. Furthermore, the food truck must be inspected by the authorized officer before issuing the permit.
- 3.3 Safety Food Requirement: All foods to be sold must be safe and clean and such foods must be protected from any and all contaminations. Furthermore, the food to be sold by food truck must be specified in the license that issued by the authorized officer.
- 3.4 Pollutions Control Requirement: All food trucks must control pollutants such as heat, smoke and odours, grease, noise, nuisance, waste, etc. that are created during food truck activities, and food truck must be installed with tools or equipment for controlling and reducing pollutants emission.

#### **4. Recommendation for regulating food truck in Thailand**

“Street Vending” is the prohibited occupation for foreigners according to the list appended to the Royal Decree Prescribing Occupations

and Professions Prohibited for Foreign Workers B.E. 2522 (1979), and it can be said that food truck business is a form of street vending. Therefore, the food truck operator must be Thai nationality.

There are many food trucks operated in Thailand nowadays and it cannot be argued that activities of such food trucks generate and create a lot of pollutants to the environment of Thailand without suitable management such as air pollution, garbage, refuse, litter, waste water, nuisances, etc. Therefore, it can be summarized that food truck activities are a point source of pollution by virtue of Section 4 of the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992).

Even though provisions specified in laws and regulations of Thailand such as the Public Health B.E. 2535 (1992), the City Cleanliness and Orderliness Act B.E. 2535 (1992), the Bangkok Metropolitan Legislation regarding Sale of Goods in Public Place or on Public Way B.E. 2545 (2002), etc. may be applied with food trucks and their activities, such aforementioned laws and regulations incline to specify general principle regarding sanitation, cleanliness, orderliness and punishments in case of violation. However, there is no detail about minimum requirements in which the food truck operator must comply with for minimizing and controlling pollutants generated from food truck activities. In fact, there is no standard measure to control and monitor food trucks that can easily and quickly move from one place to other places. Therefore, in the author's opinion, laws and regulations of Thailand regarding the food trucks should be improved. In fact, the improvement of the laws will greatly help minimizing pollutions discharged from food truck activities and will help and empower the authority to monitor and control food truck business in Thailand.

The author recommends that certain requirements should be set up as food truck regulations for food trucks in order to regulate food trucks in Thailand. Such requirements are listed as follows:

- (1) To ensure that the operator has met qualifications that required by laws and regulations, the operator must submit the application for food truck operator license to the authorized

officer before commencement of his food truck activities. It is noted that the food truck operator must be Thai Nationality only. Furthermore, the applicant must submit evidences to prove that the applicant has completed food safety course provided by the authorized department, for example, the Bureau of Food and Water Sanitation, Department of Health.

- (2) Any vehicle or conveyance to be used as food truck must be permitted by the authorized officer. The food truck operator must submit the application for the use of such vehicle or conveyance as food truck. To be noted that any pre-inspection procedure must be done by the authorized officer to ensure that such vehicle or conveyance are appropriate to be used as food truck.
- (3) To minimize pollution discharging from food truck activities, each food truck must be equipped with standard equipment that helps controlling and minimizing smoke, dust, heat, steam, smell and odours, waste water such as kitchen exhaust hood, ventilation systems, waste water tank, etc. The aforesaid standard equipment can minimize pollutants discharged from food trucks no matter what food trucks are operated in public or private areas. However, to attract and encourage all food truck operators to comply with the aforesaid idea, the Government should support some part of costs and expenses in connection with the arrangement of such standard equipment. In fact, the Government may provide tax benefits such as tax-exemption or any kind of tax-deduction as a bonus for any food truck operator who complies with the above mention.
- (4) Because food trucks can move from one place to other places easily and quickly, it is very difficult in practice for the authority to chase after or monitor each food truck. Therefore, a technology i.e. GPS device should be installed on food truck as the standard equipment. In addition, food truck application on

mobile phone or food truck website should be set up by the relevant authority. The aforesaid measure will help the authorized officer to control and monitor food trucks which are operating in his jurisdiction. This measure will also apply to all food trucks; no matter they are located in public or private areas. To attract and encourage all food truck operators to comply with the abovementioned measure, the Government should support some part of costs and expenses in connection with the arrangement of such GPS device. Moreover, the Government may provide tax-exemption or any kind of tax-deduction or the benefits as a bonus for any food truck operator who complies with the abovementioned measure.

- (5) Food truck activities may cause damages or injuries to any third party. Therefore, as a part of food truck application, the food truck operator must provide the liability insurance which covers the third party who get injured or damaged from food truck activities. To attract and encourage all food truck operators to comply with the abovementioned liability insurance policy, the Government should support some part of costs and expenses in connection with insurance premium. Moreover, the Government may provide tax-exemption or any kind of tax-deduction or tax benefits as a bonus for any food truck operator who complies with the aforesaid measure.

## 5. Conclusion

In summary, there are laws and regulations of Thailand such as the Public Health Act B.E. 2535 (1992), the Bangkok Metropolitan Legislation regarding Sale of Goods in Public Place or on Public Way B.E. 2545 (2002), and so on that may be applied to food truck activities which are operated in public places or on public ways.

According to such laws and regulations, food truck operators who operate in public places or on public ways must apply for the license from the local officer before starting their operations. Any food truck operator who operates food truck activities in public places or on public ways without license from the authorized officer, such food truck operator must be fined.

However, there are some interesting observations on such laws and regulations of Thailand as follows:

- (1) Such laws and regulations cannot be applied to food trucks that are operated in private places or food trucks that operating on private ways. Therefore, food truck operators can operate food truck activities in private places or on private ways without any license. As a result, pollutants discharging from food truck activities in private places or on private ways may not be controlled by suitable procedure.
- (2) No specification on truck or vehicle that will be used as food truck is mentioned in such laws and regulations. Therefore, any vehicle or conveyance may be modified as a food truck without any suitable control.
- (3) There is no requirement on standard equipment that should be installed on food truck for minimizing pollutants discharged from food trucks specified in such laws and regulations. Therefore, pollutants in form of dust, heat, waste water, smoke and smell discharged from food truck activities may directly spread to environment without any suitable treat.
- (4) There is no food certificate of the operator mentioned in such laws and regulations.
- (5) Such laws and regulations do not mention on the appropriate numbers of operators.
- (6) Such laws and regulations do not mention on garages or parking premises for food truck after the operation time.

- (7) Such laws and regulations do not mention on system or equipment for tracking and monitoring each food truck.
- (8) Such laws and regulations do not mention on liability insurance to cover third party who are damaged or injured from food truck activities.
- (9) Such laws and regulations do not mention on distance between food trucks and takeaway food premises or restaurants where serving the same type of foods.

In the author's opinion, the existing laws and regulations of Thailand are insufficient to control and minimize pollutants that are generated from food trucks. They are also insufficient for monitoring and controlling each food truck operated in Thailand nowadays.

The author recommends that laws and regulations regarding food trucks in Thailand should be improved in order to minimize pollutants discharged from food truck activities. Furthermore, food truck regulations should be set up and enacted so that food truck business in Thailand is efficiently monitored and controlled.

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## THE IMPLICATIONS OF THE EXISTING INTERNATIONAL ENVIRONMENTAL REGULATORY REGIMES OF ACCESS TO AND BENEFIT SHARING OF PLANT GENETIC RESOURCES\*

*Worapoj Suebprasertkul\*\**

### **Abstract**

The implications of the regulatory regimes of access to and benefit sharing (“ABS”) of plant genetic resources (“PGRs”) under international legal instruments (“ILIs”) on biodiversity are principally made by the mechanisms under the regimes. Aiming to regulate PGRs, such mechanisms rely on intellectual property rights (“IPRs”) with understanding that IPRs can solve the problem regarding ABS of PGRs. Paradoxically, it is such mechanisms that barricade equal access to PGRs and prevent benefits from being fairly shared, eventually degrading biodiversity.

Evaluation of the ILIs demonstrates the tendency towards expanding coverage of legally entitled actors and accesses, however retaining the IPRs, and consequently, causing the regimes to be stringent in allowing equal and fair ABS of PGRs to take place. Thus, we must rebuild a regulatory regime sustaining biodiversity. The proposed mechanism is the bank of PGRs where states parties are entitled to access PGRs whereas benefits – access entitlements – can be traded.

**Keywords:** Access and Benefit Sharing (“ABS”), Plant Genetic Resources (“PGRs”), International Environmental Laws, Biodiversity, Environment

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## 1. Introduction

When it comes to biodiversity of PGRs, it can be easy to overlook the real purpose of regulating PGRs. It is appealing to anyone to be caught within the bound of IPL, thus giving rise to the result opposite to reason why we establish the regulatory regimes of ABS of PGRs in the sense that is fair to all stakeholders and the environment. Although there could be many causes of depletion of genetic resources, the primary ones are raising source use, habitat loss, degradation and fragmentation, introduction of non-native species and sales of decorative plants. All of these can be instead derived from poorly managed or ineffective ABS of PGRs.

In this article shall evaluation of the regulatory regimes under certain ILIs be carried out so that one can comprehend how the PGRs have been positioned in the common space. As such, the implications made by all these regimes at the international level can be analysed as to how the international regulatory regimes affect the situation of PGRs.

## 2. Evaluation of the Existing International Regulatory Regimes of Access to and Benefit Sharing of Plant Genetic Resources

The ILIs related to ABS of PGRs are to be examined in terms of whether or not they effectively function and what legal implications they make on the international level; this is to determine whether or not they pose a problem to the international conservation of biodiversity.

As a global commons exploitation of agricultural productivity and other form of utilization of PGRs if done in a sustainable way can help them to be diverse and pervasive in many regions.<sup>1</sup> Genes are important in reproduction of all organisms. Lack of certain genes means lack of the

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<sup>1</sup> Carolina Roa-Rodriguez and Thom van Dooran, 'Shifting Common Spaces of Plant Genetic Resources in the International Regulation of Property' (2008) 11 *The Journal of World Intellectual Property* 176-202

organisms whose genes are their prototypes for their offspring. Lack of such births of the certain organisms subsequently brings about lack of certain organisms whose functions in the ecosystem are stopped, possibly causing several drawbacks to the environment. Therefore, availability of plant genetic diversity is crucial in order to make a variety of plants come into being; by this, sustainable protection of the environment can be ensured. Otherwise, organisms including human beings who rely on genetic diversity as the provider of food and habitats for the other organisms will be endangered and even extinct. One way to ensure existence of plant genetic diversity is that PGRs have to be accessed to and benefits from utilisation of them have to be shared among actors.

With realisation of importance of genetic diversity as such, many ILIs have been established; each of which has its own way of maintaining the diversity, indeed, they design different regimes regulating all the stakeholders.

The reason behind PGRs in jeopardy has been traced back since farmers and breeders collected seeds for use of both their physical properties and germplasm. PGRs have never been excluded from the tragic overuse.<sup>2</sup> Such term comes into its being due to a high variety of activities and productivities concerning exploitation of limited and unfair access to and benefit sharing of PGRs and this high volatility exists in the common space. The term “common space” means availability of resources which, when looking at the following regimes, cannot escape the state of interlocking, made by volatile appropriation motivated by commercial and agricultural interests supported by the ILIs themselves, unexpectedly culminating in limiting conservation of PGRs as the author shall now elaborate on this legal interplay on this common space.

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<sup>2</sup> Hardin G, ‘The Tragedy of the Commons’ (1968) 162(3859) Science 1243

## 2.1 The International Union for the Protection of New Varieties of Plants established by International Convention for the Protection of New Plant Varieties 1961: A Good Start?

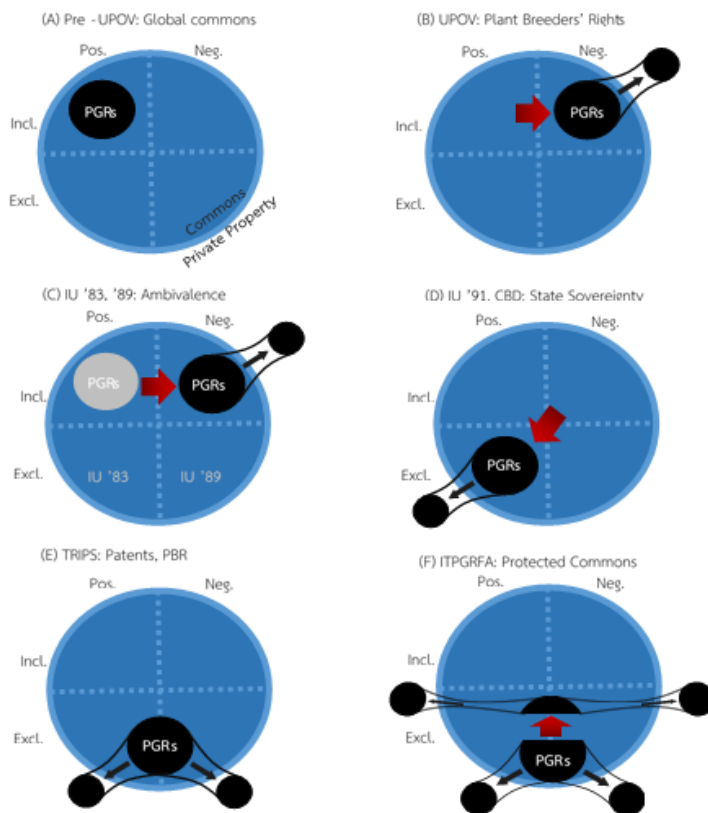
To realise the interlocking common space of PGRs as common property at the international level to which many stakeholders intend to access in order to possess and gain benefits arising from, we have to look through the development of ILIs on ABS of PGRs. In Figure 1 (A), the area labelled as *Commons Private* indicates PGRs being privately owned through IPL or any regulation allowing private appropriation; this is deemed as against biodiversity due to its being a possible barrier to ABS of PGRs. It has nevertheless to be noted that the *Positive* and *Inclusive* area of the common space indicates the area where PGRs has been in times of no regulations, therefore leaving chances of overexploiting PGRs – the problem making ILIs on ABS of PGRs established.

What comes up as the first international effort to regulate ABS of PGRs is the International Union for the Protection of New Varieties of Plants (“UPOV”), a regime established by the International Convention for the Protection of New Varieties of Plants with a legal personality as an independent intergovernmental organisation. UPOV’s objective is to provide regulations on IPRs for PGRs – commonly known as plant breeders’ rights (“PBRs”)<sup>3</sup> This first regime requires domestic laws associated with plant variety protection (“PVP”) to be enacted to implement it. For instance, Thailand enacts Plant Variety Protection Act B.E.2542 (PVPA B.E.2542); whereas, USA Plant Variety Protection Act 1970. The success of the regulations under UPOV can be effectively achieved as long as these domestic plant variety protection laws (“PVPLs”) work; in other words, the functioning of UPOV depends on domestic laws. This UPOV’s regime however leaves two loopholes. The first one is it lacks preventive tools in case certain states do not enact domestic laws. The second is it lacks a comprehensive system; indeed, it does not provide provisions in case of

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<sup>3</sup> International Union for the Protection of New Varieties of Plants, art 14

incompliance and measures to correct any omission of implementation. The author moreover has the contention that the regime is only intended to protect the IPRs rather than observing the spirit of universal ABS of PGRs and conservation of biodiversity, requiring more aspects and, importantly, more thorough compliance mechanisms than only IPRs.



**Note:** Incl. stands for Inclusive.

Excl. stands for Exclusive.

Pos. stands for Positive.

Neg. stands for Negative.

PGRs stands for Plant Genetic Resources

PBR stands for Plant Breeders' Rights

Commons Private stands for Private Appropriation of Plant Genetic Resources through Intellectual Property Law and the Laws Relevant.

**Figure 1: The International Regulatory Regimes of Access to and Benefit Sharing of Plant Genetic Resources and their Positioning Plant Genetic Resources in the Common Space<sup>4</sup>**

As to Figure 1, it is perceived that prior to establishment of UPOV, PGRs are truly common property because it is located in the *Positive* and *Inclusive* area (note “PGRs” in the top left of Figure 1(A) circle), meaning that PGRs are totally open (*Positive*) for actors to access to them – subject to exploitation and possession by all (*Inclusive*) and to benefit sharing from such utilisation.

In order to regulate PGRs, UPOV however controls access to and exploitation of them through requirements of states to enact their domestic PVPLs. Consequently, PGRs – previously universally available (*Positive*) – was no longer available due to PVPLs as a barrier. Figure 1 (B) shows that PGRs are moved to another area in the circle, indicating that they are *not* totally open for access (*Negative*) yet they can still be possessed for utilisation (*Inclusive*) which of course has to be done in accordance with PVPLs.

## **2.2 International Undertakings on Plant Genetic Resources 1983 and 1989**

International Undertaking on Plant Genetic Resources (“IU”) is initiated by the UN Food and Agriculture Organization (“FAO”). The positive tone of intention is found in IU, incorporating both UPOV and those aforementioned PVPLs for the purpose of food and agriculture. There are 2 IUs, one established in 1983 and another in 1989. The milestones established by IU 1983 are free and unencumbered mechanisms for conservation, research and development and breeding.<sup>5</sup> However, the principle of unencumbered availability of PGRs has to be based on mutual

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<sup>4</sup> Worapoj Suebprasertkul, ‘ASEAN Legal Framework for Equal Access to and Fair Benefit Sharing of Plant Genetic Resources in Southeast Asia through Establishment of the Gene Bank’ (LLD thesis, Thammasat University 2017)

<sup>5</sup> International Undertaking on Plant Genetic Resources 1983, art 5

exchange and mutually agreed terms, indicating that the samples to be taken can vary and be prone to decline of sharing the samples, inevitably rendering IU a weak point. The second annex to IU was launched out in 1989 to solve the imbalance caused by PVPLs' system. Apart from solving the distinction between the raw and worked materials, such annex has not much proven its capacity as can be seen in that farmers' rights are merely rhetoric; they are invoked without being protected by any feasible legal mechanisms. The third annex came in 1991 only to put the unsteady conception of commons property equally and exclusively shared, bringing the legal regime on the brink of contradiction. Notably, the third annex conceptualises that PGRs, with referral to that applied under UPOV, has admittedly to be subject to state sovereignty. Inspiring 113 states to adopt its key principles, IU is soft law, thus, not legally binding. Although IU's soft law characteristics play a crucial role, IU provides weak implications since its regulatory regime cannot be fruitful to the whole regimes. This viewpoint is supported by gradual progression to the subsequent legal arenas, once tarnished by establishment under IU.

With regard to IU 1983, Figure 1 (C) illustrates that *PGRs* are located in the *Inclusive* and *Positive* area on the left-hand side of the circle labelled with IU'83, where appropriation is more universal, meaning that everyone gains access to PGRs. Apparently, this is not different from the situation in the period prior to UPOV. IU 1989 has an effect similar to that of UPOV; *PGRs* are moved to the area of the circle labelled as "*Inclusive Negative*," meaning that PGRs can be accessed with limitation (*Negative*) yet possible for utilisation (*Inclusive*).

### **2.3 Convention on Biological Diversity 1993, Nagoya Protocol and Cartagena Protocol: A Complete System but State Sovereignty?**

CBD stands out from UNEP and the other METs in its attempts to be the most comprehensive legal instrument. Nevertheless, it has been criticized for its lack of compliance mechanisms. A bigger perspective sheds the light on that CBD – the pinnacle of ILIs for biodiversity conservation –

poses a problem. CBD has been faced with the mounting loss of biodiversity, so evident that the states parties to the CBD held the conference, culminating in the resolution in the 2002 decision to declare 2010 as the target date for reversing biodiversity loss.<sup>6</sup> The international concern about biodiversity loss moreover gave rise to the statement similar in spirit to that of the states parties to the CBD in the 2002 World Summit on Sustainable Development (“WSSD”) that in ascendance to WSSD, it is accepted by almost actors that the Rio agreements had not been effectively implemented. Thus, WSSD, as taken by every actor, was to be about implementation.

Certain scholars propose that it is not always due to weak implementation and compliance that attribute to biodiversity loss. The real attribution is lack of international consensus to protect the global biodiversity; this may lead us to constitute METs which are not however implementable and non-compliable. Thus, the whole regimes, CBD in particular, does not err at the point of means of states’ compliance with CBD and the other ILIs. Instead, it is the METs, including CBD, themselves, not their enforcement protocols coming later, that are weak right from their beginning. We thus can propose that there are, in actuality, defects along the legal process, commencing with the treaty-making consensus of the states – tainted with un-wholeheartedly commitment of the law. Subsequently, the treaties offer us non-compliable mechanisms and eventually lead several states to ineffective implementation, or in the worst case, non-compliance. The extreme contentment is that the approach of conventional international law has not been workable and truly not work.<sup>7</sup>

Nevertheless, compared to the previous ones, the regulatory regime under CBD is more successful. In 1992, the concept of equitable use of genetic resources is guaranteed as under one of the two key CBD principles;

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<sup>6</sup> Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity (Decision VI/26 UN Document) para 11

<sup>7</sup> John Charles Kunich, ‘Losing Nemo, The Mass Extinction Now Threatening the World’s Hotspots’ (2005) 30 I Columbia Journal of Environmental Law 9

whilst, the other concept under this key principle is sustainable use of genetic resources and the other key CBD principle is conservation of genetic resources. Deemed as broader than its predecessors, CBD goes beyond PGRs to include genetic resources of all organisms under its protection. CBD does not cancel the existing IPRs but makes certain supplementary requirements. PGRs can be privately appropriated but such enclosure has to be subject to its mechanisms by bringing in prior informed consent and the mutually agreed terms. Negotiation irrefutably comes into play between whosoever in need of PGRs and the state possessing certain PGRs. Negotiation has to be done in order that the actor needing the PGRs and the owner state can reach for the agreed terms of benefit sharing. Put simply, they have to negotiate how many benefits from utilisation of the PGRs can be regarded as equitable in return, resulting in the problems involved with determination of, firstly, what constitutes the adequate number in return, and secondly, whom the benefits should be granted to; and lastly, what form it should take.

Another problem is that notwithstanding CBD's standing for its broad protection, the weakness lies in its provisions bestowing states with authority to determine access to resources. This could be a barrier to convenient negotiation especially in the case where those owner states have more bargaining power. Whether or not they will permit the others to gain benefits and how benefits from utilisation of the PGRs accessed can be shared are the questions left as the outcome is subject to mutual consent required.

To picture this problem, Figure 1 (D) illustrates that the progression of PGRs moves from the negative side of the common space to the positive one, meaning that it shuts down some paths to use PGRs by appropriation of PGRs through IPRs (*Exclusive*) despite the open channel of modified PGRs. In other words, CBD undermines free appropriation, i.e. IPRs, providing access open to a wider group (*Positive*) notwithstanding most members of such wider group being states. Yet CBD requires consent prior to access and subordination to the owner states' sovereignty (*Exclusive*). What to be

borne in mind is that it is state sovereignty to be exercised by the owner state in question for consideration of its consent.

Notably, that CBD's regime moves into the exclusive area means that it is open for *nation states* to gain access to PGRs, thus indicating that state sovereignty is to be deployed by states in discretion for granting access. Most likely is that it must be tempting for them to grant access to specific groups, i.e. certain states; whereas, individuals find it harder to gain access. It cannot thus be said in any other way but biodiversity conservation under CBD is, more or less, subject to politics.

In conclusion, despite undermining free appropriation, CBD allows the green light for states' discretion to be exercised under the sovereignty principle. This however can be regarded as threat for diversity of PGRs. The legacy that CBD bequeaths to the international regimes is another troublesome one, inevitably leading us to doubt of CBD's intention of opening equal access. We are forced to conclude that despite good contributions CBD has brought about, the question of whether or not PGRs can be accessed to and shared by all, whilst simultaneously conserved under CBD is legitimate to raise.

## **2.4 Agreement on Trade-Related Aspects of Intellectual Property Rights 1995**

Extending its protection to cover genetic-resource based inventions,<sup>8</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 ("TRIPS") provides us with protection of PGRs through patent and sui generis systems under its Article 27. Within World Trade Organization ("WTO"), the member states are to establish within their territories either the patent or sui generis systems or both combined. Thailand, for instance, observes TRIPS by constituting both systems. TRIPS does not lend full support to positive

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<sup>8</sup> Koo, B., Nottenburg, C. and Pardey, P.G., 'Plants and Intellectual Property: An International Appraisal' (2004) 306(5700) Science 1295

exclusiveness of PGRs in the common space as CBD does,<sup>9</sup> consequently resulting in PGRs being open for appropriation by IPRs, meaning that the regulation of TRIPS allows IPL to bar a wider group from access to PGRs.

Moreover, instead of supplementing CBD's system requiring prior consent and mutually agreed terms, TRIPS treat PGRs in another way; indeed, anyone can appropriate PGRs without consent from the owners of PGRs. Illustrated in Figure 1 (E), despite one half of *PGRs* located in the *Positive* area due to the *sui generis* system allowing domestic laws to help support positive access to PGRs (*Positive*), the other of *PGRs* is dragged into the *Negative* area. This is because PGRs are also subject to the other system (out of the two systems), i.e. the patent system, under which the barriers are made for actors to access PGRs; as a result, PGRs are not open for all (*Exclusive*). Under TRIPS does the *sui generis* system make positive an open-for-all access to PGRs; whereas, the patent system makes the negative one.

In short, under TRIPS, the international ABS of PGRs regimes see TRIPS putting another international regulatory regime into the contradictory realm where the regulatory regimes go against one another. Another thing is the problem caused by TRIPS very much contradicts with CBD, positioning PGRs in the area of *Positive Exclusive*; whilst, TRIPS PGRs in the opposite to that of CBD, i.e. *Negative Exclusive*.<sup>10</sup> Notably, it has to be aware that TRIPS's protective system goes further than protection of merely PGRs to the extent that it includes other *non-selected* PGRs under its protection, regardless of whether or not the states of resources are states parties to ITPGRFA. It thus can be remarked that there are tensions between all these existing regulatory regimes of ABS of PGRs because of their differences in positioning access to PGRs.

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<sup>9</sup> Carolina Roa-Rodriguez and Thom van Dooran, 'Shifting Common Spaces of Plant Genetic Resources in the International Regulation of Property' (2008) 11 3 The Journal of World Intellectual Property 188

<sup>10</sup> Lekha Laxman and Abdul Haseeb Ansari, 'The Interface Between TRIPS and CBD: Effort Towards Harmonisation' (2012) 11.2012 Journal of International Trade Law and Policy 108

## 2.5 International Treaty of Plant Genetic Resources for Food and Agriculture 2004

The last entry is ITPGRFA, making easier exchange of seeds supporting the genetic diversity of crops and stimulating research – essential in agriculture development which results in food security. In a world where most countries depend upon crops originating elsewhere, ITPGRFA facilitates exchange and conservation of crop genetic resources amongst member states and sharing of benefits arising from utilisation.

ITPGRFA supports ABS of PGRs through the focus of PGRs utilised for food and agriculture, making possible a realistic sense since it is in food and agriculture where usefulness of PGRs is explicitly realised. This treaty combines the interests of farmers with IPRs which is usually involved with scientists and corporations. Essentially, ITPGRFA is meant to incorporate all the legal systems available in uniformity. Most striking of all its features is a Multilateral System of ABS of genetic resources – a compliance mechanism through storage of genes. As described in its Annex I, ITPGRFA lists the PGRs for food and agriculture where the stakeholders are expanded as never before with 35 food crops and 29 forage crops under the List of Crops covered under the Multilateral System. It channels another route to access apart from the one previously established by CBD where states are primary actors. Indeed, ITPGRFA provides two accesses to PGRs – the first, like CBD, *exclusive* one by states under the principle of sovereignty; and the second *inclusive* one where a broader group of actors are included within entitlement to gain access to PGRs. Interestingly, ITPGRFA also renews cooperation in research and development between the domestic and international levels.

With regard to IPRs, ITPGRFA nonetheless positions its standing in contrast with its predecessors. Article 12.3(d) of ITPGRFA<sup>11</sup> prohibits the recipients of PGRs through the Multilateral System from claiming any IPRs that limits other states from accessing PGRs regardless of the forms of

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<sup>11</sup> International Treaty of Plant Genetic Resource for Food and Agriculture 2004, art 12

ITPGRFA,<sup>12</sup> including plant genetic parts or any components in the form received from the Multilateral System.<sup>13</sup> The terms “genetic parts or components” and “in the form received” are considered as ambiguous with no definition, thus prone to interpretation.<sup>14</sup> Such interpretation may be that prohibition does not include isolated and modified genetic resources, considered out of the received form; hence, they can be appropriated by means of IPL, indicating that it does not make any difference between ITPGRFA’s Multilateral System and the other ILIs in terms of private appropriation without consent of other common owners.

Demonstrated in Figure 1 (F), *PGRs* is broken into two parts; one of which is the PGRs under the ITPGRFA’s Multilateral System; whilst, the other the PGRs outside the Multilateral System or the rest of PGRs in the whole international regimes in a fragment pulled upwards. Additionally, that both parts are pulled to both sides horizontally is the indication that both the PGRs within the Multilateral System and those without which are simultaneously privately owned or negatively appropriated.

### 3. Conclusion and Recommendations

The path to ABS of PGRs, which is not too sensitive to ownership of PGRs and IPRs, may not be fully paved. All the regimes of ABS of PGRs are ineffective in terms of mechanisms in positioning PGRs in the positive and inclusive area within the common space. The first objective of establishment of all regulatory regimes is to regulate these PGRs as global commons property, hence, the role of the law. Yet we seem to have forgotten another side of such objective, that is, conservation of biodiversity. In fact, the mechanisms under the regimes having been constituted so far

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<sup>12</sup> Christiane Gerstetter, ‘The International Treaty on Plant Genetic Resources for Food and Agriculture within the Current Legal Regime Complex on Plant Genetic Resources’ (2007) 10 3/4 The Journal of World Intellectual Property 264

<sup>13</sup> *ibid* 264

<sup>14</sup> *ibid* 264

care more about IPRs than the environment. It is therefore not surprising that ABS of PGRs is never positive and inclusive. This does not mean that law or regulatory regimes is not necessary, rather, the regulatory regimes must be designed in order to ensure biodiversity of PGRs and at the same time respect the rights equally entitled to all stakeholders. Taking into account IPRs and IPL, it is legitimate to build a regime where PGRs can be repositioned to the area where access to the PGRs is open for all at the appropriate level like when there was no law and benefit sharing can be conducted in the manner that supports both fair benefit allocation and biodiversity rather than merely monetary compensation for PGRs. This would ultimately keep sustainability of the environment.

Irrefutably, the ILIs on ABS of PGRs have shaped international ABS of PGRs; whereas, results of which is the implications which, as having been evaluated, *cannot* ensure equal and fair ABS of PGRs at the international level since all the regimes have not been capable of constituting a truly equal and fair conduct of ABS of PGRs. This is principally due to IPRs as the mechanisms equipped with the ILIs. A new approach to constitute a regime should be considered necessary to equip a regime with other systems like a gene bank where states can access PGRs on the condition of their initially providing PGRs to the bank and thus earning quotas accordingly. Meanwhile, the quotas can be redeemed as rights to access to PGRs later. The quota trading system may be of help as incentives and compliance measures without reliance on punitive ones.

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REGULATORY TAKING: ANALYSIS OF  
THE U.S. SUPREME COURT JUDGMENT IN *MURR*<sup>\*</sup>

*Pichayamon Jarueksoontornsakul*<sup>\*\*</sup>

**Abstract**

Regulatory takings is a situation in which a government regulates to limit private property rights to such a degree that the regulations effectively deprives the property owners of economic reasonable use or value of their property, or to force property owners to formally divest title of the property to the government, for the purpose of public use or public utility development. In this case, property owners will be acquired just compensation. Per U.S. constitution, regulatory taking under the Fifth Amendment requires three factors that was decided by U.S. Supreme Court in *Penn Central Transportation Co. v New York City* as follows: (1) the economic impact of the governmental regulations on the owner, (2) the extent to which the action interferes with distinct investment-backed expectations and (3) the character or nature of the government action. If regulatory taking does not meet all three factors above, it is not regulatory taking under the Fifth Amendment and the property owners have no right to acquire any compensation.

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Nevertheless, on June 23, 2017, the U.S. Supreme Court's 5-3 decision in *Murr v Wisconsin* provided more specific guidelines in the 1978 case, *Penn Central Transportation Co. v New York City*, for courts to use in defining "the relevant unit of property" and "parcel as a whole" to perform regulatory takings. This article analyzes whether the Supreme Court, in *Murr*, made the right judgment in defining "the relevant unit of property" and "parcel as a whole" by applying the three factors of the *Penn Cent. Transp. Co.* test, especially the first factor, the extent of economic impact, by considering guidelines from previous regulatory taking cases. However, the author does not agree with the Supreme Court measure for defining "the relevant unit of property" to consider whether the regulation is regulatory taking that the government must pay just compensation because the Supreme Court approach is in reverse order with the previous rulings and guidelines. Instead of considering and defining "the relevant unit of property" so as to analyze how the landowner was affected economically which thus leads to the determination whether a governmental regulation is regulatory taking and the landowner had any right to compensation, the Supreme Court has decided to apply the principle of "economic impact" on the owner to define "the relevant unit of property."

While the determination of defining "the relevant unit of property." and "parcel as a whole" do not happen in Thailand today, this article may be useful for The Royal Thai government in future to amend the law on Immovable property expropriation, to deprive of private property, and to pay just compensation to property owner.

**Keywords:** Regulatory Takings, Constitutional Law, Takings Clause, Private Property, Property Rights, Conceptual Severance, Eminent Domain.

## Introduction

The Supreme Court of the United States recently decided the case, *Murr v Wisconsin*,<sup>1</sup> which put across a new test for answering the “conceptual severance” or “denominator problem,” and the question of whether separate parcels of land, under common ownership, should be evaluated as a single parcel in a regulatory taking analysis. As the economic impact to property owner analysis, one should consider not only whether there still is some value, but also the level of value of the regulated property at the time it was impacted. Taking the economic impact factor into consideration, if treating two adjacent lots owned by a single owner separately would result in one of the properties becoming completely worthless, even there is some value, it should be a regulatory taking which is compensable. On the flip side, if treating two adjacent lots together as one parcel, the owner still makes plenty of use of property and the economic impact of the regulation is inconsequential. It is not compensable taking under the Fifth Amendment.

The case arose from the Murr family’s efforts to sell one of two adjacent lots that they own. The sale of that lot was blocked by land-use regulations of St. Croix County,<sup>2</sup> which rendered the lot chiefly economically worthless. The Supreme Court granted certiorari in *Murr* on this question: In a regulatory taking case, does the “parcel as a whole” concept as described in *Penn Central Transportation Company v City of New York*<sup>3</sup> establish a rule that two legally distinct, but commonly owned and contiguous, parcels must be combined for regulatory takings analysis purposes?<sup>4</sup>

This article is devoted to analyzing how the Court may be right or wrong in the recent *Murr* case and to discussing the issue of “regulatory taking”

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<sup>1</sup> 137 S. Ct. 1933 (2017)

<sup>2</sup> St. Croix County, Wis., Code Of Ordinances ch. 17.36(l)(4)(a) (Jul. 2007) (cited in case)

<sup>3</sup> 438 US 104 (1978)

<sup>4</sup> Richard A. Epstein, ‘Disappointed Expectations: How The Supreme Court Failed To Clean Up Taking Law In *Murr v Wisconsin*’ (2017) 11 N.Y.U. J.L. & Liberty 151, 154

by dividing into three parts: (1) *Murr*'s background, (2) definition of "regulatory taking", including "conceptual severance" (denominator problem) and the relevant court decisions, and (3) analysis of the question whether the Court in *Murr* made the right decision in applying the factors of the *Penn Cent. Transp. Co.* test, especially the first factor-the extent of economic impact-and, most critically whether the Murrs should have received any compensation.

### 1. *Murr*'s Background

Petitioners, the Murrs, are four siblings who own waterfront property along the St. Croix river in Wisconsin. The Murrs' parents purchased two contiguous waterfront parcels in the 1960s as two separately recorded parcels known as Lot E and Lot F. The Murrs' parents held title to Lot E in their own name, and to Lot F in the name of their business. While Lot E remains undeveloped, they built a cabin on Lot F.

In 1976, both lots became subject to new county zoning requirements and protected under federal, state, and local law.<sup>5</sup> The purpose of those state

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<sup>5</sup> In 1972, Congress designated a portion of the St. Croix River as a National Scenic Riverway as "wild, scenic, or recreational" under the Lower St. Croix River Act, which is an amendment to the Wild and Scenic Rivers Act, and included the 52-mile section of the St. Croix River below Taylor Falls to the confluence with the Mississippi River as part of the National Wild and Scenic River System. 16 U.S.C. § 1274(a)(9) (2008). In response, the Wisconsin Legislature enacted Wisconsin Statute § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River."

In 1973, State of Wisconsin enacted § 30.27(3) which requires all affected municipalities to adopt ordinances at least as restrictive as those of the DNR and which forces the DNR and municipalities to adopt river way zoning that complies with DNR standards. (Wis. Stat. Ann. § 30.27 (West)). The DNR responded by adopting Administrative Code Chapter NR 118. Likewise, in 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance and

and local regulations is to prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. The standards, imposed by the legislature, established minimum lot sizes for different zones in the river's vicinity and grandfathered in pre-existing lots rendered "substandard" by the new legal requirements. However, to relax such restriction for substandard lots, the law also created a "merger" provision, an exception to the grandfather clause, for adjacent lands under common ownership.

Albeit both lots are over one acre in size, because of their topography they each have less than one acre suitable for development. So, under the regulations, the parents' two adjacent lots became substandard, which is smaller than the required minimum lot size. However, since the two parcels were formally in separate ownership (the parents' name and the business's name), they were protected by the grandfather clause.

The parents maintained the lands under separate ownership until transferring Lot F to petitioners in 1994 and Lot E to petitioners in 1995. By conveying two separate lots in those years, two adjacent substandard lots become in the Murrs' common ownership and, under merger provision, both lots are effectively merged into a single lot. In 2004, the Murrs planned to either sell or develop Lot E separately. However, government officials told them that zoning regulations adopted in 1975 (that required lots to be of a certain net size) precluded the development of Lot E. Under a grandfather clause in the regulation, the property could still be developed if the lot "is in separate ownership from abutting lands." But because the Murrs also owned the abutting parcel, Lot F, the exception did not apply. The ordinance also precluded the Murrs from selling Lot E to anyone else unless it was combined with Lot F. Therefore, citing the substandard lot regulations that the lots had been merged under local zoning regulations, the county zoning

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revised it in 1977 to make it consistent with NR 118. The Lower St. Croix Riverway Ordinance mirrors Wis. Admin. Code chapter NR § 118.08(4)) (Jul. 1, 1980)

board denied the Murrs' request for a zoning variance to allow their plan to proceed.

After being denied a variance, the Murrs filed a complaint in state court alleging that the state had effectively taken their property, Lot E, by depriving them of practically all use without paying just compensation, as required by the Takings Clause in the Fifth Amendment. They alleged that without the ability to sell or develop the lot, it is economically useless.

Nonetheless, the state court rejected the unconstitutional takings claim. The court considered the denominator as Lots E and F together. They explained that when the affected property was considered that way, the Murrs could still make plenty of use of their land. The Murrs could keep both lots and locate their cabin on either lot, or they could sell the two lots together. They just could not treat the land as two separately developable parcels, and that limitation alone was not a taking. The Murrs disagreed and appealed.

Still, the Wisconsin Appeals Court rejected the petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court affirmed the lower state court by holding that the takings analysis properly focused on the two lots together, as a whole parcel, to which the Murrs still retain beneficial and practical use as a residential lot. The Court also affirmed that the merger regulations did not constitute a taking. In reaching its decision, the Wisconsin Court of Appeals relied on the Supreme Court of Wisconsin's "parcel as a whole" in *Zealy v City of Waukesha*,<sup>6</sup> which followed

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<sup>6</sup>In *Zealy v City of Waukesha*; the Wisconsin Supreme Court held, citing *Just v Marinette County* 201 N.W.2d 761 (Wis. 1972), that calculating the depreciated value of the land must be based on use of the land in its natural state (and not on what it would be worth if developed). The parcel viewed as a whole retains substantial uses (a combination of residential, commercial and agricultural), thus the city's rezoning did not deprive the owner of all, or substantially all, of the use of his land. *Zealy v City of Waukesha* 548 N.W.2d 528, 534 (Wis. 1996)

the rule set forth in *Penn Central Transportation Company v City of New York*,<sup>7</sup> In that case, the U.S. Supreme Court held:

*“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole...<sup>8</sup>*

The Murrs disagreed with the Wisconsin Court of Appeals’ decisions, and filed a petition for writ of certiorari to the U.S. Supreme Court. The question presented before the U.S. Supreme Court is whether the state courts erred in considering Lots E and F together as the denominator in the takings fraction. In other words, whether the lower court decisions are correct for deciding that the Murrs’ property should be evaluated as a single parcel consisting of Lots E and F together under regulatory takings doctrine.

The idea, again, is that the denominator makes a difference: had the state courts considered the regulatory burden using only Lot E as the denominator, they would have been more likely to find a taking because the Murrs could do little with Lot E (though the parties dispute that too). In briefing the question, each party proposed its own denominator test for the court to use going forward.<sup>9</sup>

The U.S. Supreme Court, in a 5-3 majority opinion written by Justice Kennedy, held that (1) in the context of a regulatory takings claim, courts had to consider a number of factors in determining the denominator, including the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the regulated lands, and the endeavor is

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<sup>7</sup>(n 3) 104

<sup>8</sup>Ibid., 107

<sup>9</sup>Miriam Seifter, ‘Argument preview: Defining the denominator in regulatory takings law’ (SCOTUSblog, 14 March, 2017) <<http://www.scotusblog.com/2017/03/argument-preview-defining-denominator-regulatory-takings-law/>> accessed 1 August 2018

to determine whether reasonable expectations about property ownership would have led a landowner to anticipate that his holdings would be treated as one parcel or separate tracts; and (2) under the appropriate multi-factor standard, the landowners' property should have been evaluated as a single parcel consisting of two lots together for purposes of the takings analysis because state law had merged the lots, the physical characteristics supported treatment as a unified parcel, and the parcels could not be sold or built upon separately. The Murrs were not deprived of all economically beneficial use of the property and their action was voluntary in bringing the lots under common ownership, after the regulations were enacted. Therefore; there was no compensated taking had occurred.<sup>10</sup>

## **2. Definition of a “regulatory taking”, including “conceptual severance” (denominator problem) and the relevant court decisions**

A “taking” is generally understood as an action by which the government “directly interferes with or substantially disturbs the owner’s use and enjoyment of the property.”<sup>11</sup> A government may take property in two ways: (1) by physically appropriating the property; or (2) by regulating or limiting the use of property in such a way as to destroy one or more of the fundamental attributes of ownership (the right to possess, exclude others, or make reasonable economic use of the property), or require the property owner to provide public benefit rather than mitigating some public cost caused by a proposed use. While a physical taking occurs when the government encroaches upon or occupies private land, a taking by regulation consists of government action that deprives a landowner of a property interest without involving the physical encroachment upon or occupation of private property.<sup>12</sup>

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<sup>10</sup> *Murr* (n 1) 1936

<sup>11</sup> *Brothers v United States* 594 F.2d 740, 742 (9th Cir. 1979) (citing *Pete v United States* 531 F.2d 1018, 1031 (1976))

<sup>12</sup> *Bassett v United States* 55 Fed. Cl. 63, 65 (2002)

In the first type of case, the government typically exercises its eminent domain power, which is called a “direct condemnation”. In this situation, the government admits that it wishes to take or has taken private property from an individual and then brings the individual into court to obtain the property in exchange for just compensation.

In the second type of case, the government does not offer any compensation and must be sued for a taking. Such a suit is called an “inverse condemnation” action,<sup>13</sup> which the government defends by claiming that it is using police power instead of its power of eminent domain. In this situation, a landowner who succeeds in his claim against the government will be paid compensation. The second type of case can be divided into two sub-categories, which are “regulatory taking” or taking in fact, where the government takes property by issuing regulations,<sup>14</sup> and “per se taking”<sup>15</sup> or categorical taking”, where the government takes property by destroying a fundamental attribute of ownership.

Under the Fifth Amendment of the U.S. Constitution, private property cannot be taken for public use, without just compensation;<sup>16</sup> this is called the “Taking Clause” and it applies to the states through the Fourteen Amendment.<sup>17</sup> It is clear that when the government physically seizes private

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<sup>13</sup> The Municipal Research and Services Center, ‘Regulatory Takings’ (Explore Topics) (Oct. 9, 2017) <<http://mrsc.org/Home/Explore-Topics/Legal/Planning/Regulatory-Takings.aspx>> accessed 1 August 2018

<sup>14</sup> The regulation of the property’s use is so severe that it goes too far, as Justice Holmes put it in *Pennsylvania Coal Co. v Mahon* 260 US 393 (1922)

<sup>15</sup> *Loretto v Teleprompter Manhattan CATV Corp.* 458 US 419 (1982)

<sup>16</sup> US Const. Amend. v “...nor shall private property be taken for public use, without just compensation.”

<sup>17</sup> US Const. Amend. XIV, § 1. “...; nor shall any State deprive any person of life, liberty, or property, without due process of law...”

For the relationship between the Fifth Amendment and the Fourteen Amendment, see *Chicago, B. & Q.R. Co. v City of Chicago* 166 US 226 (1897) and John D. Echeverria & Sharron Dennis, ‘The Takings Issue And The Due Process Clause: A Way Out Of A Doctrinal Confusion’ (1993) 17 VT. L. Rev. 695, 709-10. See also William Michael

property for public use, such as for building a highway or a park, the government will have to pay just compensation to the land owner. In defining just compensation, the United State Supreme Court sets forth that it is to be measured by the market value of the property at the time of the taking,<sup>18</sup> which is equal to the difference between the market value of property before and after the invasion. Justice Marshall explained the fair market value standard as follows:

*In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property “in as good a position pecuniarily as if his property had not been taken.” Olson v United States, 292 US 246, 255 (1934). However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. ... The Court therefore has employed the concept of fair market value to determine the condemnee’s loss.*<sup>19</sup>

The phrase “regulatory taking” appears to be an oxymoron, since a valid police power regulation is not a compensable taking,<sup>20</sup> and because a court is able to strike down an invalid regulation. In other words, taking by regulation may not pay compensation if the government used police power. As

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Treanor, Note, ‘The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment’, (1985) 94 Yale L.J. 694

<sup>18</sup> *United States v 50 Acres of Land* 469 US 24 (1984). See also *Klopping v City of Whittier* 8 Cal. 3d 39, 42 (1972) The Court stated that the “date of the taking”, for purposes of calculation of fair market value of the land, should be before enacting regulation which cause the value of the land to decrease.

<sup>19</sup> *United States v 564.54 Acres of Land* 441 US 506, 510-11 (1979)

<sup>20</sup> The classic understanding of the police power is the power to protect the “safety, health, peace, good order, and morals of the community.” (*Crowley v Christensen* 137 US 86, 89 (1890)) In *Mugler v Kansas* 123 US 623, 665 (1887) stated “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”

mentioned, there are two types of government power for taking private property: the power of eminent domain and the police power. The power of eminent domain is the power of government to acquire private property for public use, while the police power is the power to adopt regulations to promote the public health, safety, and welfare of a community.<sup>21</sup> Nonetheless, for the most part, regulatory taking claims assert that purported police power regulations actually constitute covert or implicit takings. The term “police power”<sup>22</sup> refers to state regulatory power.<sup>23</sup> In *Commonwealth v Alger*,<sup>24</sup> Massachusetts Chief Justice Lemuel Shaw decided that although the government used its power by limiting the landowner’s usage (the prohibition of warehousing gunpowder in inhabited areas, construction rules designed to

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<sup>21</sup> The court in *Commonwealth v Alger* stated, “All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.” *Commonwealth v Alger* 61 Mass. 53, 85 (1851)

<sup>22</sup> The term “police power” was first used in 1827 by Chief Justice Marshall, to delimit the scope of federal and state authority, in *Brown v Maryland* 25 US 419 (1827) But it was first widely used because of *Mayor of New York v Miln* 36 US 102 (1837); D. Benjamin Barros, ‘The Police Power and the Takings Clause 58’ (2004) U. Miami L. Rev. 471, 476 and this term in modern doctrine was known by Chief Justice Lemuel Shaw in the 1851 case: *Commonwealth* Ibid 53

<sup>23</sup> D. Benjamin Barros (n 22) 473

<sup>24</sup> *Commonwealth* (n 21) 53, 85

limit the risk of fire, and use regulations prohibiting the location of contagious disease hospitals), and the prohibitions on such uses diminish the value of the property and cause economic harm to the property owner, the constitution did not require compensation because they are exercises of the police power, not the power of eminent domain.<sup>25</sup>

However, the Supreme Court, in *Pennsylvania Coal Co. v Mahon*,<sup>26</sup> first recognized a relationship between the takings clause in the Fifth Amendment and regulation of property.<sup>27</sup> The Court decided that the Fifth Amendment's Takings Clause applies not only when government directly condemns property through eminent domain or physically takes property, but also when a government regulation "goes too far" in restricting the use of property,<sup>28</sup> which is called a "regulatory taking."

There are two tests for considering whether land use regulation is a Taking.

First, some regulations are takings per se. In *Lucas v South Carolina Coastal Council*,<sup>29</sup> the U.S. Supreme Court held that in the relatively rare circumstance in which a land-use regulation denies a property owner all "economically viable use of his land," the Fifth Amendment requires payment of compensation (with limited exceptions) despite a legitimate public purpose of preventing serious harm to the public.<sup>30</sup> Justice Scalia, in *Lucas*, explained that in past regulatory takings cases, at least two categories of regulatory action were found to be "compensable" without inquiry into the "public interests advanced in support of the restraint." The first category consists of regulations that cause an actual physical "invasion" of property. (Construing *Loretto v*

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<sup>25</sup> Ibid

<sup>26</sup> *Pennsylvania Coal Co.* (n 14) 393

<sup>27</sup> Ibid 413

<sup>28</sup> Ibid 415

<sup>29</sup> 505 US 1003 (1992)

<sup>30</sup> Ibid 1006

*Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982)).<sup>31</sup> The second category occurs when regulation denies all “economically beneficial or productive use of the land.” (Construing *Keystone Bituminous Coal Ass’n. v DeBenedictis*, 480 US 470, 495 (1987)).<sup>32</sup>

Second, other regulations are taking under *Penn Central Transportation Co. v New York City*,<sup>33</sup> called “regulatory takings.” A regulatory taking will be found when a regulation goes too far.<sup>34</sup> Claiming under the regulatory takings doctrine, if there is no per se taking, the property owner must show a substantial and measurable decline in market value as a result of the regulations because there are no facial takings under regulatory takings analysis.<sup>35</sup> This regulatory taking test arose as a result of New York City's efforts to apply its historic preservation law to the Grand Central Station.<sup>36</sup> The Supreme Court reviewed its earlier cases and concluded that takings actions are “essentially ad hoc, factual inquiries” to apply the “goes too far” test.<sup>37</sup>

In *Penn Cent. Transp. Co.*, New York City enacted the Landmarks Preservation Law to enable the city to designate certain buildings and neighborhoods as historical landmarks. *Penn Central Transportation Co.*

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<sup>31</sup> In *Loretto*, the plaintiff Loretto purchased a five-story apartment building in New York City. Under New York law, a landlord must permit a cable television company to install its cable facilities upon his property. In the case, the defendant Teleprompter Manhattan CATV Corp. installed cable facilities that occupied portions of Loretto's roof and the side of her building. The U.S. Supreme Court ruled that a permanent physical occupation authorized by government is a taking requiring the payment of just compensation without regard to the public interests that it may serve or the fact that it only has a minimal economic impact on the property owner. *Loretto* (n 15) See also *Kaiser Aetna v United States* 444 US 164 (1979), and the rights to descent and devise in *Hodel v Irving* 481 US 704 (1987)

<sup>32</sup> *Lucas* (n 29) 1015

<sup>33</sup> *Penn Cent. Transp. Co.* (n 3)

<sup>34</sup> *Pennsylvania Coal Co.* (n 14) 412

<sup>35</sup> See *Keystone Bituminous Coal Ass’n v DeBenedictis* 480 US 470 (1987)

<sup>36</sup> *Penn Cent. Transp. Co.* (n 3)

<sup>37</sup> *Ibid* 124

(Penn Central) owned the Grand Central Terminal in New York City which was designated as a historical landmark under the law. Penn Central leased the airspace above the Grand Central Terminal for fifty years before submitting proposals for building designs to the New York City Commission and applying permission to construct an office building above the Grand Central Terminal. The Commission denied that request on the ground that the Grand Central Terminal was an historical landmark. Penn Central brought suit in New York Supreme Court against New York City alleging that the City Commission's application of the Landmarks Preservation Law which denied its rights to build an office building above the Grand Central Terminal and receive revenue from the building constituted a taking of the company's property without just compensation as required by the Fifth and Fourteenth Amendments.

In an effort to begin to give some content to regulatory takings analysis, the U.S. Supreme Court identified three factors with "particular significance" in regulatory taking cases for determining when a governmental regulation goes too far.<sup>38</sup> A new multi-factor test was articulated for determining when a regulation requires the payment of just compensation to a property owner. When determining whether a state action constitutes a taking of private property for public use with the requirement of just compensation under the Fifth and Fourteenth Amendments, courts should consider the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation. The Court found no taking.<sup>39</sup> Under the test of *Penn Cent. Transp. Co.*, courts look at the unique facts of each case, paying special attention to three factors: the economic impact of the regulation, the property owner's reasonable

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<sup>38</sup> The Court's statement in *Penn Cent. Transp. Co.* that these three factors have "particular significance" might be read to suggest that other factors could be relevant as well. However, the Court has never explicitly expanded upon this list of factors. *Ibid* 124

<sup>39</sup> *Ibid* 127

investment-backed expectations, and the character of the government action. In *Penn Cent. Transp. Co.*, the Court applied these factors as follows:

(1) The “economic impact” of the governmental regulations on the owner. The economic impact of the law on Penn Central does not constitute a total diminution of the value of its property, as it can still generate revenue from renting out portions of the Grand Central Terminal. It is merely prohibited from gaining additional revenue from leasing the airspace rights above the building.

(2) The extent to which the action “interferes with distinct investment-backed expectations.” The Court asserted that Penn Central’s investment-backed expectations are not significantly impaired by the regulation. The regulation permits Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment, where the revenue from developed airspace was not an option when Penn Central first invested in the property.

(3) The “character” or “nature” of the government action. The Court commented that a “taking” may more readily be found when the interference with property can be characterized as a physical invasion by the government,<sup>40</sup> than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. The governmental invasion caused by the regulation is not physical but the government action in the case is merely a prohibition on further development of Penn Central’s property.<sup>41</sup>

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<sup>40</sup> In the decades following *Penn Cent. Transp. Co.*, the Supreme Court qualified the open-ended “too far” test by announcing a per se rule on takings. In *Loretto*, defendant Teleprompter Manhattan CATV Corporation installed some cable boxes and cable lines on top of Loretto’s apartment building without her permission, pursuant to a state law authorizing such installations. *Loretto* (n 15) 422–23. Finding that the installation constituted a permanent physical occupation, the Court held that because “a permanent physical occupation authorized by government is a taking,” regardless of the public interest at stake or the extent of physical occupation, the state law effected a taking, requiring compensation. *Ibid* 426, 455

<sup>41</sup> *Penn Cent. Transp. Co.* (n 3) 107

These three factors can be thought of as proxies for eminent domain-like conduct. The heart of the inquiry is whether the regulation is more like an act of eminent domain or a routine exercise of state police powers to regulate public health and safety.<sup>42</sup>

Under the Supreme Court's regulatory takings doctrine per *Penn Cent. Transp. Co.*, courts must determine, as one of factors, the regulation's economic impact—the extent to which the regulation impacts the property's value. To determine how much economic impact of the governmental regulations on the owner, the court considers the burden on the landowner's right in using property as a whole. But whether land is valueless depends on whether the "relevant parcel" is the two lots combined as one lot, or just the regulated portion of the property. There are many factors that might determine what the relevant parcel is. The deed, adjacency, the single transaction, and the nature of the regulation, could be used to determine the relevant parcel, with varying results. The question of when a parcel is treated as one or two is the issue of "conceptual severance,"<sup>43</sup> also known as the "denominator problem."<sup>44</sup> (The denominator problem is a legal precursor to the ultimate question of fairness embodied in the Armstrong principle<sup>45</sup> and is a question on how to pick the denominator for measuring the extent of a loss, by considering a number of factors in determining the proper denominator of the takings inquiry.<sup>46</sup> The denominator problem needs a flexible approach, designed to account for factual differs."<sup>47</sup>)

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<sup>42</sup> *Lingle v Chevron U.S.A., Inc.* 544 US 528, 539 (2005)

<sup>43</sup> The term "conceptual severance" is first neologized by Margaret Jane Radin (Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 Colum. L. Rev. 1667, 1676)

<sup>44</sup> Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harv. L. Rev. 1165, 1192–1193

<sup>45</sup> See William Michael Treanor, 'The Armstrong Principle, the Narratives of Takings, and Compensation Statutes' (1997) 38 Wm. & Mary L. Rev. 1151

<sup>46</sup> Frank I. Michelman (n 44)

<sup>47</sup> *Loveladies Harbor v United States*, 28 F.3d 1171 (Fed. Cir. 1994)

The word “conceptual severance,” as the process of using only the property interest affected by the regulation, was created by Professor Margaret Jane Radin. She defined “conceptual severance” to consist of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually, construes those strands in the aggregate as a separate whole thing.”<sup>48</sup>

Whether an owner can conceptually sever determines how much diminution of value the property owner has suffered as a result of the adoption of some regulations. For proving value diminution, the property owner attempts to conceptually sever his property physically, functionally, or temporally effect to his bundle of rights so that a regulation diminishes a significant portion or all of the severed property’s value.

Four categories of conceptual severance have emerged in the scholarly commentary. Those are vertical, functional, temporal, and horizontal severance.<sup>49</sup>

(1) **Vertical severance** – the U.S. Supreme Court has consistently rejected vertical severance since *Penn Cent. Transp. Co.* in 1978. The Court rejected the Penn Central’s argument that the law effectively took away all of its air rights.<sup>50</sup> Rejecting vertical severance, the Court held that the city’s Landmarks Preservation law did not go too far and thus did not affect a taking of Penn Central’s property.<sup>51</sup> The divisions of a parcel into air rights in *Penn Cent. Transp. Co.* is an example of vertical division of land. The other

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<sup>48</sup> Margaret Jane Radin (n 43)

<sup>49</sup> David A. Dana & Thomas W. Merrill, *Property: Takings* (Foundation Press New York 2002) 135

<sup>50</sup> See *Penn Cent. Transp. Co.* (n 3) 130

<sup>51</sup> See *Penn Cent. Transp. Co.* (n 3) 137-138

examples are the divisions of a parcel into surface rights, or subsurface rights.<sup>52</sup>

However, before *Penn Cent. Transp. Co.*, in 1922, the Court in *Pennsylvania Coal Co. v Mahon*<sup>53</sup> recognized the fundamental private property rights versus public tension again by mentioning that where the regulation rendered coal mining commercially impracticable and caused sufficient diminution in property value, it should be considered a taking.

In *Pennsylvania Coal Co.*, there had been an actual severance of the property subject to the regulation, that is, the subsurface mineral rights. The dispute began when the coal company conveyed the surface of a plot of land it owned to Mahon but retained the right to mine underneath the property while Mahon's right was subject to the risks associated with mining that caused subsidence. After that, the Commonwealth of Pennsylvania enacted the Kohler Act, preventing coal mining. Consequently, as a result of the regulation, the property owner (the coal company) suffered essentially a total loss of its support estate. The Court partly based its decision on protecting property rights, seeking to achieve a balance between the requirements of the protection of property rights and advancing the state's interest in regulating property for health, safety, and the common welfare. The court asserted that a state may pass laws in the valid exercise of its police powers that has incidental

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<sup>52</sup> However, it seems the U.S. Supreme court, in the past, accepted vertical severance. The Court in *Pennsylvania Coal Co.* held that Pennsylvania Coal Co. had only acquired surface rights and not the right to supporting property underneath the land. When it could not exercise the only valuable right it possessed which was to mine the property for profit because the subsurface rights to a property be taken by The Kohler Act for the public, such Act went beyond a regulation and became a taking. The Court considered the magnitude of diminution of the value of property and found that when a diminution reaches a certain point the government must compensate for it. (*Pennsylvania Coal Co.* (n 14) 413; Also, see *McCarran Int'l Airport v Sisolak*, where the Court stated, "Like most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." (*McCarran Int'l Airport v Sisolak* 122 Nev. 645 (2006))

<sup>53</sup> *Pennsylvania Coal Co.* (n 14)

impact on property values, but when the law causes sufficient diminution in property value, the state must take the land by eminent domain and provide compensation. While the use of property may be regulated, overregulation will be considered a taking. It is a question of degree on calculating the diminution in value. The issue is whether the court starts with the total value of the landowner's rights, or whether the court conceptually severs the surface rights and the subsurface mineral rights and the support estates. If the court does this conceptual severance, it would say that the landowner has lost 100 percent of his support rights - a total wipeout - rather than, say, five percent of his total value. In this case, the statute does not seek to correct a public nuisance, because only one home is affected, and it does not intend to protect personal safety, since Mahon knew the risks involved in purchasing the land. Thus, the statute does not fall within the government's police power. Instead, it should be considered a taking.<sup>54</sup>

(2) **Functional Severance** – the court accepted this kind of conceptual severance. Functional severance is grounded in the notion that property is a bundle of rights.<sup>55</sup> The bundle of rights traditionally include the rights to use, possess, exclude, and dispose.<sup>56</sup>

The court in *Keystone Bituminous Coal Ass'n v DeBenedictus*<sup>57</sup> ruled that in determining whether a regulation restricting the use of property constitutes a taking of the property, the courts consider the parcel of property as a whole, rather than as a bundle of discrete parts.<sup>58</sup> In 1966, the Pennsylvania legislature

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<sup>54</sup> Ibid 412

<sup>55</sup> See Courtney C. Tedrowe, 'Conceptual Severance and Takings in the Federal Circuit' (2000) 85 Cornell L. Rev. 586 (exploring the relationship between the bundle of rights metaphor and conceptual severance).

<sup>56</sup> See Richard A. Epstein, *Takings: Private Property And The Power Of Eminent Domain* (Harvard University Press London 1985) 59 (advocating for an extremely liberal and individualistic conception of property where property consists of the rights of "possession, use, and disposition")

<sup>57</sup> *Keystone Bituminous Coal Ass'n* (n 35) 470

<sup>58</sup> Ibid 497

enacted the Subsidence and Land Conservation Act, which prohibited mining coal when doing so might cause subsidence of land. Land subsidence due to coal mining is a significant problem in Pennsylvania as it has caused widespread property damage. The Keystone Bituminous Coal Association brought suit in federal court against various state officials as defendants who were in charge of determining what coal could not be mined and enforcing the prohibition on mining. Keystone claimed that the Subsidence Act's prohibition on mining coal constituted a taking requiring just compensation. Keystone also claimed that the regulations were a taking because they prevented the mining companies from exercising their rights to the support estates of their land.<sup>59</sup> In this case, the court found that Subsidence and Land Conservation Act did not prevent all economically viable uses of the mine companies' land. While the mine company, Keystone, claimed that it was denied all economically viable uses of the coal on which it is compelled to leave in the ground and of the support estates that it purchased under Pennsylvania law, courts determine whether regulations are takings by looking at how the regulations will affect parcels of property taken as a whole. Where an owner possesses a full bundle of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.<sup>60</sup> The Court in *Keystone* also found no taking because there was no showing of the diminution of value in land resulting from the regulation.<sup>61</sup>

However, if the regulation denies all economically beneficial or productive use of land, the court decided that a taking occurred. The U.S. Supreme Court in *Lucas v South Carolina Coastal Council*,<sup>62</sup> carved out an exception to the multifactor test articulated in *Penn Cent. Transp. Co.* when government regulations have a severe enough economic impact on the use of property, amounting to a permanent physical occupation of land. The Court

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<sup>59</sup> The State of Pennsylvania recognizes three types of estates: surface estate, mineral estate, and support estate. *Ibid* 478

<sup>60</sup> *Ibid* 473

<sup>61</sup> *Ibid* 512

<sup>62</sup> *Lucas* (n 29) 1003

adopted a “per se” rule that declared that in the “extraordinary circumstance” in which a regulation caused a property owner to lose all economically beneficial uses of the land, a taking necessarily resulted – a per se taking.<sup>63</sup> The Supreme Court held that David Lucas, who purchased two beachfront lots on a South Carolina barrier island with the expectation of constructing single-family homes, had suffered a “taking” of his property by government enactment of the Beachfront Management Act, which prohibited the building of any permanent residential structures on the lots. Lucas's plans were completely frustrated, and the value of his two lots plummeted to almost nothing. The Court ruling, written by Justice Antonin Scalia, held that although government may generally restrict the use of private property without compensation, a taking occurs when the regulation denies all economically beneficial or productive use of land,<sup>64</sup> and that constitutes a per se taking.<sup>65</sup> Thus, the Fifth Amendment would guarantee him just compensation for “total takings.”<sup>66</sup>

Per a footnote in *Lucas*, Justice Scalia suggested looking to state law specifically to see whether state law recognizes or protects the specific property interest at issue, as a factor in the relevant parcel determination.<sup>67</sup>

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<sup>63</sup> Ibid 1019

<sup>64</sup> Ibid 1015. Regulatory taking cases should not be confused with cases involving an actual physical invasion of the property, which called Per se taking or categorical taking. Cf. *Loretto v Teleprompter Manhattan CATV Corp.* the court held that when a physical invasion of private property is involved, a taking occurs no matter how small the affected land segment may be. (*Loretto* (n 15))

<sup>65</sup> Ibid 1015-16

<sup>66</sup> But if the loss of economic value is “total” but “temporary, the courts decided it is not taking. See *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency* 535 US 302 (2002)

<sup>67</sup> The court stated that “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the property interest against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion

However, the court did not decide how to determine the relevant parcel of land, within the meaning of *Penn Cent. Transp. Co.*, that is subject to the regulatory taking, especially when the landowner owns multiple parcels in the vicinity, some of which have been purchased and sold over multiple transactions.

(3) **Temporal Severance** – this kind of conceptual severance was accepted, then rejected, by the court. It may be the most confusing form of conceptual severance because time plays varying roles in property. Time is a characteristic of property interests (e.g., leaseholds or defeasible fees).<sup>68</sup> Further, time can characterize as the government action (i.e., the effective duration of the regulation). Additionally, time can also be a characteristic of the taking denominator (e.g., regulation prohibits owner to use property from 2017 to 2018).<sup>69</sup> The question was first addressed in *First English Evangelical Lutheran Church v County of Los Angeles*,<sup>70</sup> which held that, under the Takings Clause, a taking requires just compensation, regardless of whether the offending government regulation is later rescinded and the taking is made merely temporary, not permanent.<sup>71</sup>

However, in 2002, the Supreme Court reversed its previous holding in *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*.<sup>72</sup> The Court in *Tahoe* decided that if the loss of economic value is “total” but “temporary, then it is not a taking. In that case, a 32-month development moratorium for certain areas in the Tahoe basin denied all economic use of its

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of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.” *Lucas* (n 29) 1016 fn.7

<sup>68</sup> See Danaya C. Wright, ‘A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis’ (2004) 34 *Envtl. L.* 175, 214

<sup>69</sup> Angela Chang, ‘Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights’ (2013) 98 *Cornell L. Rev.* 965, 975-976

<sup>70</sup> 482 US 304 (1987)

<sup>71</sup> *Ibid* 318, 321

<sup>72</sup> *Tahoe-Sierra Pres. Council* (n 66)

property during that 32-month period.<sup>73</sup> However, by citing *Penn Cent. Transp. Co.*'s "parcel as a whole" rule, and distinguishing plaintiffs' claim from *Lucas* that dealt with a permanent regulation that deprived an individual of all viable economic use of a fee simple estate, Justice Stevens rejected temporal severance, holding that plaintiffs cannot conceptually sever the 32-month fragment from the remaining fee simple estate and claim that the moratoria effected a taking of the 32-month segment.<sup>74</sup>

(4) **Horizontal Severance** – this is the conceptual severance stereotype that usually emerges in one's mind when thinking about land use regulatory taking claims, and is the heart of conceptual severance.<sup>75</sup> Horizontal severance is a necessary question in determining the extent of the property owner's loss and ultimately whether the property owner is entitled to just compensation.

In *Palazzolo v Rhode Island*,<sup>76</sup> the court cited the multi-factors in *Penn Cent. Transp. Co.* The court stated that where a regulation places some limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.<sup>77</sup> In this case Anthony Palazzolo owned a waterfront parcel of land in the town of Westerly, located in the State of Rhode Island. Nearly all of Palazzolo's property was designated as coastal wetlands under Rhode Island law. The property was designated as such when Palazzolo acquired it, and the effect of such a designation was to prohibit the development of the property. Despite the designation, Palazzolo submitted several proposals to the Rhode Island Coastal Resources Management Council, the state organization responsible for protecting wetlands, seeking permission to

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<sup>73</sup> Ibid 312

<sup>74</sup> Ibid 331

<sup>75</sup> Angela Chang (n 69) 977

<sup>76</sup> 533 US 606 (2001)

<sup>77</sup> Ibid 611

fill the marshes located on his property and develop it for public use. The Council denied all of Palazzolo's proposals, and he filed suit in Rhode Island state court on the grounds that the Council's application of its restrictive wetlands policies and denial of his proposals constituted a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Superior Court of Rhode Island rejected Palazzolo's claim, and he appealed. The Supreme Court of Rhode Island also rejected Palazzolo's claim and held that his takings claim was not ripe, that he had no right to challenge land regulations in place on his property at the time he acquired it. The court held further that the *Lucas* ruling did not apply because Palazzolo had not lost all economically beneficial use of his property because Palazzolo could develop an upland portion that had an estimated worth of \$200,000. Therefore, Palazzolo could not recover under *Penn Cent. Transp. Co.*<sup>78</sup>

The case raises the question as to what the Court meant when it established the rule of "parcel as a whole" in *Penn Cent. Transp. Co.* During the following forty years, the Court has provided little guidance on the meaning and proper application of Penn Central's three factors, perpetuating the essentially ad hoc approach to takings analysis<sup>79</sup> and contributing to the widespread view that regulatory takings is an especially confusing field of law.<sup>80</sup> The Court has many times repeated the list of *Penn Cent. Transp. Co.* factors, but has never refined the meaning of those factors, or explained how they should be weighted,<sup>81</sup> and also never explained how to consider "as a whole".

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<sup>78</sup> Ibid

<sup>79</sup> See *Tahoe-Sierra Preservation Council, Inc.* (n 66) 302, 326 quoting *Lucas* (n 29) 1015 In turn quoting *Penn Cent. Transp. Co.* (n 3) 124 ("In the decades following [Penn Central], we have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries'")

<sup>80</sup> See D. Benjamin Barros (n 22) 471 fn.1 (bemoaning the "widespread confusion" created by Supreme Court takings jurisprudence and citing numerous prior articles making similar complaints)

<sup>81</sup> Holly Doremus, 'Takings and Transition' (2003) 19 J. Land Use & Envtl. L. 1, 7

Suppose a landowner buys two identically sized, adjacent lots with separate deeds in a single transaction; black lot and white lot. Afterward, a regulation forbids all construction on the black lot. Accordingly, if the landowner would like to bring a case by claiming the regulation has taken his property and seek compensation, under the Supreme Court's regulatory taking doctrine in *Penn Cent. Transp. Co.* claiming such regulation goes too far, one factor that the court has to consider is the economic impact of such regulation. To consider the regulation's economic impact, the court has to determine the extent to which the regulation impacts the property's value. If the regulation renders the property valueless or 100 percent loss, the regulation constitutes a taking, requiring just compensation.<sup>82</sup> But if the loss is less than 100 percent the percentage is not the only consideration. The Supreme Court has indicated that reductions in value of over 90 percent are not necessarily sufficiently onerous to constitute a taking.<sup>83</sup> In other words, the U.S. court generally has required diminutions well in excess of 85 percent to find a regulatory taking.<sup>84</sup>

However, there is still a question of how close the deprivation is to a total loss when the regulation only affects part of the parcel. Such question

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<sup>82</sup> See *Lucas* (n 29) 1003

<sup>83</sup> See *Agins v City of Tiburon* 447 US 255 (1980) (no taking with an eighty-five percent reduction in value); *Village of Euclid v Ambler Realty Co.* 272 US 365 (1926) (no taking with a seventy-five percent reduction in value). Cf. *Hadacheck v Sebastian* 239 US 394 (1915) (no taking with a 92.5 percent diminution in value – but not *Penn Cent. Transp. Co.* analysis)

<sup>84</sup> *Walcek v United States* 49 Fed. Cl. 248, 271 (2001) The Court in *Walcek* cited one anomalous decision, *Florida Rock Indus., Inc. v United States* 45 Fed. Cl. 21, 36 (1999) in which the court had concluded that a 73.1% diminution in value was indicative of a *Penn Cent. Transp. Co.* taking. However, the significance of this outlier should be discounted because the court also relied in part on a finding that the owner could only recoup half of its original investment in the property. That calculation was based on the assumption that the owner's basis in the property should be adjusted for inflation, an approach that was subsequently disapproved by the Federal Circuit in its decision affirming the trial court's ruling in *Walcek v United States* 303 F.3d 1349 (Fed. Cir. 2002)

is the question of conceptual severance or the denominator problem. The answer depends on what the meaning of “parcel as a whole” is and whether the relevant parcel is the two lots combined as one lot, or just the black lot portion of the property. If the relevant parcel is only the black lot which is evaluated as separate parcels, it means the government has taken total value of the owner’s property. On the contrary, if the relevant parcel is the two lots combined and is evaluated as single parcel, it means the regulation impairs only 25 percent or 50 percent of the relevant parcel, thus no taking has arisen.

So, before *Murr*, the meaning of the phrase “as a whole” was unclear. What is the parcel for which the diminution in value should be measured? This problem often referred to as finding the appropriate denominator.<sup>85</sup> The harm or diminution in value resulting from a regulation, in the meaning of “as a whole”, will vary depending upon whether the loss is calculated on the portion of the parcel affected by the regulation, the parcel measured by its physical boundaries, or all the lands held by the owner affected by the regulation. The Supreme Court answered these inquiries in *Murr*, in which the Court defines the meaning in practice of the term “parcel as a whole”. The question in *Murr* is whether two separately adjacent parcels of land, under common ownership, should be evaluated as a single parcel in a regulatory taking analysis.

### **3. Analysis of question whether the court in *Murr* made the right decision on the question of Taking and Compensation**

In *Murr*, the problematic ordinance did not deny the Murrs all economic benefit because the Murrs can use their lands but cannot sell them separately,

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<sup>85</sup> *Lucas* (n 29) 1016 fn.7; *Pennsylvania Coal Co.* (n 14) 419 (Brandeis, J., dissenting)

so the standard for considering whether there is regulatory taking is the *Penn Cent. Transp. Co.* test. The court, in *Murr*, stated that states create property rights with respect to particular things, and, in the context of real property, those things are horizontally bounded plots of land, so, the first thing to do is to identify the relevant “private property.”<sup>86</sup> The precise question in this case is how the “parcel as a whole” test of *Penn Cent. Transp. Co.* applies to two contiguous parcels that came under common ownership by different routes.<sup>87</sup> The U.S. Supreme Court upheld the Wisconsin Supreme Court’s ruling that two contiguous lots should be considered one parcel for the purposes of the government regulatory taking.

However, to determine whether there is regulatory taking, the Court should determine that a landowner possesses a valid stick in the bundle of property rights affected by the governmental action. If that landowner does possess such interest, the court will proceed to the second step, i.e., determining whether the government action at issue constituted a taking of that stick.

### 3.1 The definition of private property

The first question in this case, to determine whether there is regulatory taking under the *Penn Cent. Transp. Co.* test, should be what the meaning or scope of private property is. In a private property system, in the case of each object, the individual person whose name is attached to that object is a person who determines how the object shall be used and by whom, and his decision would be upheld by the society as final<sup>88</sup> when there is any dispute about what is to be done with the object. Such privileged position is called ownership. Property is as an essentially abstract set of legal rights, usually with

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<sup>86</sup> *Murr* (n 1) 1953

<sup>87</sup> Richard A. Epstein (n 4) 151-152

<sup>88</sup> Jeremy Waldron, ‘What Is Private Property?’ (1985) 5 *Oxford Journal of Legal Studies* 313, 327

respect to tangible things.<sup>89</sup> It is a commonplace that property is a bundle of rights.<sup>90</sup> Ownership under the bundle-of-rights metaphor represents rights that one is entitled to vis-a-vis other people.<sup>91</sup> According to John Lewis, the bundle-of-rights metaphor was rooted in the individual's instinctive sense that ownership of a thing meant, in practical terms, "the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that," and so forth.<sup>92</sup>

The Supreme Court of the United States in *Phillips v Wash. Legal Found.*,<sup>93</sup> set forth how to determine what private property is. In that case, the Court stated that for purposes of the takings clause of the Federal Constitution's Fifth Amendment, interest earned on client funds held by lawyers in trust accounts pursuant to a state's "interest on lawyers trust account" (IOLTA) program is private property, because (1) possession, control, and disposition are valuable property rights that inhere in such interest income, even though the property may have no economically realizable value to the owner; (2) the value of such interest income is (a) created by the owners' funds and (b) not "government-created value," that is, the product of increased efficiency, economies of scale, or pooling of funds by the government; and (3) the state's confiscation of such interest income does not amount to a fee for services performed, as funds held in IOLTA accounts are managed entirely by banks and private attorneys rather than the state.<sup>94</sup> Under the rule in *Phillips*, the Murrs' lands are private property because they typically have the right of

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<sup>89</sup> Leif Wenar, 'The Concept of Property and the Takings Clause' (1997) 97 Colum. L. Rev. 1923, 1926 ("According to Hohfeld, property cannot be things, like land or breweries; property can only be property rights-the rights over things")

<sup>90</sup> See J.E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L. Rev. 711, 713 ("The prevalence of the [bundle-of-rights] paradigm is undeniable")

<sup>91</sup> Ibid 712-713

<sup>92</sup> John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 Callaghan & company, Chicago 1888) § 55, 44

<sup>93</sup> *Phillips v Wash. Legal Found.* 524 US 156 (1998)

<sup>94</sup> Ibid 159

possession, control, and disposition in their lands and the lands' value created by the Murr's development and money.

To define the scope of private property, the courts, typically, look to state law. The state law defines the boundaries of detached parcels of land, and those boundaries should determine the scope of private property.<sup>95</sup> However, the majority in *Murr* departed from the traditional approach<sup>96</sup> of looking only to state and local law to define the "private property rights" at issue in a takings case. Instead, the majority stated that the courts must consider a number of factors, including the physical characteristics of the land; the prospective value of the regulated land; and whether reasonable expectations would lead the land owner to expect that his holdings would be treated as one parcel.<sup>97</sup> The majority's decision did not define the phrase "parcel as a whole" for determining the economic impact of the regulation, a factor set forth in *Penn Cent. Transp. Co.* Instead, the majority defined such term as another factor, besides the three factors set forth in *Penn Cent. Transp. Co.*, for determining whether a regulation affects a taking to the property, which is a separate question and makes it look like the Court lost its way. In other words, "parcel as a whole" should be determined as a part of the economic impact of regulation, not as a factor for regulatory taking.

The majority in this case mentioned that the test for regulatory taking requires the courts to compare the value of property that has been taken with the value that remains in the property.<sup>98</sup> It also stated that a further related question is how to define the unit of property whose value is to furnish the denominator of the fraction, which leads to another question

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<sup>95</sup> *Murr* (n 1) 1950 (Roberts, C.J., dissenting)

<sup>96</sup> To determine property boundaries, the traditional approach is found under the state law. See 46 U.S.C. § 103 (2006) stated "In this title, the term "Boundary Line" means a line established under section 2(b) of the Act of February 19, 1895 (33 U.S.C. 151(b))." An example for public land is *State of Arkansas v State of Mississippi* 250 US 39 (1919) An example for private property is *Littlejohn v Fink* 190 N.W. 1020 (1922)

<sup>97</sup> *Murr* (n 1) 1945

<sup>98</sup> *Ibid* 1936

whether the property taken is all, or only a portion of, the parcel in question.<sup>99</sup>

Moreover, the transferring of Lot E to the Murrs individually did nothing to change the physically boundaries under state and local law. The Murrs have two parcels, lot E and lot F, each parcel described by a deed or other document separately. Under the traditional approach of looking at state law, these two parcels are treated separately in law, for example, there are two deeds and separate title records, and each parcel owner has to pay estate tax separately. Hence, to determine the scope of the Murrs' property, for identifying the relevant parcel, the court should consider only Wisconsin state law, which in other legal ways treated and determined Lot E and F separately as separate parcels, albeit defining the parcel by reference to state law could be altered by state related authorities according to the majority. The majority explained that State may impose development limits on the aggregate area of nonadjacent property owned by a single person.<sup>100</sup> But if the state enacts the law and imposes development limits, the adjacent lots of single owner would be treated as one parcel under such state law and other local laws. For instance, the owner of adjacent lots should pay for estate taxes or fees as one parcel or the estate deeds of parcels should be combined as one deed.

The Court defined "private property" contrary to other laws. Lots E and F were treated separately under other branches of state law. But the majority in *Murr* treated Lot E and F as one parcel, with the result that there was no regulatory taking under the factors of *Penn Cent. Transp. Co.* As Chief Justice Roberts, in dissent, explains:

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<sup>99</sup> Ibid 1944. In addressing this question, the Court articulated a new standard that moves beyond the limitations of state and local law. The Court explained that: "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property from the value that remains in the property", it is essential to determine "how to define the unit of property whose value is to furnish the denominator of the fraction." Ibid 1944

<sup>100</sup> Ibid 1945

*Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such established property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property" – adopted solely "for purposes of th[e] takings inquiry," – undermines that protection.<sup>101</sup>*

Additionally, if the title to Lot E referenced one person who is not the same person on the title to Lot F, does the judgment overlap? If the facts changed and instead of transferring the lots to the Murrs, the transfer was to another individual, the lot would not subject to the Wisconsin law and the owner could dispose or develop the land. That would lead to the weird outcome if the state enacted the law to protect the environment. In *Murr*, where both Lot E and F, which belonged to the Murrs, are considered as a single parcel and no taking occurred, instead, the facts change to Lot E and F were belonged to separated owners and were considered as separated parcels, it might be a taking for which just compensation can be received. So, under the same standard, it is perplexing if the court treats the two adjacent lots of a single owner at one time as a parcel, but there are still two separately deeds that the owner could sell one of parcel with deed of title to the others later, which not subject to the Wisconsin regulation.

### **3.2 Whether regulatory taking occurred under *Penn Cent. Transp. Co.* factors**

In *Murr*, the court mentioned that the state and local regulations effectively merged Lots E and F because a substandard lot, lot E, is a residential lot which does not meet the lot size requirements for the district in which it is located as set forth in the law and thus should be evaluated as a single parcel consisting of Lots E and F together due to the Murrs' voluntary act in bringing the

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<sup>101</sup> *Murr* Ibid 1950 (Roberts, C.J., dissenting)

lots under common ownership after the regulations were enacted. In other words, the conveyances were made even though the Murrs were notified that the property in question was “subject to easements, covenants, restrictions and declarations of record,” including the merger restrictions created under the Wisconsin ordinance.<sup>102</sup> This reasoning implies that if the Murrs had transferred title to Lot E to a wholly owned corporation the merger doctrine would not have applied. Indeed, the Murrs could have avoided the application of the parcel-as-a-whole doctrine in regulatory taking by following the simple maneuver of keeping the title to the two parcels in separate legal entities at all relevant times. There is nothing that the government could have done to stop them from doing so.

Before the transfer, the Murrs had a right to transfer their property to their descendants and also had a right to claim a regulatory taking. The individual’s right to retain the interests and exercise the freedoms of managing a bundle of rights are the core of private property ownership. And not only the landowner, who acquired the property before the regulation, but also the landowner who bought or obtained the regulated property with notice of the regulation may challenge such regulation and claim a regulatory taking. The U.S. Supreme Court court in *Palazzolo v Rhode Island*<sup>103</sup> ruled that landowner who obtained the property with notice of the regulation, which may be called “coming to taking,” may still challenge such regulation as a taking, requiring payment of just compensation under the Taking Clause when the property was affected by that regulation. Following *Palazzolo*, even though the Murrs acknowledged the merger clause, they still had right to claim a regulatory taking occurred under principles outlined in *Penn Cent. Transp. Co.*

### 3.2.1 The economic impact of the regulation analysis, including conceptual severance

Private owners of property care about regulatory risks that impact property values. Some might think that economic impact is the least problematic of the *Penn Cent. Transp. Co.* factors because it apparently

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<sup>102</sup> Richard A. Epstein (n 4) 160

<sup>103</sup> *Palazzolo* (n 76)

showed the greater the economic impact of a government action the greater the likelihood of a taking, and in the absence of a very significant economic impact, a regulatory taking claim will generally fail.<sup>104</sup> Admittedly, a high level of economic impact should be necessary to establish a regulatory taking. However, the actual economic effects of regulations are often difficult to measure, and it indeed may be impossible to determine whether the net economic effect of a regulation is positive or negative.<sup>105</sup> Taking the economic impact into account, if treating two adjacent lots owned by single owner separately would result in one of the properties becoming completely worthless, it should be a regulatory taking that is compensable.

The Court in *Murr* used multiple factors to define the property boundary. For considering the question how to define the unit of property that is the subject of the alleged taking, the majority in *Murr* stated that courts must consider other factors, such as the land's treatment, the land's physical characteristics and land's prospective value, as well as reasonable expectations. However, considering the substantial net reduction in the value of a piece of their property, the Murrs lost their economic expectations in the property.<sup>106</sup>

There is not a single undivided property right inhering in an item of property, but, rather multiple property interests, often metaphorically called a "bundle of sticks" or "bundle of rights" that can be taken in whole or in part.

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<sup>104</sup> John D. Echeverria, 'Making Sense of Penn Central' (2005) 23 UCLA J. Envtl. L. & Pol'y 171, 178

<sup>105</sup> As the Supreme Court observed in *Tahoe-Sierra*, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way— often in completely unanticipated ways." *Tahoe-Sierra Pres. Council* (n 66) 302, 324

<sup>106</sup> The court explained that because the test for regulatory taking requires courts to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction. *Murr* (n 1) 1936

After defining property as a bundle of rights, one must determine what rights are essential to that bundle, what minimum rights combined constitute property, and what rights the government can rescind without such action constituting a taking of property<sup>107</sup> and whether the challenged regulation destroys one or more of the fundamental attributes of property ownership – the right to possess, to exclude others, or to dispose of property. Chief Justice Roberts insisted, in *Murr*, that the three factors balancing test of *Penn Cent. Transp. Co.* was developed in “response to the risk that owners will strategically pluck one strand from their bundle of property rights —such as the air rights at issue in *Penn Cent. Transp. Co.* — and claim a complete taking based on that strand alone.”<sup>108</sup>

However, similar to *Keystone*, which concluded that a regulation that merely affects one stick of the bundle of property rights is not a taking,<sup>109</sup> in *Murr*, the court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation by citing *Penn Cent. Transp. Co.*, which rejected a challenge to the denial of a permit to build an office tower above the Grand Central Terminal. The Court refused to measure the effect of the denial only against the “air rights” above the terminal, cautioning that “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>110</sup> Instead, the property right that was affected in *Murr* is the right of property on horizontal severance, which differs from the air rights that is vertical severance in *Penn Cent. Transp. Co.*, because the loss of air rights above the Grand Central Station, could not be treated as a

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<sup>107</sup> Courtney C. Tedrowe (n 55) 592

<sup>108</sup> *Murr* (n 1) 1953

<sup>109</sup> *Keystone Bituminous Coal Ass’n* (n 35) 470, 473 See also *Andrus v Allard* 444 U. S. 51 (1979) a case dealing with personal property, the Court held that “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”

<sup>110</sup> *Murr* (n 1) 1944

complete wipeout when the owner retained the ability to operate at ground level. Unlike denying development rights above the Grand Central Terminal in *Penn Cent. Transp. Co.*, denying development and selling rights means that the Murrs have lost 100 percent of their surface right in development and disposition of Lot E. Although the Murrs still have the right of use, denying development and selling rights have a large economic impact on Lot E because, as analyzed above, treating Lots E and F separately would result in one of the properties, Lot E, becoming worthless due to the limited ability to build and develop.

Albeit the Murrs still have property right on Lot E, which means the land has some value, the rights to dispose and develop were forfeited as long as the law is enforced. By considering physical taking analysis in *Loretto*, the limitation of the development and selling rights by land-use regulations of St. Croix County might seem to be a temporary taking of property, even if having no physical action by government, because Lot E can still be developed or disposed once the prohibition is lifted. Even if the language in *Loretto* stressed the word “permanent,”<sup>111</sup> nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable.”<sup>112</sup> Also in *Hearts Bluff Game Ranch, Inc. v State of Texas*,<sup>113</sup> the Supreme Court of Texas, affirming the decision of the intermediate appellate court, held “in order for an inverse condemnation claim to be valid, there must be a current, direct restriction on the use of the land, referring to a physical act or legal restriction on the property’s use, such as a blocking of access or denial of a permit for development.”<sup>114</sup>

The analysis of economic impact should consider not only whether there is some value, but also the level of value of the regulated property at the time it was impacted. The most familiar and widely used approach for measuring economic impact is to estimate the difference, as of the date of the alleged

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<sup>111</sup> *Loretto* (n 15) 421

<sup>112</sup> *San Diego Gas and Elec. Co. v City of San Diego* 450 US 621, 657 (1981)

<sup>113</sup> 381 S.W.3d 468 (Tex. 2012)

<sup>114</sup> *Ibid* at 472

taking, between the “fair market value” of the property; (1) subject to the regulatory constraint being challenged, and; (2) under the assumption that the regulation being challenged did not apply.<sup>115</sup> By applying this approach, the Supreme Court has indicated that reductions in value of over 90 percent are not necessarily sufficiently onerous to constitute a taking.<sup>116</sup>

The Court in *Murr* stated that the value of property, by combining two lots together, will increase. The Court described that if the two regulated lots are combined together, the value of property will increase to \$698,300 and \$771,000 for the lots as two distinct build-able properties, which is far greater than the total value of the separately regulated lots, which are at \$373,000 for Lot F with its cabin and at \$40,000 for Lot E as an undevelopable lot.<sup>117</sup> However, if considering the boundaries of Lot E and Lot F separately under state and local law, Lot E is worthless, since the Murrs cannot improve or sell solely Lot E.<sup>118</sup> Similar to *Pennsylvania Coal Co.*, because of preventing coal mining by the Kohler Act, the landowner has lost 100 percent of his support rights and the court decided that a taking occurred. Furthermore, the court in *Tahoe* reasoned that if the loss of economic value is total but temporary, it is not a taking. The decision implies that if the loss of economic value is total and not temporary, it may be a taking.

Additionally, viewing through the history, in 1995 the United States Senate considered the passage of a bill that would have, among other things,

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<sup>115</sup> John D. Echeverria (n104) 180

<sup>116</sup> See (n 83)

<sup>117</sup> *Murr* (n 1) 1949

<sup>118</sup> Cf. *Res. Invs., Inc. v United States*, the court distinguished between the elimination of the value of the property versus the elimination of economically viable use. Specifically, the court noted that: “The complete elimination of a property’s value may be *sufficient* to establish a categorical taking under many circumstances... Yet the lack of value is not *necessary* to effect a taking, as a parcel will typically retain some quantum of value even without economically viable use.” *Res. Invs., Inc. v United States* 85 Fed. Cl. 447, 487-88 (2009)

partially codified a conceptual severance view of property.<sup>119</sup> The objective of the bill was to afford greater protection to property owners in the face of expanding federal regulations.<sup>120</sup> Title V of the bill required compensation for statutory use restrictions on land or interests in land arising by specified regulations and Title II required compensation for reductions caused by a federal act of one-third or more of the market value of “any interest defined as property under State law; or ... understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest.”<sup>121</sup> Although Title V applied to only two acts, the Endangered Species Act<sup>122</sup> and section 404 of the Federal Water Pollution Control Act,<sup>123</sup>

and Title II applied to many laws, both potentially could be interpreted as voicing the doctrine of conceptual severance. Under Title V, “any interest in land” could include easements, servitudes, air rights, and so forth, but the terms of the bill did not limit the provision to these traditional categories of property interests.<sup>124</sup>

In fact, any aspect of land ownership that one could conceivably sell is potentially a land interest and thus potentially compensable.<sup>125</sup>

### 3.2.2 The extent to which the regulation has interfered with distinct investment-backed expectations analysis

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<sup>119</sup> Courtney C. Tedrowe (n 55) 594 (citing “Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a) (1995). The bill was reported to the Senate by Senator Orrin Hatch on December 22, 1995. The Senate Judiciary Committee filed a floor report on March 11, 1996. S. Rept. 104-239. The bill was not called for a vote”)

<sup>120</sup> See Frank I. Michelman, ‘Testimony Before the Senate Committee on Environment and Public Works’ (1996) 49 Wash. U. J. Urb. & Contemp. L. 1, 5

<sup>121</sup> 33 U.S.C. § 203(5)(E)-(F) (1994)

<sup>122</sup> 16 U.S.C. §§ 1531-1544 (1994)

<sup>123</sup> 33 U.S.C. §§ 1251-1387 (1994)

<sup>124</sup> See Frank I. Michelman (n 120)

<sup>125</sup> Courtney C. Tedrowe (n 55) 594

The second factor in *Penn Cent. Transp. Co.* test that has particular significance in evaluating regulatory takings claims is the extent to which regulation has interfered with distinct investment-backed expectations of the property owner. According to the facts in *Murr*, Lot E was purchased for investment. The Murrs' parents first purchased Lot F in their own names in 1960. Consistent with the laws at that time, they built themselves a cabin close to the river, and subsequently transferred the title to that lot and cabin to a plumbing company of which they were sole owners. Three years later in 1963, the Murrs' parents purchased Lot E, which they kept in their own name. They did not build anything on the property, but instead they held it for investment purposes.<sup>126</sup>

In its ruling, the U.S. Supreme Court agreed with the Wisconsin courts that the state and local regulations effectively merged Lots E and F and the property was subject to the regulations because of the Murrs' voluntary act in bringing the lots under common ownership, after the regulations were enacted.<sup>127</sup> As a result, the Court held, "the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."<sup>128</sup> If we took the investment-backed-expectations test seriously, the point should count strongly in favor of the Murrs, given that Lot E was acquired in 1963 solely for investment purposes. However, the court did not consider the Murrs' investment-backed-expectations.

Under the investment-backed-expectations factor, the courts should consider whether the owner has been able to carry out his original intentions in acquiring the property and whether the owner purchased the property with notice of the regulatory limitation at the time the owner purchased the property. The Murrs at all times had the primary expectation that Lot E was held for investment, which could only be achieved if its development were possible by a potential buyer of the property. Their expectations were based on the state of the law for real estate at the time

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<sup>126</sup> *Murr* (n 1) 1936

<sup>127</sup> *Ibid* 1948

<sup>128</sup> *Ibid* 1938

of the initial purchase, and the expectations were constant over the entire period in which title was held in various forms by various members of the Murr family. If determining under this factor, it is clear that the Murr family's expectation was completely shattered after the merger took place under Wisconsin law; their investment-backed-expectations were dashed, supporting a finding of regulatory taking. Additionally, a large component of property, and of its value, is the right to receive streams of income in the future. As Justice Brennan has suggested, the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."<sup>129</sup> It would seem, then, that the taking of a stream of income is a taking of property.

### 3.2.3 The character of the governmental action analysis

The character of the government action, the third *Penn Cent. Transp. Co.* factor, is used to determine whether a taking may have occurred where a regulation places limitation on land but does not eliminate all economically beneficial use. Under the character factor, the initial questions are: (1) whether the regulation applies broadly across the community and creates a reciprocity of advantage, the magnitude of the benefits conferred by the regulatory program, and; (2) whether the degree to which the regulatory program is designed to protect the community or individual citizens from harm.

For the first question, the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation is intended to bar government from forcing some people singlehandedly to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.<sup>130</sup> Hence, a regulatory takings claim should not properly be rejected on the ground that the public value of what the government is trying to perform outweighs the burden on a private property owner. The second

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<sup>129</sup> *Lucas* (n 29) 1017 (citing *San Diego Gas & Electric Co.* (n 112) 652) (Brennan, J., dissenting)

<sup>130</sup> *Armstrong v United States* 364 US 40, 41 (1960)

question considers the harm-preventing and benefit-conferring nature of a regulation,<sup>131</sup> both of which should be relevant considerations in the *Penn Cent. Transp. Co.* analysis. The distinction between harm-preventing and benefit-conferring regulations reflects a difference in the fundamental nature of governmental actions that should properly inform the outcome of regulatory takings cases.

In *Murr*, neither the majority by Justice Kennedy nor dissent by Chief Justice Roberts analyzed the strength of Wisconsin's interest. Also, they did not examine whether the regulation outweighs the Murrs' burden. One application of the character factor focuses on whether government action interferes with the right to devise private property.<sup>132</sup> The Court in *Hodel v Irving*<sup>133</sup> struck down federal legislation designed to deal with the fractionation of Indian lands through inheritance as an unconstitutional impairment of Indians' right to devise their property and held that the legislation effected a taking on the ground that the "character of the Government regulation here is extraordinary."<sup>134</sup> In *Penn Cent. Transp. Co.*, the Court agreed that the right to develop and dispose were property rights, but held that no taking had occurred because historical preservation restrictions were permissible under the police power.<sup>135</sup> In the same *Penn Cent. Transp. Co.* vein, assuming that Wisconsin regulation had taken private property, the key question here would be whether this regulation is necessary to protect the health and safety of the community. In other words, if that taking is justified under the police power, no compensation need be paid. Contrarily, if that taking is claiming eminent domain for public use, then just compensation will be paid.

For the issue as to whether Wisconsin enacted the regulation by exercise its police power or not, a treatise on the Law of Eminent Domain explained:

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<sup>131</sup> *Lucas* (n 29) at 1003, 1024

<sup>132</sup> John D. Echeverria (n 104) 195

<sup>133</sup> *Hodel* (n 31) 704

<sup>134</sup> *Ibid* 716

<sup>135</sup> *Penn Cent. Transp. Co.* (n 3) 138

*Everyone is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints **the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.....** It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular public use.*<sup>136</sup>

Efforts to preserve the St. Croix river and surrounding land along the Lower St. Croix River are a legitimate exercise of the government's police power. Yet, when the government tries to deprive the Murrs of their property rights, then the act becomes one of eminent domain. If the

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<sup>136</sup> John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 3<sup>rd</sup> edn, Callaghan & company, Chicago 1909) § 6, 13

Wisconsin's regulation is enacted for the benefit of the whole community, which is the equivalent of "public use," then any loss in property value as a result of governmental activity should be compensated. The policy underlying the eminent domain provision of the Constitution is to distribute the cost of public improvements throughout the community rather than to impose that cost on individuals by chance of the location of their land.<sup>137</sup>

Once the government action is a regulatory taking for public use, the hard question is the measure of compensation for the loss of these development rights, which should be fully compensable for the duration of the restriction. The right to compensation accrues from the date of substantial interference with the landowner's property rights, although the date of the constitutional violation, as a matter of law, occurs when the government refuses to pay compensation.<sup>138</sup> In most circumstances, this will be the date the landowner is denied a development permit or variance.

Therefore, considering under *Penn Cent. Transp. Co.* factors and traditional lot lines, it seems that the Murrs were taken their property and they were eligible to receive just compensation.

### 3.3 How much in compensation the Murrs should receive

The Just Compensation Clause in the Fifth Amendment, like other constitutional rights, is intended to define an area where the majority must respect the freedom of the individual. The Just Compensation Clause protects individual freedom by compensating the individual for costs incurred by a government action that promotes the common good.<sup>139</sup> Protecting individuals' security of possession is an essential component in the development of society.<sup>140</sup> There are two aspects of property's protection of individual

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<sup>137</sup> *Yee v City of Escondido* 503 US 519, 523 (1992)

<sup>138</sup> *First English Evangelical Lutheran Church* (n 70) 320 fn.10 (citing *Kirby Forest Indus., Inc. v United States* 467 US 1, 5 (1984))

<sup>139</sup> Charles A. Reich, 'The New Property' (1964) 73 Yale L. J. 733, 771-772

<sup>140</sup> David Hume 'A Treatise of Human Nature' (1888) bk. III, pt. II, § II 491-493 (Selby-Bigge ed)

liberty.<sup>141</sup> First, property creates a zone within which the individual can act in ways frowned on by the majority. Second, property assures that political minorities have the material means to act independently of political majorities. This second aspect is protected by the Just Compensation Clause. The Just Compensation Clause does not give property absolute protection. Rather, the government can take property, but if it does, it must pay compensation.<sup>142</sup> Maintaining the individual's material autonomy requires compensation even where the government action does not take all of a property owner's estate.<sup>143</sup> Such rule also raises the possibility that the government, by successive takings of half of the individual's property, could reduce the individual's estate to essentially nothing.<sup>144</sup>

On the flip side, to utilitarians, an individual's property should be protected due to its importance in the effective functioning of capitalist society.<sup>145</sup> Government interference with private property is discouraged because of its negative effect on private labor and investment.<sup>146</sup> However, the primary goal pursued by utilitarians is the maximization of utility, not of individuals, but of society as a whole.<sup>147</sup> Thus, if taking private property is necessary for whole society, the government can do so, but must pay just compensation. Professor Frank I. Michelman set forth the classic utilitarian test for compensability, consisted of three elements.

First, positive “[e]fficiency gains’ [are] the excess of benefits produced by a [government action] over losses inflicted by it.”<sup>148</sup>

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<sup>141</sup> D. Benjamin Barros ‘Defining “Property” in the Just Compensation Clause’ (1995) 63 Fordham L. Rev. 1853, 1858

<sup>142</sup> Ibid

<sup>143</sup> Ibid

<sup>144</sup> Ibid 1872

<sup>145</sup> Ibid 1859

<sup>146</sup> See *Lucas* (n 29) 1035 (“The Takings Clause ... protects private expectations to ensure private investment”) (Kennedy, J., concurring). See also Susan Rose-Ackerman, ‘Against Ad Hocery: A Comment on Michelman’ (1988) 88 Colum. L. Rev. 1697, 1701-1702

<sup>147</sup> Frank I. Michelman (n 44) 1192–1193

<sup>148</sup> Ibid 1214

Second, negative “demoralization costs” take into account the effect a transaction will have on the affected individuals and society generally. “Demoralization costs” are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers, specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.<sup>149</sup>

Third, “settlement costs” are the costs of compensation needed to make the affected property owner whole.<sup>150</sup> If the positive efficiency gains of a government action are less than both demoralization and settlement costs, then the government action is improper because it results in a net loss of utility.<sup>151</sup>

In other circumstances, the government should only pay compensation when “demoralization costs exceed settlement [compensation] costs.”<sup>152</sup> Thus, the utilitarian test does not simply weigh the benefit of a regulation against its immediate cost.<sup>153</sup> It also takes into account the effect denying compensation would have on society as a whole.<sup>154</sup> Using state law as the source of property, the libertarian approach to the Just Compensation Clause thus requires compensation for any government action that renders valueless any property interest that is defined by state law.<sup>155</sup>

The Fifth Amendment, written by James Madison, was part of a liberal repudiation of republicanism that was concerned with protecting the individual

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<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid 1215

<sup>152</sup> Ibid

<sup>153</sup> Ibid

<sup>154</sup> David Hume (n 140) 498

<sup>155</sup> D. Benjamin Barros (n 141) 1858

against the legislature and the majority it represented.<sup>156</sup> Madison apparently intended the Just Compensation Clause to apply only to physical appropriations of property by the federal government.<sup>157</sup> However, that did not mean that the Just Compensation Clause should not be applied to regulations because, as the Court has noted, “one of the principle purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>158</sup>

Whether a regulation constitutes a taking depends in large part upon the degree to which the regulation burdens private property. Generally, the more severe the burden that the regulation imposes upon private property, the more likely it is that the regulation constitutes a compensable taking.<sup>159</sup> Just compensation for regulatory taking is calculated by the difference between the property’s values immediately before the regulation became effective and the property’s values immediately following the regulation.<sup>160</sup>

Nonetheless, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking, are separate questions. Under the *Penn Cent. Transp. Co.* test, the court in *Murr* should have found there is regulatory taking for Lot E. However, it does not follow the Murrs should receive full compensation for Lot E. In *Florida Rock Industries, Inc. v United States*,<sup>161</sup> Judge Plager discussed value as a separate element of takings law (although not as a separate element of property). He noted that “[a] speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market.

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<sup>156</sup> William Michael Treanor (n 17) 709-711

<sup>157</sup> Ibid 711

<sup>158</sup> *Dolan v City of Tigard* 512 US 374, 384 (1994) (quoting *Armstrong* (n 130) 49)

<sup>159</sup> *Clifton v Blanchester* 964 N.E.2d 414, 415 (Ohio 2012)

<sup>160</sup> William J. Patton, Comment, ‘Affirmative Relief for Temporary Regulatory Takings’ (1987) 48 U. Pitt. L. Rev. 1215, 1224

<sup>161</sup> 18 F.3d 1560 (Fed. Cir. 1994)

\* \* \* The fact that many players in the market chose to disregard the immediate potential for development in favor of a long-term perspective—hardly unusual behavior in Florida’s history of real estate investment—does not make the market as a whole aberrational.”<sup>162</sup>

Although a taking requires just compensation, just compensation hardly ever is “full” compensation. A succinct explanation is offered by Judge Posner in the Seventh Circuit’s opinion in *Coniston Corp. v Village of Hoffman Estates*<sup>163</sup> as follows;

*Compensation in the constitutional sense is ... not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are intramarginal, meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not for sale). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it personal) value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.*<sup>164</sup>

Moreover, the purpose of just compensation is to ensure that the individual’s ability to function independently of the government will not be impaired by a loss of property. In *Bassett v United States*,<sup>165</sup> the Court stated that just compensation principle requires the government to remunerate a deprived property owner so as to place the property owner in as good a position pecuniarily as if the government had not taken his property.<sup>166</sup>

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<sup>162</sup> Ibid 1567

<sup>163</sup> 844 F.2d 461 (7th Cir. 1988)

<sup>164</sup> Ibid 464

<sup>165</sup> *Bassett* (n 12) 63

<sup>166</sup> Ibid 69 (citing *Phillips* (n 93) 156, 176-77)

Restoring the deprived property owner's pre-taking financial position involves compensating the property owner for the fair market value of the property lost as a result of the taking.<sup>167</sup> Fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts."<sup>168</sup> A property owner is entitled to have the fair market value of his property determined by his property's highest and best use before the taking.<sup>169</sup> Highest and best use is the reasonably probable and legal use of property which is physically possible, appropriately supported, financially feasible, and that results in the highest value. Valuation of highest and best use may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted.<sup>170</sup>

Furthermore, in *City of Norwich v Styx Inv'ts in Norwich*,<sup>171</sup> the Connecticut appellate court mentioned that it is well settled that the amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking. In determining market value, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land. In determining its highest and best use, the court must consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking.<sup>172</sup>

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<sup>167</sup> *Bassett* (n 12) 69 (citing *Almota Farmers Elevator & Warehouse Co. v United States* 409 US 470, 473 (1973))

<sup>168</sup> *Ibid* (citing *United States v Cartwright* 411 US 546, 551 (1973) and *Yancey v United States* 915 F.2d 1534, 1542 (Fed. Cir. 1990))

<sup>169</sup> *Stearns Co. v United States* 53 Fed. Cl. 446, 455 (2002) (citing *Olson v United States* 292 US 246 (1934))

<sup>170</sup> *Bassett* (n 12) 65

<sup>171</sup> 887 A.2d 910 (Conn. App. Ct. 2006)

<sup>172</sup> *Ibid* 911

In *Murr*, determining whether there is regulatory taking under *Penn Cent. Transp. Co.* test, the court should determine only Lot E because Lot E, under the regulations, cannot be sold without Lot F, while, to determine how much should be just compensation, the court should determine the fair market value of Lot E and Lot F as a whole because of just compensation goal. At this point, the Court in *Murr*, stated that the State of Wisconsin's appraisal included values of \$698,300 for the lots together as regulated; \$771,000 for the lots as two distinct build-able properties; and \$373,000 for Lot F as a single lot with improvements. The Murrs' appraisal included an un rebutted, estimated value of \$40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property.<sup>173</sup>

The general rule is that the loss to the owner from the taking, and not its value to the condemnor, is the measure of the damages to be awarded in eminent domain proceedings."<sup>174</sup> Just compensation is calculated from the difference between the property's value before the regulation became effective and the property's value immediately following the regulation. Also, the purpose of just compensation is to place the property owner in as good a position pecuniarily as if the government had not taken his property. The monetary value of Lot E before the merger clause became effective was \$40,000 as an undevelopable lot, while the monetary value of Lot E immediately following the merger clause, supposing divided with Lot F equally, was \$349,150 for the lot as regulated and \$385,500 for the lot as build-able property. The fair market value of Lot E, combined with lot F, after the regulation became effective is far greater than the fair market value of the separate regulated lot.<sup>175</sup> The value added by the lots' combination supports their treatment as one parcel for calculating the just compensation.

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<sup>173</sup> *Murr* (n 1) 1941

<sup>174</sup> *City of Norwich* (n 171) at 910, 911

<sup>175</sup> Lot F with its cabin at \$373,000, according to the State's appraiser, and Lot E as an undevelopable plot at \$40,000, according to the Murrs' appraiser. *Murr* (n 1) 1941

In *Fla. Rock Indus., Inc. v United States*,<sup>176</sup> the court stated “the record reveals a substantial possibility that a taking should be held to have occurred... so a remand is necessary. On remand, the court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking.”<sup>177</sup> The Court also stated, “in determining the severity of economic impact, the owner’s opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.”<sup>178</sup> Also, the Massachusetts Supreme Judicial Court in *Sorenti Bros. v Commonwealth*,<sup>179</sup> reasoned that when a partial taking of property has been made, the property owner is entitled to recover damages for loss of access to the remainder of the property only where that loss or impairment is severe.<sup>180</sup>

The appellate court in *City of Norwich v Styx Inv'rs in Norwich* stated that if a prospective, integrated use is the highest and best use of the land and

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<sup>176</sup> 791 F.2d 893 (Fed. Cir. 1986).

<sup>177</sup> Ibid 905

<sup>178</sup> *Fla. Rock Indus., Inc.* (n 176) 893, 905

<sup>179</sup> 9 N.E.3d 779 (Mass. 2014) (In this case Plaintiff, a property owner, brought the eminent domain action seeking damages from the Commonwealth on account of land takings that the Commonwealth made in connection with the Sagamore Bridge Flyover Project in Bourne that eliminated a traffic rotary north of the bridge. Plaintiff owned parcels of land near the former rotary and operated a gas station on one of the parcels. After a jury trial, Plaintiff was awarded almost \$3 million in damages. The Appeals Court affirmed. The Supreme Judicial court vacated the judgment of the superior court and remanded for a new trial, holding (1) under Mass. Gen. Laws ch. 81, § 7C (§ 7C), for a property owner to be entitled to damages on account of the construction of a limited access highway, since the flyover project was not laid over a public way that directly abutted Plaintiff’s property, Plaintiff was not entitled to damages under § 7C as a matter of law; and (2) under Mass. Gen. Laws ch. 79, § 12 (§ 12), when a partial taking of property has been made, the property owner is entitled to recover damages for loss of access to the remainder of the property only where that loss or impairment is severe. Since Plaintiff retained reasonable and appropriate access to and from the gas station parcel, Plaintiff was not entitled to impairment of access damages under § 12.)

<sup>180</sup> Ibid 779

can be achieved only through combination with other parcels of land, and combination of the parcels is reasonably probable, then evidence concerning assemblage, and, ultimately, a finding that the land is specially adaptable for that highest and best use, may be appropriate. The Court further stated that the consideration of a future change in the use of the parcel taken, and the effect that such a change may have on the market value at the time of the taking, has long been recognized in Connecticut, and the use of property in conjunction with other parcels may affect value if it is shown that such an integrated use reasonably would have occurred in the absence of the condemnation.<sup>181</sup>

Moreover, the Minnesota Supreme Court in *State by Humphrey v Strom*<sup>182</sup> held that when part of a parcel is taken, the award must include all damages to the part retained by the landowner. In the case, the State began eminent domain proceedings to acquire property necessary for the construction and conversion of a highway. The condemnation included a partial taking from an office site owned by the property owner. Court-appointed commissioners had filed an award of damages for the land taken and for damage to the remainder. The questions certified in the appeal asked the court to determine whether evidence of construction-related interferences and loss of visibility may be taken into account to the extent they affect the market value of the property in determining just compensation in an eminent domain proceeding. The court found that in a partial taking condemnation action, evidence of construction-related interferences and evidence of loss of visibility to the public traveling on a redesigned highway were admissible, not as separate items of damages, but as factors to be considered by the finder of fact in determining the diminution in market value of the remaining property.<sup>183</sup> Also, the Supreme Court of New Jersey in *Borough of Harvey Cedars v Karan*<sup>184</sup> ruled that in case of the partial taking of property, just compensation to the owner must be based on a

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<sup>181</sup> *City of Norwich* (n 171) 910, 911

<sup>182</sup> 493 N.W.2d 554 (Minn. 1992)

<sup>183</sup> *Ibid* 556

<sup>184</sup> 70 A.3d 524 (N.J. 2013)

consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property. In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project. To calculate that loss, courts must look to the difference between the fair market value of the property before the partial taking and after the taking.<sup>185</sup>

When there are damages, the court has to determine such damages for calculating compensation, and, on the flip side, when there are benefits, the court should determine such benefits for calculating compensation as well. There may possibly be items of special damages which may not be accurately reflected in the difference between the market value before and the market value after, but everything which affects the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value.<sup>186</sup> Additionally, when only part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.<sup>187</sup> Special benefits may be setoff from the value of the land taken and severance damages.<sup>188</sup>

Furthermore, Wisconsin statutes and state case law provide that the owner is entitled to full compensation for the value of the land taken, but that special benefits may be setoff from the damage to the remaining

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<sup>185</sup> Ibid 526

<sup>186</sup> *State v Schmidt* 867 S.W.2d 769, 770 (Tex. 1993)

<sup>187</sup> Howard Strickland Abbott, 'A Treatise on the Law of Municipal Corporations' Vol. 2, (Keefe-Davidson Company 1906) § 793, 1889

<sup>188</sup> See Julius L. Sackman, *Nichols on Eminent Domain* (3<sup>rd</sup> edn. rev. 1998) § 8A.03 See also *Collins v State Highway Com.* 145 Kan. 598 (1937); *Beard v Kan. City* 154, 230 (Kan. 1916); *Trosper v Saline County Comm'rs* 27 Kan 391 (1882) *Roberts v Bd. of Cty. Comm'rs* 21 Kan. 247 (1878); *Tobie v Comm'rs of Brown Cty.* 20 Kan. 14 (1878); *Comm'rs of Pottawatomie Cty. v O'Sullivan* 17 Kan. 58 (1876)

land.<sup>189</sup> The Wisconsin Appellate Court in *Calaway v Brown County*<sup>190</sup> held that the measure of damages in a partial taking is to compare the fair market value of the property as a whole immediately before the taking and the fair market value of the remainder immediately after the taking.<sup>191</sup>

There have been cases where the court has determined that there has been taking, because of being complete deprivation of economically beneficial use, but that the owner is not entitled to compensation because of the “background principles” exception to *Lucas*. The South Carolina Supreme Court in *McQueen v South Carolina Coastal Council*,<sup>192</sup> accepted as uncontested that McQueen’s lots retain no value and therefore a total taking has occurred.”<sup>193</sup> However, citing the background principle of South Carolina’s public trust doctrine, which grants the state a property right in the land below the mean high-water line, the court found that no compensation was due to McQueen after reconsideration in light of *Palazzolo*. At the time of McQueen’s permit denial, the tideland had sufficiently encroached upon his property so as to prevent any ability to undergo the construction.<sup>194</sup> Thus, the South Carolina Supreme Court remanded the case to the lower courts with its instruction.

Therefore, considering the cases above, the Murrs should not have obtained compensation. Just compensation calculated from fair market value and fair market value of the Murrs’ property, which was determined

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<sup>189</sup> See Wis. Stat. Ann. §§ 32.09, 32.18, 32.57, 32.58, 32.61 (West). See also *Calaway v Brown Cty.* 553 N.W.2d 809 (Wis. Ct. App. 1996) (holding that the measure of damages in a partial taking is to compare the fair market value of the property as a whole immediately before the taking and the fair market value of the remainder immediately after the taking); *Red Top Farms v State Dep’t of Transp., Div. of Highways* 503 N.W.2d 354 (Wis. Ct. App. 1993) (holding that only special benefits can be setoff); *Molbreak v Shorewood Hills* 225 N.W.2d 894 (Wis. 1975); *Renk v State* 191 N.W.2d 4 (Wis. 1971); *Petkus v State Highway Com.* 130 N.W.2d 253 (Wis. 1964); *Hietpas v State* 130 N.W.2d 248 (Wis. 1964)

<sup>190</sup> *Calaway* Ibid 809

<sup>191</sup> Ibid 810

<sup>192</sup> 580 S.E.2d 116 (S.C. 2003)

<sup>193</sup> Ibid 119

<sup>194</sup> Ibid 120

by their properties' highest and best use before the taking, is lower than fair market value of the Murrs' property, combined two lots together. In addition, if the court disregards the value of Lot E combined with Lot F as regulated lots to calculate compensation to the Murrs, by giving the Murrs \$40,000 for Lot E being taken, the Murrs will receive the benefit more than to place the Murrs in as good a position pecuniarily as if State of Wisconsin had not taken their property, which is contrary to the purpose of Just Compensation Clause.

## Conclusion

Defining property by using a state property law, considering the boundaries of Lot E and Lot F under the Wisconsin state and local laws, and applying the *Penn Cent. Transp. Co.* balancing factors, the Court should have found a regulatory taking. Taking the economic impact factor into account, defining the "the relevant unit of property" and "parcel as a whole" by merging Lot E and Lot F together as one parcel, the Wisconsin regulation renders Lot E worthless to the Murrs although Lot E still has some monetary value. While Wisconsin regulation allowed the Murrs to continue using Lot E as had been done in the past, which did not deny all the owner's economic beneficial use, the law did not permit the Murrs to profit from developing or disposing the land and obtain a reasonable return on its investment. The Murrs were deprived of their economic expectation in property Lot E when it became nearly worthless. And the economic impact from such regulation of lot E was severe. Therefore, the regulation could be enacted by Wisconsin only by using its power of eminent domain for public use, not its police power. The Court in *Murr*, by evaluating two adjacent lots as a single parcel consisting of Lots E and F together, went astray by failing to adhere to the State's historic lot lines in determining the "parcel" for application of the *Penn Cent. Transp. Co.* test, especially the first factor: economic impact. That error determined the result that no taking occurred.

Nonetheless, the Court in *Murr* reached the correct result on compensation issue by not providing the Murrs with compensation. Per the impact of the government action, the compensation should be measured by the reduction in value of the affected property. Although under the regulations, the Murrs have no ability to develop and dispose of Lot E without Lot F, the Murrs did not lose monetary value on Lot E. Because the purpose of Taking Clause is to protect private property and the policy underlying that provision is to distribute the cost of public improvements throughout the community rather than to impose that cost on individuals by chance of the location of their lands,<sup>195</sup> the Murrs should have not received compensation where the Murrs did not bear any cost from the taking of Lot E. On the contrary, the fair market value of the Murrs' properties is far greater than before they were taken. By disregarding the value of Lot E combined with Lot F as regulated lots to calculate compensation to the Murrs, and giving the Murrs \$40,000 for Lot E being taken, the Murrs will receive a benefit that places the Murrs in a better position pecuniarily than if the State of Wisconsin had not taken their property, and that is contrary to the purpose of Just Compensation Clause. Where there are damages, the court has to determine such damages for calculating compensation, on the flip side, where there are benefits, the court should determine such benefits for calculating compensation as well.

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<sup>195</sup> *Yee* (n 137) 522

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## RIGHTS OF FEMALE WORKERS IN THE PRIVATE SECTOR TO BREASTFEEDING BREAKS AND BREASTFEEDING FACILITIES<sup>\*</sup>

*Prug Deetha<sup>\*\*</sup>*

### Abstract

This article examines the major problems of Labour Protection Act B.E. 2541 concerning the lack of rights and protection to enable female workers in the private sector to properly breastfeed, express and store breast milk in the workplace. However, unlike Thailand, the International Labour Organisation (ILO), the UK, Sweden and Vietnam properly provide the rights of female workers to breastfeeding breaks and breastfeeding facilities. Therefore, this article analyses and surveys the ILO standards, the labour laws of the UK, Sweden and Vietnam in order to find the recommendations for solving the problems in Thailand.

The analysis demonstrates that in the ILO standards, British, Swedish and Vietnamese laws, female workers in the private sector are entitled to rights to breastfeeding breaks and breastfeeding facilities to support them to continue breastfeeding during work in order to increase the rate of breastfeeding and alleviate the health problems of both mothers and children. This can be adopted into Thailand by amending Labour Protection Act B.E. 2541 to properly increase rights of female workers in the private sector to breastfeeding breaks and breastfeeding facilities.

**Keywords:** Breastfeeding Breaks, Breastfeeding Facilities, Nursing Mothers, Breast Milk, Breastfeeding, Rights of Female Workers in the Private Sector, Female Workers in the Private Sector, Childcare Center, Labour Laws.

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<sup>\*</sup> This article is summarised and rearranged from the thesis “Rights of Female Workers in the Private Sector to Breastfeeding Breaks and Breastfeeding Facilities”, Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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## Introduction

Breast milk is the best food for infants after birth, since it is composed of appropriate nutrition that is important for them to grow and be protected from any diseases.<sup>1</sup> This article is mainly focused on the lack of legal rights and protection to support female workers in the private sector to properly breastfeed in the workplace. Most female workers are forced to return to work soon after giving birth because of financial problems and the short length of maternity leave. If work and breastfeeding cannot be reconciled, it will definitely have negative effects on the rate of breastfeeding, the health of both mothers and children, society and the economy, respectively.

The International Labour Organisation (ILO) recognises the WHO's recommendation which is the standard for mothers to feed their children with breast milk for at least six months and children should continue to be breastfed until they are two years of age or more.<sup>2</sup> The Maternity Protection Convention No.183 and Recommendation No.191<sup>3</sup> set the minimum standard for breastfeeding break and breastfeeding facilities for female workers in the private sector. Moreover, The laws of the United Kingdom, Sweden and Vietnam, which are member States of the

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<sup>1</sup> Karleen D Gribble, 'Mental health, attachment and breastfeeding: implications for adopted children and their mothers' (International Breastfeeding Journal, 9 March 2006) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1459116/>> accessed 11 October 2017

<sup>2</sup> World Health Organization, 'Exclusive breastfeeding for six months best for babies everywhere' (statement, 15 January 2011) <[http://www.who.int/mediacentre/news/statements/2011/breastfeeding\\_20110115/en/](http://www.who.int/mediacentre/news/statements/2011/breastfeeding_20110115/en/)> accessed 11 October 2017

<sup>3</sup> International Labour Organization, 'International Labour Standards on Social security' (ILO) <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>> accessed 11 October 2017

International Labour Organisation,<sup>4</sup> set breastfeeding breaks and breastfeeding facilities for female workers in the private sector.

In Thailand, the rights of a mother during the period prior to and after giving birth shall be protected and assisted as provided by law according to the Constitution.<sup>5</sup> Thai Labour Protection Act B.E. 2541 is inconsistent with the provision to protect mothers after childbirth under the ILO standard and the Constitution since it does not provide sufficient support to workers to breastfeed particularly in the workplace. The lack of these rights and protection under Thai laws leads to the problems of maternity protection after childbirth and increase improper behaviour on the part of female workers. Hence, there is a great need to amend the Thai Labour Protection Act B.E.2541.

## **1. Rights to Breastfeeding Breaks and Breastfeeding Facilities under Thai Laws, International Standards and Foreign Laws**

### **1.1 Breastfeeding Breaks**

Breastfeeding breaks are time for female workers who are nursing mothers to breastfeed their children, pump milk for storage or rest during the long hours at work. The ILO Convention<sup>6</sup> requires employers to provide breastfeeding breaks and breastfeeding facilities to female workers. The ILO aims to reconcile work with breastfeeding, extending the length of breastfeeding time for mothers to increase the breastfeeding rate.

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<sup>4</sup> International Labour Organization, 'Alphabetical list of ILO member countries' (ILO, 12 January 2017) <<http://www.ilo.org/public/english/standards/relm/country.htm>> accessed 11 October 2017

<sup>5</sup> The Constitution of the Kingdom of Thailand B.E.2560, s 48

<sup>6</sup> Maternity Protection Convention No.183 (adopted 15 June 2000, entered into force 07 Feb 2002) art 10  
<[https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C183](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C183)>

Vietnam has established the rights to breastfeeding breaks and breastfeeding facilities<sup>7</sup> in accordance with the ILO standard and requires employers to provide female workers with breastfeeding breaks at works. This is aimed to increase the breastfeeding rate in Vietnam and distinguish it from other Asian countries that fail to provide the proper protection for female workers.

The UK and Sweden have established their laws differently from the ILO Convention. They do not explicitly require employers to provide breastfeeding breaks; however, female workers in both countries are entitled to breastfeeding breaks and breastfeeding facilities after a long maternity leave on request or collective bargaining. Both countries apply a long length of maternity leave with more than 80% of pay.

In Thailand, rights to breastfeeding breaks and breastfeeding facilities are not explicitly or specifically provided to female workers under Thai laws. Only the policy of the Breastfeeding Foundation Centre and Department of Labour Protection, Welfare and other co-work organisations promotes the provision of breastfeeding breaks and facilities to female workers. In this author's opinion, Thailand should set special regulations to provide breastfeeding under the law to demonstrate that Thailand sufficiently supports breastfeeding and to reconcile breastfeeding with work. Besides, Thailand is a developing country which provides improper maternity leave<sup>8</sup> which is too short for exclusive breastfeeding.

## 1.2 Duration of Breastfeeding Breaks

The duration of breastfeeding is a daily break or a reduction of hour of work. The ILO sets the standard for breastfeeding breaks under Convention No. 183, which includes various durations for a break such as a

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<sup>7</sup> Labour Code of Vietnam 2012, art 155 cl 5 and its Decree No.85/2015, art 7 cl 3 a) <  
[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=91650](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91650)>

<sup>8</sup> Labour Protection Act B.E. 2541, s 41

one-time break, more than one time or reduced working time.<sup>9</sup> However, the UK and Sweden do not set breastfeeding breaks pursuant to the ILO standard. Breastfeeding breaks do not explicitly appear under their national law because they provide female workers with a long length of paid leave so that the mothers can stay at home and spend lots of time breastfeeding their children. The duration of breaks depends on the employees and employers have the duty to allow the appropriate time based on the employee's request. The employers cannot refuse to provide breastfeeding breaks for mothers, since it may lead to unfair practice in the workplace.

As a South-east Asian country, Vietnam has set breastfeeding break for 60 minutes once a day and mothers can take the break until their child is twelve months old. Vietnam provides a clear duration for female workers in accordance with the ILO standard. Thailand should also set an appropriate duration for female workers to take breastfeeding breaks by applying the standard.

### 1.3 Wages during Breastfeeding Breaks

Female workers should be entitled to these breaks after returning to work. Unpaid breastfeeding breaks are not fair to female. It may lead to health problems for children and nursing mothers who work instead of taking a break to breastfeed and store breast milk for children. The International Labour Convention has set its standard to provide paid breastfeeding breaks for female workers.<sup>10</sup> In addition, Vietnam also sets its

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<sup>9</sup> Maternity Protection Convention No.183 (adopted 15 June 2000, entered into force 07 Feb 2002) art 10  
<[https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C183lin](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C183lin)  
k>

<sup>10</sup> Ibid

Labour Code to meet the international standard by providing full pay for nursing mothers.<sup>11</sup>

#### 1.4 Breastfeeding Facilities

Breastfeeding facilities are places for breastfeeding, anything that is important for breastfeeding and childcare centres. Breastfeeding places and facilities are explicitly provided under ILO Recommendation No. 191 and Vietnamese law,<sup>12</sup> although they are not obviously provided in the British and Swedish laws. Breastfeeding places are clean rooms or corners with a screen composed of any important facilities for breastfeeding, such as a chair, table, electronic breast pump, refrigerator, breast milk storage bags, washbasin and toilet tissue. In addition, childcare centres are places that can support mothers who have to work and nurse their children. Female workers can leave their children in the childcare centre and go to work free of anxiety or burdens. There are no specific regulations to enforce employers to provide childcare centre at or near the workplaces under ILO Recommendation No.191, the UK laws or Swedish laws. The Vietnamese Labour Code provides a regulation about kindergartens or nursery schools<sup>13</sup> as guidelines for employers who want to prepare a centre for female workers, and although it does not enforce employers, it offers incentives to those who establish a childcare centre in the workplace.<sup>14</sup>

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<sup>11</sup> Labour Code of Vietnam 2012, art 155 cl 5 and its Decree No.85/2015, art 7 cl 3 b) < [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=91650](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91650) >

<sup>12</sup> Decree of Vietnam Labour Code No.85/2015, art 3 cl 3 and art 7 cl 4  
<[http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=100428&p\\_country=VNM&p\\_count=573](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=100428&p_country=VNM&p_count=573)>

<sup>13</sup> Ibid., art 9 and 10

<sup>14</sup> Ibid., art 11

## 2. Nonexistence of Rights to Breastfeeding Breaks and Breastfeeding Facilities for Female Workers in the Private Sector in Thailand

The National Health Act B.E. 2550 aims to protect the health of children, supports women's health and provides general protection for nursing mothers who need specific healthcare.<sup>15</sup> Employers should promote nursing mothers and breastfeeding and must provide a workplace that is environmentally-friendly for their female employees, since the lacking of breastfeeding, proper places to breastfeed or give breast milk to children may damage the health of female workers and their children. However, this Act does not contain a specific regulation that requires employers to provide breastfeeding breaks and facilities in the workplace for female workers.

The Occupational Safety, Health and Environment Act B.E. 2554 aims to protect all workers from any injuries caused by their position and conditions of work. Female workers who want to breastfeed their children at work should be protected from any improper work that endangers their physical health. The strength of the Act is that it can requires employers to provide employees with the proper working conditions and environment.<sup>16</sup> However, there are no specific regulations to provide breastfeeding breaks and breastfeeding facilities under this Act.

Furthermore, maternity protection after childbirth under the Thai Labour Protection Act B.E. 2541 still fails to meet the international standards based on the fact that the minimum standard of ILO sets breastfeeding breaks and breastfeeding facilities as essential for inclusion in labour laws. Thai female employees are only entitled to a normal break of at least an hour every day without pay.<sup>17</sup> This implies that mothers who want to take a breastfeeding break may have to use this break time for breastfeeding or

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<sup>15</sup> National Health Act B.E.2550, s 5 and 6

<sup>16</sup> Occupational Safety, Health and Environment Act B.E. 2554, s 6

<sup>17</sup> Labour Protection Act B.E.2541, s 27

pumping milk in the workplace. Thus, the significant weaknesses of Thai laws are that there is no a specific provision under the specific laws which could assure mothers' rights to breastfeeding and breastfeeding facilities.

### **3. Conclusion and Recommendations**

#### **3.1 Conclusion**

Having compared and analysed Thai laws related to breastfeeding breaks, specific regulations to grant breastfeeding breaks and breastfeeding facilities to female workers in the private sector, it can be concluded that these rights are obviously unavailable under any related Thai laws. Unlike the ILO Convention and Recommendation, Vietnam, the UK and Sweden, which provide the right to breastfeeding breaks and facilities.

#### **3.2 Recommendations for the new amendment**

The addition of new sections in Chapter 3 Maternity Protection of Labour Protection Act B.E. 2541 is recommended, as follows.

##### **3.2.1 Breastfeeding Breaks**

The definition of breastfeeding breaks should be provided in the new section as "Breastfeeding breaks are break times for female workers to breastfeed, pump breast milk, collect breast milk or take a rest" because providing the definition of breastfeeding breaks can facilitate employers and female employees to better understand the need for breastfeeding breaks. The daily period for breastfeeding should not be too short because female workers need more time to breastfeed, pump milk or take a rest. Break times should not be too long to interrupt the business. For example, "Two thirty-minute breastfeeding breaks each day in the late morning and at noon respectively for a period one year after childbirth. The length of female workers to be entitled to breastfeeding breaks should be set according to the WHO's recommendation, which is more than six months for breastfeeding. The writer would like to recommend that female workers

should be entitled to this break for one year to enable children to receive enough breast milk for their growth, increase breastfeeding rate and it is a proper duration for employers' business.

The breaks should be counted as working time so that female workers should be entitled to full pay unlike normal break time.<sup>18</sup> Full wages will encourage mothers to continue their breastfeeding and take breastfeeding breaks.

### **3.2.2 Breastfeeding Facilities**

Employers should provide breastfeeding facilities to female workers to reduce the obstacles to breastfeed in the workplace. Breastfeeding facilities are appropriate places and related facilities for breastfeeding. Moreover, employers may provide childcare centres for their workers at or near the workplace and those who do should receive benefits pursuant to the government's policy, such as a tax reduction or budget to assist them.

### **3.2.3 Legal Penalty**

The punishment for employers who do not provide breastfeeding breaks and facilities to female workers should not be severe such as imprisonment for a criminal offence. The punishment for employers should be a fine in an amount set by the labour inspector, but not exceeding the amount under the law.

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<sup>18</sup> Labour Protection Act B.E. 2541, s 27

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## THE INFLUENCE OF THE CHINESE COAST GUARD ON THE UNCLOS AND USE OF FORCE DOCTRINE IN MARITIME

*Suprawee Asanasak\**

### **Abstract**

The role of the Chinese Coast Guard (CCG) in the South China Sea has rapidly been turned into ‘the Chinese newest armed force’. With a hybrid nature as a civilian actor possessing naval combative capacity, the nature of the CCG has both shaped and defied the current use of force law in maritime context. This article aims to revisit the seminal case of *the South China Sea Arbitration (The Philippines v China)* and investigate how the Hague Tribunal had considered this new state practice. Also, the article will examine whether the CCG would fall within the use of force doctrine. As the current law stands, there has not been any complete consideration of this perplexing nature. The Hague Tribunal took a precautionary approach to limit its analysis of the CCG and the legality of the CCG’s activities under the use of force doctrine seems to be far from clarity.

**Keywords:** the Chinese Coast Guard, Coast Guard, South China Sea, UNCLOS

## 1. Introduction

For more than decades, China/Taiwan, the Philippines, Vietnam, Brunei and Malaysia (hereafter the claimants) have all claimed their sovereignty over the sea around the Spratly Islands, Paracel Islands and Scarborough Shoal in the resource-rich South China Sea. In 2015, despite the Philippines's tremendous effort to settle the South China Sea disputes through the international agreed mechanism of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>1</sup>, China, the most powerful and aggressive claimant, immediately and completely denounced the awards from the landmark *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*.<sup>2</sup>

China has long argued that it has sovereignty over the disputed areas because of its so-called historical rights. Relying on the Chinese ancient map, China consistently claims that Chinese territories extend beyond Hainan Island to cover a large part of the South China Sea, before reaching the outset bound by the notorious Nine-Dash line had been drawn.<sup>3</sup> The Hague Tribunal in the *South China Sea Arbitration* rejected China's historical rights but declared no jurisdiction to delimit the territories in the South China Sea. Despite the narrow scope of the awards, China never recognizes

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<sup>1</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS. 397. 17

<sup>2</sup> *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (Merits) [2016] PCA 2013-19; *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (Jurisdiction and Admissibility) [2015] PCA 2013-19

<sup>3</sup> Bill Hayton, 'The Modern Creation of China's Historic Rights Claim in The South China Sea' [2018] *Asian Affairs* 49:3, 370-382 See also Julian Ku, 'The South China Sea and China's "Four Sha" Claim: New Legal Theory, Same Bad Argument' (*Lawfare*, 25 September 2017) <<https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>> accessed 15 September 2018

nor follows it.<sup>4</sup> Instead, China resorts back to state practices as a means to resolve the disputes. It continues to proclaim a de facto control over the area by building massive artificial islands and sending the Chinese Coast Guard (the CCG) to defend its self-proclaimed territories. These practices are both unique and unprecedented. The rise of the coast guards in the region, especially the CCG, is a fast developing practice that is deserved more attention and clarity over its clouded legal status.

After the watershed reform of coast guard in 2013, China boasts to deploy the largest coast guard vessel in the world and approximately 17,000 personnel in both the South China Sea and the East China Sea.<sup>5</sup> The rapid expansion and regular deployment of the Chinese Coast Guards (CCG) confirm a new practice of the use of coast guard, rather than the navy, in the disputed water. This new practice also sparks the beginning of the coast guard arm race between the claimants. From 2010 to 2016, Vietnam has increased its coast guard tonnage by 73 per cent and the Philippines have increased theirs by 100 per cent.<sup>6</sup>

The expansion of the CCG budget also allows the CCG to equip themselves with large vessels that are retired warships from the People's Liberation Army Navy (PLAN)<sup>7</sup>, and to rapidly transform more of its ships into armed coast guard vessels.<sup>8</sup> Some of the coast guard ships are now armed with 76mm rapid-fire guns, two auxiliary guns and two anti-aircraft machine

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<sup>4</sup> Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study', [2018] Chinese Journal of International Law, Volume 17, Issue 2

<sup>5</sup> Lyle J. Morris, 'Blunt Defenders of Sovereignty: The Rise of Coast Guard in East and South East Asia', [2017] 84 Navel War College Review 70

<sup>6</sup> Ibid. 78

<sup>7</sup> Ibid. 7

<sup>8</sup> Michael D. Armour, 'The U. S. Coast Guard In The South China Sea: Strategy Or Folly?' (*Center of Maritime Security*, 6 November 2017) <<http://cimsec.org/u-s-coast-guard-south-china-sea-strategy-folly/34648>>accessed 15 September 2018

guns.<sup>9</sup> However, most of the CCG's vessels are still lightly armed with non-lethal weapons such as water cannons and sirens. The CCG manoeuvres are less dangerous than full force naval operations but still create a life-threatening danger. By relying on a so-called 'bullying tactic',<sup>10</sup> the CCG employs the sheer size of its vessels to throw their weight around and potentially sink the counterpart vessels. Finally, the full-fledged militarization of the CCG came in early 2018 when the Chinese Communist Party started to transfer authority over the CCG to the Central Military Commission, rendering the CCG a new branch of Chinese Army.<sup>11</sup>

The role of coast guards in the South China Sea, especially the CCG has rapidly turned from being 'a fulltime marine harassment organization',<sup>12</sup> to 'the Chinese newest armed force',<sup>13</sup> in only a few years. The rise of the CCG also creates a grave international concern that triggers a debate whether Washington should also send the US coast guard into the western Pacific.<sup>14</sup> This practice is alarming not solely because of its dangerous threat but its uncertain legal status. The CCG has cloaked its increasing military

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<sup>9</sup> Ibid.

<sup>10</sup> William Pesek, 'Making sense of South China Sea dispute' (*Forbes*, 22 Aug 2017), <<https://www.forbes.com/sites/outofasia/2017/08/22/making-sense-of-the-south-china-sea-dispute/#5ea32f0f1c3b>> accessed 15 September 2018

<sup>11</sup> David Tweed, 'Military control of Chinese coast guard adds edge to sea disputes' (*Japan Times*, 27 March 2018) <<https://www.japantimes.co.jp/news/2018/03/27/asia-pacific/military-control-chinese-coast-guard-adds-edge-sea-disputes/#.W56WD5MzbOS>> accessed 14 September 2018

<sup>12</sup> Todd Crowell, 'A Coast Guard Arms Race' (*Real clear defence*, 22 May 2016) <[https://www.realcleardefense.com/articles/2016/05/23/a\\_coast\\_guard\\_arms\\_race\\_109386.html](https://www.realcleardefense.com/articles/2016/05/23/a_coast_guard_arms_race_109386.html)> accessed 15 September 2018

<sup>13</sup> Lyle J. Morris, 'China Welcomes Its Newest Armed Force: The Coast Guard' (*War On the Rocks*, 4 April 2018) <<https://warontherocks.com/2018/04/china-welcomes-its-newest-armed-force-the-coast-guard>> accessed 15 September 2018

<sup>14</sup> Armour (n 8)

capacity under the civilian outlook. It gradually forms the distinctive nature that is not easily distinguished into either law enforcement actor or military actor. The militarized CCG has challenged not only the existing law but also the clear-cut traditional distinction between naval force and law enforcement force. The doctrinal presumption<sup>15</sup> that a civilian actor would possess less capacity to create danger is now challenged by the presence of the armed coast guard. The strong emphasis on appearance over real capacity seems to render the current law out-of-touch from this new practice in the South China Sea. There is an urgent need for the law to reconsider the appearance presumption embedded in both jurisdiction and substantive law in the UNCLOS, in order to accommodate, regulate and scrutinize the new emerging practice of the armed coast guards.

## **2. Question of Jurisdiction: Should the CCG's Activities Deem 'Law Enforcement Activities', 'Military Activities' or Neither?**

The first and most significant issue concerning the use of coast guards is whether their activities would fall within the jurisdiction of the UNCLOS compulsory dispute resolution. The law on the UNCLOS jurisdiction is encapsulated in Part XV, Section 2 of the UNCLOS. The Article requires parties who cannot settle their disputes under Section 1 to submit the disputes to either a court or a tribunal according to Annex VII. However, as long as a written declaration is made, the signatory states can exclude themselves from the UNCLOS jurisdiction in matters enumerated in Article 298(1), which are 'disputes concerning military activities' and 'disputes concerning law enforcement activities'. Relying on Article 298(1)(b), the Tribunal in *the South China Sea Arbitration* acknowledged that China has

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<sup>15</sup> See *Guyana v Suriname* [2007] ICGJ 370; *The Arctic Sunrise Arbitration (Netherlands v Russia)* [2013] ITLOS No.22

triggered Article 298 exemption by its written declaration in 2006.<sup>16</sup> The Tribunal in *the South China Sea Arbitration* considered China's military/paramilitary activities in relation to Article 298(1)(b) in Submission No. 14 concerning the stand-off incident and the artificial island construction around Second Thomas Shoal. The ruling, nevertheless, is far from satisfactory.

In Submission No.14, The Philippines accused China of breaching the obligation to refrain from aggravating or extending the dispute [pending before the Tribunal]. The Philippines grounded their accusation on two incidents; the stand-off incident between the Philippine navy and a mix of both the CCG and PLAN around Second Thomas Shoal, and the artificial island construction activities around seven reefs in the South China Sea. The Tribunal dismissed the aggravation claims based on the stand-off incident but declared jurisdiction over the island construction activities. The two incidents were distinguished on what the Tribunal upheld as 'military activities'.

Regarding the stand-off incident, the Philippines reminded the Tribunal of the presence of the CCG in the so-called Cabbage tactic<sup>17</sup> during the incident. The CCG's presence should render the incident non-military in nature. The Tribunal, unlike the Philippines, emphasized instead on the presence of the military force in the incident and concluded that the facts fall well with the military activity exceptions of Article 298(1)(b) before dismissing the claim.<sup>18</sup> Although the Tribunal described the incident as

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<sup>16</sup> People's Republic of China, Declaration under Article 298 (25 August 2006), 2834 UNTS 327

<sup>17</sup> The Cabbage tactic is illustrated as follows; In the area around the island, fishing administration ships and marine surveillance ships are conducting normal patrols while in the outer ring there are navy warships. The island is thus wrapped layer by layer like a cabbage. As a result, a cabbage strategy has taken shape. See *South China Sea Arbitration (Merits)* (n 6) para 1120

<sup>18</sup> *South China Sea Arbitration (Merits)* (n 6) para 1161

representing ‘a quintessentially military situation.’<sup>19</sup> The Tribunal reserved itself from exploring ‘the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b).’<sup>20</sup> By contrast, in the incident of the Chinese artificial island construction, the Tribunal ruled the activities as non-military activities. Rather than considering the presence of the CCG or PLAN, the Tribunal satisfied with China’s self-verifying documents<sup>21</sup> reiterating that its activities in the South China Sea are for a civilian function such as fishing and exploration and are carried out by the CCG, a civilian actor. As the island construction activities were civilian<sup>22</sup>, they did not trigger any of Article 298 issues. After exercising its jurisdiction, the Tribunal found China breaching its obligation not to aggravating pending disputes.<sup>23</sup>

The Tribunal’s analysis in Submission No. 14 seems to cause both confusion and uncertainty on how to draw the line between civilian and military acts, especially in activities that appear to be both military and civilian. The presence of navies or coast guards does not seem to be a sole decisive factor in characterizing the nature of the operation because a self-certifying document can also serve as a pivotal factor. It is uncertain as to what evidence is needed to prove an activity civilian or military. Moreover, the Tribunal also read the law enforcement activity exception in Article 298 narrowly, only to excuse the jurisdiction over the law enforcement activities that regulate marine science research or fisheries as elaborated in Article 297 paragraph 2 or 3 respectively.<sup>24</sup> This strict reading rendered the law enforcement activity exception inapplicable to the Submission and forced the Tribunal to rely on the distinction between civilian and military activities

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> *South China Sea Arbitration (Merits)* (n 6) para 916-931

<sup>22</sup> Ibid.

<sup>23</sup> *South China Sea Arbitration (Merits)* (n 6) para 1173

<sup>24</sup> *South China Sea Arbitration (Jurisdiction and Admissibility)* (n 6) para 378

without having any middle ground to fall into. The analysis is also inconsistent with the reality in the South China Sea where the CCG has become militarized and the prevalence of the Chinese Maritime Militia is on a surge.<sup>25</sup> This half-baked analysis of law comes with an expensive price of uncertainty and confusion.

In fact, the Tribunal can have a full flank analysis of the nature of the armed CCG by shifting the analysis from the appearance of the actor to the use of force capacity of the actor. Rather than giving a substantial weight on one factor to determine the nature of the force used, the Tribunal should collectively take into account of all pieces of evidence, such as a presence of a navy or coast guard and a party's certifying document of an incident, with equal weights. This departure from the appearance presumption in international law<sup>26</sup> can derive a legal support from Article 31(3)(b) of the Vienna Convention on the Law of Treaties<sup>27</sup> states that an interpretation of any treaties or international law can be determined by 'Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. By relying on this Article, the Tribunal can incorporate the new practice in the South China Sea into the UNCLOS' hard-and-fast rules. As a result, the Tribunal would be able to discuss the uniqueness of the CCG's practice while arriving at the same conclusion. This reality-consistent approach would accommodate future development of the disputes

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<sup>25</sup> Chinese Maritime Militia (CMM) refers to military-trained civilians and fishermen who are sent to be the first line of defence against other Claimants. The use of Chinese militia began in 2014 in the HYSY 981 incident See Morris (n 13) 97

<sup>26</sup>See *Guyana v Suriname* [2007] ICGJ 370; *The Arctic Sunrise Arbitration (Netherlands v Russia)* [2013] ITLOS No.22

<sup>27</sup> Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS. 331

### 3. Question of Substantive Law: Are the CCG's Activities Considered the Use of Force?

In *South China Sea Arbitration*, the Tribunal discussed the bullying behaviors of the CCG within the Philippines territorial sea around the vicinity of Scarborough Shoal (Submission No. 13) in the context of Article 94, requiring a flag state to follow an accepted international regulation<sup>28</sup> and to ensure safety at sea.<sup>29</sup> The Tribunal also incorporates the Convention on the International Regulations for Preventing of Collisions at Sea 1972 (the COLREGS)<sup>30</sup> into Article 94(5) as an accepted international regulation and found that the CCG had breached numerous rules of the COLREGS<sup>31</sup>, fundamentally because of its 'total disregard of good seamanship and neglect of any precaution',<sup>32</sup> creating a risk of collision. Article 94 is a catch-all Article governing all kinds of vessels at any zones in the sea. The widest scope of Article 94 allows the Tribunal to sidestep the untouchable question of sovereignty, which the Tribunal has no jurisdiction to delimit, but still permits the Tribunal to find the CCG's acts illegal. Also, the hybrid identity of the CCG does not seem to cause any problems since Article 94 would govern all kinds of vessels – military and civilian alike.

The pitfall of Article 94, nevertheless, is its limited effect. Article 94(5) covers any accepted international regulation, not just the COLROEGS. China can potentially substitute the COLREGS with the progressive Code of Conduct in the South China Sea as long as China can make a persuasive argument the code is an accepted international regulation. Since 2002, China has been keen to enter into a bilateral agreement on the South China

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<sup>28</sup> United Nations Convention on the Law of the Sea, Article 94(5)

<sup>29</sup> United Nations Convention on the Law of the Sea, Article 94(3)

<sup>30</sup> Convention on International Regulations for Preventing Collisions at Sea (adopted in 20 October 1972) 1050 UNTS 16

<sup>31</sup> *South China Sea Arbitration (Merits)* (n 6) para 1109, 1109

<sup>32</sup> *South China Sea Arbitration (Merits)* (n 6) para 1088

Sea conflicts with its South East Asian claimants unanimously represented by The Association of South East Asian Nations (ASEAN).<sup>33</sup> The recent 51<sup>st</sup> ASEAN Foreign Minister meeting in early 2018 results in a workable timeline for ASEAN and China to negotiate and start the drafting process of the Code of Conduct in the South China Sea.<sup>34</sup> Given the Chinese heavy investment in its Belt and Road Initiative in South East Asia, China's increasing influence over the region might give it a leverage to negotiate the Code of Conduct in its favour.<sup>35</sup> With a possibility that the Code of Conduct would substitute the COLREGS in Article 94, it is hard to predict whether Article 94 would have teeth at all.

However, even a stronger pill is given to contain the CCG's aggressive activities, the success of the treatment is still unclear. Article 301, banning the use of force in oceans, is the most powerful legal force to end any kind of aggressive activities as long as those activities are considered the use of force or threat to the use of force. This strongest pill might not have its full-force if applies in the in *the South China Sea Arbitration*. Firstly, Article 301, applying to state parties only 'in exercising their rights and performing their duties under this Convention', might not be an appropriate law in the arbitration. This is because rights and duties under the Convention cannot be determined before because the question of delimitation has been unsolved.

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<sup>33</sup> Carl Thayer, 'ASEAN and China set to agree on Single Draft South China Sea Code of Conduct' (*The Diplomat*, 27 July 2018) <<https://thediplomat.com/2018/07/asean-and-china-set-to-agree-on-single-draft-south-china-sea-code-of-conduct>> accessed on 15 September 2018

<sup>34</sup> Ibid.

<sup>35</sup> Editors South China Morning, 'Divided Asean spins its wheels as great powers become back-seat drivers in Southeast Asia' (*South China Morning*, 19 August 2018) <<https://www.scmp.com/news/china/diplomacy-defence/article/2160250/aseans-limits-are-display-effort-build-robust-southeast>> accessed 15 September 2018

Secondly, the hybrid nature of the CCG would challenge the definition of the use of force under the use of force doctrine. *Guyana v Suriname*<sup>36</sup> stands as a precedent that the ban on the use of force applies to law enforcement activities, which are carried out by either a navy or a civilian actor. The case also emphasises the appearance presumption that the use of force by civilian coast guards would be less threatening and aggressive than the use of force by navies.<sup>37</sup> In *Guyana*, the mere shouting by a naval constitutes a use of force. This approach would allow a legal protection to the CCG's activities because the approach presumed that civilian force would have less dangerous capacity than naval force and less likely to breach the ban on the use of force. On the other hands, the *I'm Alone*<sup>38</sup> approach can alternatively hold the CCG's enforcement activities illegal. The Commissioners ruled that the law on the use of force also applies to law enforcement activities such as boarding, searching and seizing the ship. The use of force in law enforcement is not illegal as long as the force is necessary and reasonable for the law enforcement purpose.<sup>39</sup> However, resorting primarily to the bullying tactics, the CCG rarely starts firing or employs any dangerous weapons. It is doubtful whether these activities would exceed necessary and reasonableness parameter in the *I'm Alone* since the approach does not seem to directly consider the intimidating appearance and potential full-scale battle that the armed CCG creates. All in all, the very nature of the CCG has cut through the traditional understanding of the role of civilian force and naval force in maritime conflict management and the current law based on the traditional understanding simply could not follow.

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<sup>36</sup> *Guyana v Suriname* [2007] ICGJ 370

<sup>37</sup> Alex G. Oude Elferink, 'The Russian Federation and the Arctic Sunrise Case: Hot Pursuit and Other Issues under the LOSC' [2016] 92 INT'L L. STUD 381

<sup>38</sup> *S. S. "I'm Alone" (Canada, United States)* [1935] 3 R.I.A.A. 1609

<sup>39</sup> *Ibid.* para 1617

#### 4. Conclusion

One of the Chinese policy-maker reveals that the use of coast guards is 'an attempt to demilitarize territorial disputes, as well as to show rival claimants that China views these disputed areas as sovereign Chinese territories subject to domestic law.'<sup>40</sup> In other words, the presence of the CCG suppresses the seriousness of the ongoing sovereignty disputes and turns them into mere domestic maritime governance problems. While the destabilizing effect of the coast guard might reduce tensions around the dispute, Brian C. Chao is worried that the CCG is just a diplomatic tool that 'could lull all participants into a false sense of calm.'<sup>41</sup> The claimants might underestimate the naval capability cloaked underneath the CCG's uniform and this might lead to a greater risk of miscalculation. The CCG might also have a misconception about the legality of its actions and take a greater risk at seas, thinking the law is on its side. Clarity in law and a fully developed interpretation to suit the real CCG's practice would not only pave a way for a stable and predictable body of international law but would help all the claimants to better channel their policy to settle these prolonged and ever-escalated disputes in the South China Sea.

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<sup>40</sup> Morris (n 13) 83

<sup>41</sup> Brian C Chao, 'Coast Guards Could Accidentally Spark War in the South China Sea' (*National Interest*, 28 June 2016) <<https://nationalinterest.org/feature/coast-guards-could-accidentally-spark-war-the-south-china-16766>> accessed 15 September 2018

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THE HUMAN RIGHTS OF A STATELESS SURROGATE-BORN CHILD IN  
SPECIFIC RELATION TO ACCESS TO THE RIGHT OF NATIONALITY AND  
THE BEST INTEREST PRINCIPLE OF A CHILD AS CONTEMPLATED UNDER  
THE UN CONVENTIONS ON THE RIGHTS OF THE CHILD (CRC)<sup>\*</sup>

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**Abstract**

It remains steadily in vogue the practice of surrogacy in some advanced climes where often by a legal agreement, a woman concedes to become pregnant for another, carries the pregnancy to due term, and gives birth to a child or children all of this for another person (s) who ultimately becomes the parent (s) or commissioning parent (s) of the newborn child or children. International surrogacy arrangement has become one perennial sort of an issue that has surfaced within the past decades. Its consistent practice in some climes and the persistent non-interference by State Parties renders the fate and continued freedom of a surrogate-born child at the mercy of being Stateless.

This paper is thoroughly kindled by the writer's keen interest in this area of concentration and thus undertakes to examine the critical aspects of international surrogacy arrangement, Statelessness as product of international surrogacy arrangement and how it affects the nationality right

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and best interest of the child, and how as well these rights help in the optimization of their protection.

The author concludes by proposing the reformation of domestic legislation as a way of regulating the Stateless surrogate child. That State Parties observe the best interest of the child and that the ascertainment of the nationality right as contemplated under the *CRC* is better coordinated to address the Stateless surrogate child by States Parties complying strictly with the spirit and letter of the Convention.

**Keywords** Stateless Persons, Nationality Right, Best Interest Principle, Surrogate-born Child, Statelessness

## 1. Introduction

Recent decades have experienced a growing number of cases of Stateless children, especially those resulting from international surrogacy arrangements. Current discussions in the *First Global Forum on Statelessness* indicate the need for more confabulations among key stakeholders and practitioners and also the utilization of the *UNHCR* guidelines on the burning issue.<sup>1</sup> The writer argues that due to the transcending power of the human rights regime, Stateless surrogate children are entitled to enjoy the equivalent right to nationality and their interest best secured as anyone in the host country, as well as the necessary protection due them by reason of their status as children.

Furthermore, it is no doubt a well-known truth to assert that Stateless surrogate-born children are at a serious disadvantage owing to their status, particularly their inability to access basic rights and enjoy same to the fullest capacity and extent. As a result of this bleak development, the international community and well-meaning agencies have striven to address the issue of Statelessness through various endeavours, ranging from providing relevant guidelines to frame working proposed global action plans.

This thesis provides a brief background of an international surrogacy arrangement and how Statelessness has emerged therefrom. Also explored are the bases for surrogacy, the relevant and specific human right issue arising out of those circumstances and how the *Convention on the Rights of the Child (CRC)*<sup>2</sup> addresses these issues in enhancing the rights of Stateless surrogate-born children and optimizing their protection. The principal issue of rights and protection of children born out of surrogacy will not be

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR), 'First Global Forum on Statelessness: New Directions in Research and Policy Key Outcomes' (6 October 2014) <<http://www.refworld.org/docid/555de2af4.html>> accessed 6 May 2017

<sup>2</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

sufficiently addressed if keen consideration is not had to the conception of surrogacy and how it results in Statelessness.

### 1.1 Statelessness as Product of International Surrogacy Arrangement

The process or arrangement whereby a person carries and delivers a child on behalf of another person is termed surrogacy.<sup>3</sup> This concept has been integrated as one of many ways of generating income in some developing countries. As a rule, the arrangement does not just spring from the thoughts of men as such to so have another conceive for the other rather takes place as a result probably of a malformation in the womb, a recurring pregnancy loss, among others reasons.<sup>4</sup> In India, commercial surrogacy thrives and accounts for the highflying medical tourism, generating around \$6 billion and 450,000 tourists annually at least in the last decade.<sup>5</sup> It is estimated that over 25,000 children have been born through surrogacy arrangements, while more than half of these figures currently live in various parts of the West.<sup>6</sup>

The couple or individual who requests that another person (called the surrogate) carry a child on their behalf may be termed the intending parent (s) or the commissioning parent (s). There are basically two (2) types of surrogacy arrangements. The first is the traditional surrogacy where the surrogate mother is regarded as the genetic mother who provides the ovum

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<sup>3</sup> Institute on Statelessness and Inclusion (ISI), 'The World's Stateless Report 2017' (Oisterwijk, ISI 2017), 375 <<http://www.institutesi.org/worldsstateless17.pdf>> accessed 1 June 2018

<sup>4</sup> *ibid*

<sup>5</sup> Sanoj Rajan, 'Ending Statelessness arising out of Surrogacy in India: The Latest Developments' (*European Network on Statelessness*, 21 April 2017) <<http://www.statelessness.eu/blog/ending-statelessness-arising-out-surrogacy-india-latest-developments>> accessed 29 May 2018

<sup>6</sup> *ibid*

and gestates the child.<sup>7</sup> The process simply involves the fertilization of the egg of the surrogate mother and the sperm of a donor.

Advancement in medical technology ushered in the second type of surrogacy; gestational surrogacy. This type of surrogacy prompts the surrogate mother to gestate the child where both the ovum and sperm though obtained from either the intended parents or third-party donors; she is nonetheless by such act genetically related to the child.<sup>8</sup> Accompanying the foregoing advancement is the consequences of the dichotomy between the legitimacy of surrogacy and national laws and as well the impact of the likelihood of Statelessness.<sup>9</sup> In other words, surrogacy, particularly of international nature have occasioned difficulty in determining the nationality of most surrogate children,<sup>10</sup> save the relevant laws applicable to both the country of '*commissioning parents*' and that of the surrogate mothers are in agreement.<sup>11</sup> Such type of surrogacy services put the surrogated child at risk of being Statelessness or being Stateless.

### 1.1.1 Various Circumstances Causing Statelessness in International Surrogacy Arrangement

Considered under this heading are several circumstances that have rendered many a mammoth number of children born through surrogacy, Stateless. These circumstances give rise to the challenges on the right to

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<sup>7</sup> Caitlin Pyrc, 'Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem,' (2016) *Indiana Journal of Global Legal Studies* <<http://www.repository.law.indiana.edu/ijgls/vol23/iss2/19>> accessed 31 May 2018

<sup>8</sup> Caitlin (n 7)

<sup>9</sup> Institute on Statelessness and Inclusion (ISI), 'The World's Stateless Report 2017' (Oisterwijk, ISI 2017), 375

<sup>10</sup> *ibid* 376

<sup>11</sup> *Re X & Y (Foreign Surrogacy)* [2008] EWHC (Fam) 3030 (Eng.); Also Mark Henaghan, 'International Surrogacy Trends: How Family Law is Coping' (2013) *Australian Journal of Adoption* <<http://www.nla.gov.au/openpublish/index.php/aja/article/viewFile/3188/3713>> accessed 1 June 2018

nationality and the right to family existence. The conflict in the nationality laws, family laws on parentage to boots existing policies on surrogacy, between the countries of surrogate mother and that of the commissioning parent, constitutes one of the circumstances. This statement of the issue was manifested in a number of cases including and with particular reference to the *Volden case*,<sup>12</sup> where a Norwegian woman, Kari Ann Volden, battled for years to establish the nationality of twin children born through surrogacy. The contextual tale was that Volden, scourged with premature ovarian failure proceeded to Mumbai in 2009 to have a child through surrogacy. With the help of an Indian egg donor and a Scandinavian sperm donor, a tailored embryo was formed and implanted into a surrogate's womb. The outcome resulted in the birth of a pair of twins. However, the Norwegian government refused to recognize Volden as the legitimate mother since 'egg donation was prohibited and considered a criminal offence' under the Norwegian law.<sup>13</sup>

There are instances where the country of the surrogate mother accepts the surrogacy as legal and acknowledges the commissioning parent's nationality on the child.<sup>14</sup> In such a situation, some stubborn difficulties occasioning Statelessness may still arise. That is, where there is a strict anti-surrogacy law in the country of the commissioning parent, the surrogacy arrangement may still die a natural death, leading to the child being Stateless.<sup>15</sup> This position was exemplified in the case of *Baby Manji Yamada v. Union of India and Another*,<sup>16</sup> where the commissioning parents, Ikufumi and Yuki Yamada, travelled to India in 2007 and had a surrogacy arrangement with the fertility specialist Dr Nayna, through a married Indian

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<sup>12</sup> Sumitra Debroy, 'Stateless twins live in limbo' (*The Times of India*, 2 February 2011) <<http://timesofindia.indiatimes.com/city/mumbai/Stateless-twins-live-in-limbo/articleshow/7407929.cms>> accessed 26 May 2018

<sup>13</sup> Sumitra (n 12); also *Jan Balaz v. Anand Municipality and 6 ors*, Air 2010 Guj 21

<sup>14</sup> ISI (n 3) 379

<sup>15</sup> *ibid* 381

<sup>16</sup> *Baby Manji Yamada v Union of India and Another* [2008] 13 SCC 518

woman Pritiben Mehta.<sup>17</sup> However, as Baby Manji was born, Ikufumi attempted to return with Baby Manji to Japan, their home State but was refused entry since the Japanese Civil Code only recognized the woman who gives birth to the baby as the legitimate mother.<sup>18</sup> On getting to India, the Indian government refused to grant passport and birth certificate to baby Manji as the parental section requested the signature of both parents, which in Baby Manji's case, only the father Ikufumi was available.<sup>19</sup>

Another common situation occurs in cases where either of the parties to the surrogacy arrangement decides not to go ahead with it. In such case, the commissioning parents may refuse to take the child.<sup>20</sup> This could be due to some 'breach or changes in the terms of the surrogacy contract,' such as genetic mixed-up, birth defects,<sup>21</sup> or owing probably to marital issues (such as getting divorced, etc.) between the commissioning parent. Under such circumstance, the surrogate child is left with the surrogated mother and the legal identity of the surrogated child may not be established as such, thus bringing about the irrepressible challenge of Statelessness of the surrogate born child.<sup>22</sup> A similar circumstance may occur by inducement by the surrogate mother who may refuse to let go of the surrogate child.<sup>23</sup> A case in point was the matter between *D v. L (Minors)*

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<sup>17</sup> Kari Points, 'Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji' <[https://kenan.ethics.duke.edu/wp-content/uploads/2012/08/BabyManji\\_Case2015.pdf](https://kenan.ethics.duke.edu/wp-content/uploads/2012/08/BabyManji_Case2015.pdf)> accessed 30 May 2018

<sup>18</sup> Brasor Philip, 'Surrogate Path for Dads not always as easy as for Ricky' *The Japan Times* ( 31 August 2008) <[https://www.japantimes.co.jp/news/2008/08/31/national/media-national/surrogate-path-for-dads-not-always-as-easy-as-for-ricky/#.W\\_rNbuhKiMo](https://www.japantimes.co.jp/news/2008/08/31/national/media-national/surrogate-path-for-dads-not-always-as-easy-as-for-ricky/#.W_rNbuhKiMo)> accessed 25 November 2018

<sup>19</sup> Kari (n 17)

<sup>20</sup> ISI (n 3) 379

<sup>21</sup> UN General Assembly (n 2)

<sup>22</sup> ISI (n 3) 379

<sup>23</sup> ibid 380

(*Surrogacy*),<sup>24</sup> where the commissioning parents did not get the consent of the surrogate mother even after the child has attained six (6) weeks old. Circumstances like the foregoing are particularly prevalent in countries where strong anti-surrogacy law exists and the surrogate mother recognized as the mother of the surrogate child.<sup>25</sup> Another instance is where the country of the surrogate mother recognizes the commissioning parents as the actual parents. Such a case usually renders the surrogate child Stateless.

Finally, Statelessness may arise from cases where the commissioning parents are homosexuals. Under such situation, proving the affinity with the child or nationality so as to help the child escape Statelessness may prove knotty. There was a case wherein an Israeli court refused a paternity test to initiate the process of citizenship for twins born through surrogacy arrangement to a homosexual couple.<sup>26</sup> The court had ruled that it lacked the authority to so approve the paternity test that would permit the children Israeli citizenship. International law recognizes the authority of States to choose its own citizen and from the above one can safely posit that much of the discretion lies in the power of the relevant States and sometimes the employment of such discretion may result in Statelessness as there is no obligation as such under international law mandating States to grant nationality unconditionally. However, with the above cases and reports, this writer argues that the human right law is capable of transcending these barrier fronts and that States should enhance the rights to grant protection under specific human right regime.

To be examined shortly is whether there are adequate remedies within the human rights regime especially the Convention on Rights of Children in enhancing the rights and protection of children who have been

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<sup>24</sup> *D v. L (Surrogacy)* [2012] EWHC LG31 (Fam)

<sup>25</sup> ISI (n 3) 381

<sup>26</sup> Harinder Mishra, 'Israeli gay couple to take surrogate twins home' *The Indian Express* (Jerusalem, 28 May 2010) < <http://archive.indianexpress.com/news/israeli-gay-couple-to-take-surrogate-twins-home/624650/> > accessed 25 November 2018

rendered Stateless by reason of surrogacy arrangements. Furthermore, how the regime can be coordinated to enhance the rights and protections of the surrogate Stateless children is also properly spoon-fed in the next examination.

#### 1.1.1.1 The Convention on the Rights of the Child (CRC) in Resolving Statelessness Caused by Surrogacy

The term Statelessness is and has never been in the best interest of a child.<sup>27</sup> *Article 7 of the CRC* obliges States Parties to recognize the right of every child to acquire a nationality, and to ensure the implementation of this right, particularly where the child would otherwise be rendered Stateless. *Article 3* of the said Convention provides and secures the principle of the best interests of the child, stating in effect that the child's best interests be assessed and taken into account as primary consideration in all actions or decisions that pertain to him or her, both in the public and private sphere. *Article 9* provides for the right of a child not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if contrary to the child's best interests. A community comprehension of *Article 3 and 7 of the CRC* is evidently manifested without a doubt in its mandatory tones that due compliance by States Parties to the CRC is a necessity.<sup>28</sup> Apart from the plethora of existing international and regional instruments on the right of every child to a nationality, there are also decisions of regional human rights courts and committees on the issue of an international surrogacy arrangement.<sup>29</sup>

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<sup>27</sup> Article 3 of the CRC

<sup>28</sup> It should be noted that Articles 3 and 7 are not the only relevant provisions, but may be considered as good examples

<sup>29</sup> ISI, 'Addressing the Right to a Nationality through the Convention on the Rights of the Child,' *A Toolkit for Civil Society*, June 2016  
<[http://www.institutesi.org/CRC\\_Toolkit\\_Final.pdf](http://www.institutesi.org/CRC_Toolkit_Final.pdf)> accessed 29 May 2018

Furthermore, notwithstanding the fact that the *CRC* has been ratified by States world over, even amidst the very relevant and rich human right instruments and provisions and decisions, the Statelessness of a child or surrogate born child still persists as a major challenge. Preliminary findings of the *ISI World Stateless Report of 2017* revealed that neither the international human right law nor international law per se has clearly addressed the issue of Statelessness caused by surrogacy.<sup>30</sup> The same report also presented two likely solutions, both directed to international surrogacy. These solutions included a regulation of the international surrogacy arrangements under international law so as to prevent Statelessness while the other recommended better regulation of international surrogacy arrangements at the national level, to prevent similar outcome of Statelessness.<sup>31</sup> However, as rightly indicated by the author, both of these levels would take time and require deadly commitment from the States.<sup>32</sup>

#### 1.1.1.1.1 Resolving Surrogacy Problems Leading to Statelessness

It is posited that "the best approach to the problem of international surrogacy rest largely with domestic regulation."<sup>33</sup> It is suggested that resort to domestic legislation must find a middle ground in which countries address the impacts of new technology without being restrictive that they force the market out of the country or into the black market.<sup>34</sup> Notably, a better option is for States to find a middle ground if the problem is to be largely curtailed at least to an extent. This feat apparently works out in

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<sup>30</sup> ISI (n 3) 384

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> Erin Nelson, 'Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy,' *Journal of Law, Medicine & Ethics*, 41 (2013): 240, 241-42, in Caitlin Pyrcie, 'Surrogacy and Citizenship,' 494

<sup>34</sup> Caitlin (n 8) 952

some States that have outright prohibition laws on commercial surrogacy but however permit altruistic surrogacy within the confines of the law.<sup>35</sup>

Importantly, States are admonished to take into consideration the best interest of the child in line with *Article 3 of the CRC*, while a case of international surrogacy is determined. By so doing, although the rule of law would take its course, the chances of rendering another child Stateless is avoided or at least slim as not to allow the child suffer the offence of the parent. This was the position in *Mennesson v. France*,<sup>36</sup> a French case on nationality in the context of surrogacy, where the Court ruled that even though the children's parents had broken the law, since surrogacy is prohibited under French laws thereby causing the denial of certain elements of the children's identity, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.<sup>37</sup>

Lastly, the writer suggests that besides revising the laws at the international scene, it is pertinent to also ascertain how the human rights can be better coordinated with the specific human rights regime, addressing specific issues as arising out of the situation of Statelessness resulting from surrogacy, and to take steps in bringing States to implement same. This would aid in restoring the status as well as the rights and protections of such children.

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<sup>35</sup> Oireachtas Library & Research Service, 'Surrogacy, parentage, and citizenship: Ireland in the wider world,' *Spotlight*, No.3 (2013): 10-11

<sup>36</sup> *Mennesson v. France* ECHR, (Application No. 65192/11), 26 June 2014, paras 99 and 97. <<http://hudoc.echr.coe.int/eng?i=001-145179> (FR)> accessed 4 June 2018

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## THE ROLES OF “GOOD FAITH” AND “GOOD COMMERCIAL PRACTICE” IN INTERPRETING A CONTRACT IN THAILAND<sup>\*</sup>

*Munin Pongsapan<sup>\*\*</sup>*

### Abstract

Two main rules of interpretation, sections 171 and 368 of the Thai Civil and Commercial Code were copied from English translations of §§ 133 and 157 of the German Civil Code 1900, respectively. In Thailand, good faith has universal applicability in identifying and interpreting contracts. It assists the courts in implying a contractual duty into a contract and is the main tool used to interpret a contract. Despite being products of two conflicting theories, namely intention and expression theories, sections 171 and 368 CCC are often cited collectively when a contract is interpreted. Thai courts have combined these two provisions to establish common guidelines for interpretation to the effect that in interpreting a contract, the common intention of the parties must be ascertained in accordance with the dictates of good faith in relation to good commercial practice. Thai courts neither define nor distinguish between these two concepts. Their collective citation has become a pattern in the application of sections 171 and 368 CCC. Although we have yet to obtain clear criteria for invoking good faith and good commercial practice by the courts, it is clear that we cannot rely on the literal meaning of the words used in the contract to interpret contractual terms. Thai courts can revoke a term even if it is written in the clearest possible manner. This may improve the debtor's chance of relief from a contractual obligation.

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## 1. Introduction

Words are not always understood as intended. The meaning of a verbal statement depends essentially on what the parties making and receiving it think it means, but since what people think depends on their personal knowledge, experience, preferences, concerns, and interests, a statement often means different things to the author and its addressee.<sup>1</sup>

Even if a contractual term is expressed in the clearest possible way, its meaning can always be disputed. This is the case in Thailand, where the literal meaning of words or expressions is less relevant to the interpretation of contract than good faith and good commercial practice. The debtor's breach of contract may be justified by implying a duty within a contract or by redefining the common intention of the parties by referring to good faith. Based on two main rules of interpretation, sections 171 and 368 of the Thai Civil and Commercial Code ('CCC')<sup>2</sup>, copies of an English translation of sections 133 and 157 of the 1900 German Civil Code ('BGB'), respectively, Thai courts provide guidelines for interpretation to the effect that, in interpreting a contractual term, the common intention of the parties is to be ascertained in accordance with good faith in relation to good commercial practice without clinging to the literal meaning of the statement. These guidelines are laid down in a way that is perfectly in line with European jurisprudence. Yet questions arise as to what the terms 'good faith' and

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<sup>1</sup> Hein Kötz, *European Contract Law* (Tony Weir tr, Clarendon Press 1998) 108. See also Hugh Beale and others, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing 2010) 667.

<sup>2</sup> In this paper, the English translation of the Thai Civil and Commercial Code is based on Chung Hui Wang's *The German Civil Code Translated and Annotated with an Historical Introduction and Appendices*. This text was also used by the drafting committee in making the Thai Code in 1925. See Chung Hui Wang, *The German Civil Code Translated and Annotated with an Historical Introduction and Appendices* (Stevens and Sons 1907).

‘good commercial practice’ mean exactly and how they can be employed in identifying and interpreting contractual terms. This article sets out to answer these questions. While there are many judicial decisions on contract interpretation, there is shockingly little scholarly literature on the topic, which explains the lack of any theoretical framework. This article aims principally to answer the questions as to what the terms ‘good faith’ and ‘good commercial practice’ mean exactly and how they can be employed in identifying and interpreting contractual terms. By so doing, it will also have the opportunity to explore Thai scholars’ and courts’ theoretical and practical understanding of the roles of ‘good faith’ and ‘good commercial practice’ in identifying and interpreting contractual terms.

## **2. Historical Reflections**

To fully and properly understand the roles of good faith and good commercial practice in interpretation of contract, a historical investigation of the root of the two main provisions relating to contractual interpretation is required. This section will give an historical account of the making of the Thai Civil and Commercial Code (‘CCC’) in general and sections 171 and 368 CCC in particular.

### **2.1 The Making of the Thai Civil and Commercial Code**

The promulgation of the CCC in 1925 marked the birth of modern Thai private law. The history of the CCC of 1925 is a history of legal borrowing; nearly every single rule of the Code was extracted from English translations of foreign civil and commercial codes, principally the German Civil Code of 1900 and the Japanese Civil Code of 1898. The latter was chosen mainly because of the draftsmen’s belief that it was merely a mirror of the former. Unsurprisingly, this was a mainstream perception of the Japanese Civil Code of 1898 during the first half of the twentieth century both in Japan and abroad.

Despite draftsmen of the Japanese Civil Code of 1898, from the very beginning, insisting that they ‘could not agree to take the law of any one country as an exclusive model’<sup>3</sup> and that ‘the new [Japanese] code is based on the French code and other codes of French origin at least as much as it is on the German code’,<sup>4</sup> the influence of German law is overwhelming. Indeed:

Because of the belief that the new Code was based on German Law, Japanese scholars and lawyers have worked hard to digest German civil law theories. The most common destination of Japanese academics studying abroad was Germany, especially before the Second World War.<sup>5</sup>

The broad conception of German law’s dominant influence in the Japanese Civil Code was later proved to be fallacious. Comparative researches on the reception of foreign private law in Japan emerging from the 1960s reinterpreted the relationship between Japanese, German and French private law. According to Zentaro Kitagawa, German jurisprudence exerted far more influence in the process of *interpreting* and *expounding* the Japanese Civil Code than in the process of making it.<sup>6</sup> This confirms the draftsman Ume’s remark that German law was not predominantly used in shaping Japanese provisions of the Code.

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<sup>3</sup> Nobushige Huzumi, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Tokyo Printing 1904) 10.

<sup>4</sup> Kenjiro Ume’s Speech at the French Civil Code Centenary Celebrations in 1904 at the Faculty of Law of the Imperial University of Tokyo, quoted in Yosiyuki Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 52.

<sup>5</sup> Hiroshi Oda, *Japanese Law* (3rd edn, Oxford: OUP 2009) 666. See also Kenzō Takayanagi, ‘Occidental Legal Ideas in Japan: Their Reception and Influence’ (1930) 3 *Pacific Affairs* 740, 747.

<sup>6</sup> Zentaro Kitagawa, ‘Japanese Civil Law and German Law – From the Viewpoint of Comparative Law’ in Zentaro Kitagawa and Karl Riesenhuber (eds), *The Identity of German and Japanese Civil Law in Comparative Perspectives* (De Gruyter Recht 2007) 33-34.

Whether the Japanese rules are of German or French origin is crucial to our understanding of the making of the CCC of 1925, in general, and the adoption of foreign rules concerning specific performance and damages in Thailand in particular. The reason for this lies in the change of Thai policy in 1925 which involved replacing the French Civil Code of 1804 with the German Civil Code of 1900 as the principal model for a new Thai civil and commercial code. After a long and unsuccessful process of codification of private law modeled on the French Civil Code and directed by French draftsmen, the new drafting committee with a Thai majority agreed that the new code would be founded on the German Civil Code and the Japanese Civil Code of 1898 by means of ‘copying’. To follow the German Code was clearly the Thai draftsmen’s ultimate aim, but the Japanese Code was also chosen because they believed that it was made by ‘copying the German Civil Code’.<sup>7</sup> Most of the provisions of the CCC of 1925, especially Book II on Obligations, were thus copied from the German Civil Code and the Japanese Civil Code, side by side, without any concern for their conceptual differences.<sup>8</sup>

To employ the copying method, the draftsmen of the CCC of 1925 relied heavily on a number of English materials. They obtained English translations of German Cc rules from Chung Hui Wang’s *The German Civil Code: Translated and Annotated* of 1907, and their source of knowledge about German civil law was Ernst Schuster’s *The Principles of German Civil Law* of 1907. The English translations of Japanese provisions were taken from JE de Becker’s *Annotated Civil Code of Japan* of 1909, and the draftsmen consulted de Becker’s *The Principles and Practice of the Civil*

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<sup>7</sup> Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Bangkok: Thammasat University 1982) 4, 13, 23, 42.

<sup>8</sup> For a detailed account of the making of the Civil and Commercial Code of Thailand in 1925, see Munin Pongsapan, ‘The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance’ (PhD Thesis, University of Edinburgh 2013) 88-121.

*Code of Japan* of 1921 when commentaries on Japanese rules were needed. These English publications are pivotal in understanding the systems of contractual interpretation in Thai law, since all of the relevant Thai provisions were copied from them.

Thus, the draftsmen of the CCC of 1925 principally relied on two foreign codes – the German Civil Code of 1900 and the Japanese Civil Code of 1898. They used the English drafts of Books I and II of the old CCC of 1923, which was drafted by the French draftsmen, as the basis for Books I and II of the CCC of 1925 and examined them article by article. They compared the drafts of the CCC of 1923 with the English translations of the German and Japanese Codes, written by Wang and De Becker respectively. Most of the CCC of 1925 rules were newly imported from the German and Japanese Civil Codes. The old articles that were consistent with the German and Japanese Codes were preserved (although revised), and those that were inconsistent were removed. Some provisions, which were products of French jurisprudence, were kept when they were consistent with the German and Japanese rules, but the Thai draftsmen, who were critical of the French Code, avoided adopting any new French rules. When it came to a choice between German and Japanese provisions, one that was more articulate prevailed.

The Thai drafting methodology resembles Watson's notion of legal borrowing, especially his view that the framing of a single basic code of private law is a relatively easy task<sup>9</sup> and that a successful transplant does not require 'a systematic knowledge of the law'.<sup>10</sup> The draftsmen of the CCC of 1925 concentrated their attention on the letter rather than spirit of the law. They did not discuss, for example, the sources of the Japanese model's rules or how they had developed. They were often satisfied with

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<sup>9</sup> Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 100-101.

<sup>10</sup> Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79, 79.

the Thai rules provided that their wording was in line with those of the Japanese and German provisions.<sup>11</sup>

## 2.2 The Making of Sections 171 and 368 CCC

To trace the origin of sections 171 and 368 CCC, it may be necessary to explore their English drafts prepared by the draftsmen of the CCC of 1925 which were subsequently translated into the Thai language. Even though the English drafts are not an official version of the CCC as the only official version is in the Thai language, they are essential to the understanding the origin of the Thai rules and their interpretation. This is because if one seeks to discover the true intent of a Thai rule, one needs to look at its foreign origin.

English Draft of the CCC <sup>12</sup>	Foreign Models Adopted by the Draftsmen <sup>13</sup>
<p>Section 132 [currently section 171]: In the interpretation of intention, the true intention is to be sought rather the literal meaning of the words or expression.</p> <p>Section 368: Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taking into consideration.</p>	<p>§ 133 BGB: In the interpretation of a declaration of intention the true intention is to be sought without regard to the literal meaning of the expression.</p> <p>§ 157 BGB: Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.</p>

**Table 1-1:** Comparison between the texts of the English drafts of sections 171 and 368 and their German models.

<sup>11</sup> Pongsapan (n 8 above) 117-121.

<sup>12</sup> Office of the Council of State, Doc No 79, ‘การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)’ (1925).

<sup>13</sup> Chung Hui Wang, *The German Civil Code: Translated and Annotated* (Stevens and Sons 1907).

From the table above, it is evident that the texts of the English drafts of sections 171 and 368 prepared by the draftsmen of the CCC of 1925 were copied from Chui Hui Wang's English translations of §§ 133 and 157 BGB of 1900 respectively.

Ernest Joseph Schuster, a German jurist, who authored the book "The Principles of German Civil Law, which was principally used by the draftsmen of the CCC of 1925 to understand German civil law when they copied German rules from the German Civil Code of 1900, comments § 157 BGB that:

The appeal to good faith shows that, in the cases to which the rule is to be applied, the parties are assumed to be well aware of the fact that a literal interpretation of the words used by them would not carry out the bargain which they had in view when entering upon the agreement.

The reference to custom is only a particular application of the general principle. Where special modes of expression have, in a particular trade or among a particular class of people, a meaning different from the ordinary meaning, it would clearly be against good faith, in the case of an agreement between persons accustomed to use such special meaning, to assert that the ordinary meaning was intended.<sup>14</sup>

### 3. Identifying Contractual Terms

This section deals with the identification of contractual terms. In Thailand, 'implied terms' is not commonly known among Thai lawyers; identifying contractual terms is not a normal step in interpreting a contract and is not dealt with as a topic of contractual interpretation in Thai

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<sup>14</sup> Ernest J Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 105-106.

literature on contract law. Thai scholars and practitioners appear to be more familiar with the term ‘express terms of contract’, than ‘implied term’. When they interpret contractual terms, they tend to focus their attention on express terms – terms which are written down in the contract. The so-called “implied terms” as commonly known in common law jurisdictions are known by Thai lawyers merely as the application of the principle of good faith in search for a true intent of the contracting parties.<sup>15</sup> However, to see a clear position of Thai law’s contractual interpretation in the comparative world, the chapter attempts to fit the related Thai law in a common law structure of contractual interpretation that is to understand Thai law from a common law perspective.

### 3.1 Preliminary Observations

Unlike English law,<sup>16</sup> Thai law’s response to the disappointment of one contracting party’s expectations from a concluded contract is not determined by the distinction between a warranty and representation. If the debtor fails to perform its contractual obligations, the creditor may seek remedies for breach of contract, namely specific performance, compensatory damages, and termination of the contract.<sup>17</sup> However, under Thai law, the creditor’s reliance on the debtor’s misrepresentation does not give rise to any remedial rights other than the right to set aside the voidable contract. In fact, Thai law does not recognize misrepresentation apart from mistakes that cause invalidity. Where a contracting party’s mistake in

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<sup>15</sup> Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 138-139.

<sup>16</sup> Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 382; See also Andrew Burrows and Edwin Peel, ‘Overview’ in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (OUP 2007) 3-16..

<sup>17</sup> For more information on breach of contract in Thai law, see Munin Pongsapan, ‘Remedies for Breach of Contract in Thai Law’ in Mindy Chen-Wishart, Alexander Loke, and Burton Ong (eds), *Studies in The Contract Laws of Asia: Remedies for Breach of Contract*, vol 1 (OUP 2016) 370-399.

relation to an essential quality of a person or thing was induced by the debtor's fraudulent act, the contract is rendered voidable on the grounds of fraud. The party has the right to choose between ratification and avoidance. As invalidity cannot be a basis for a claim for damages under Thai contract law, that party may instead need to seek compensation for any loss caused by the fraudulent act on the grounds of tort.

As the availability of compensatory damages depends on proof of breach of contract, it is essential for the contracting party seeking such remedy to prove the existence of the contractual term that has allegedly been breached. In Thai law, a contract can be formed simply by mutual agreement—the meeting of an offer and its acceptance (*consensus ad idem*).<sup>18</sup> Formality is not required for the formation of a contract, except for certain types of contract<sup>19</sup> such as sales, gratuitous gifts, and exchanges of immovable property. A contract can thus be either oral or in writing. To form a contract, an offer must be unequivocal and must be expressly communicated to the offeree who can, however, implicitly accept it. The parties are not required to agree on every detail of the contract,<sup>20</sup> as a contract can be formed by agreement on all essential terms. What is essential should be determined objectively. For example, the subject matter and price are usually essential to all sales contracts, while the place and time of performance are not. However, the essential elements can also be established subjectively during the process of forming the contract.<sup>21</sup> An

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<sup>18</sup> Section 151: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

<sup>19</sup> Section 152: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

<sup>20</sup> Section 367: 'If the parties to a contract, which they regarded as concluded, have in fact not agreed as to one point upon which an agreement was to be settled, those parts which were agreed upon are valid in so far as it may be inferred that the contract would have been concluded even without a settlement of this point.'

<sup>21</sup> Section 366: 'So long as the parties have not agreed upon all points of a contract upon which, according to the declaration of even one party, agreement is essential,

offeror may attach a condition to the offer to the effect that a contract will not come into existence until the place of performance is settled. Accordingly, a contract is not formed until the parties agree on this term, even though all objectively essential terms on the subject matter and price have been finalized.

### 3.2 Express Terms

As has been discussed above, contractual terms may be expressed or implied in Thai law. As Mindy Chen-Wishart points out, ‘*Express terms* are those set out in the contract. *Implied terms* are those which are read into (added to) the contract.’<sup>22</sup> Her observation on express terms in English contract law can also apply to Thai contract law, namely that ‘express terms can be in writing or oral or both’.<sup>23</sup> As was mentioned earlier, in Thai law, the formation of most contracts requires no form. Testimony is sufficient to prove the existence of the contract. However, certain contracts, such as, for example, loans and rental of immovable property, require written evidence to file a claim. Written evidence as a rule requires a statement bearing the signature of the party liable that demonstrates the existence of the claim. It can be produced at any time, even after the contract has been formed.

### 3.3 Parol Evidence Rule Equivalent

Influenced by the parol evidence rule in English law<sup>24</sup>, section 94 of the Thai Civil Procedure Code<sup>25</sup> stipulates that, where the law requires

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the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.

If it is agreed that the contemplated contract shall be put into writing, in case of doubt, the contract is not concluded until it is put in writing.’

<sup>22</sup> Chen-Wishart (n 16) 382.

<sup>23</sup> Ibid 382.

<sup>24</sup> The parol evidence rule is a rule in the Anglo-American common law regarding contracts, and governs what kinds of evidence parties to a contract dispute can

written evidence, the court may not admit a witness called by a party irrespective of the consent of the other party: (1) to adduce the claim instead of a document; and (2) to add to or contradict the document.<sup>26</sup>

However, a witness may be admissible to prove the forgery of documents, the invalidity of the contract, or the incorrect interpretation of contractual terms by the other party, or where the original copy of the contract is destroyed by *force majeure* or lost in circumstances for which the claimant is not responsible.<sup>27</sup> In contrast to the parol evidence rule, section 94

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introduce to identify the specific terms of a contract. The rule prevents parties who have reduced their agreement to a final written document from later introducing other evidence, such as the content of oral discussions from earlier in the negotiation process, as evidence of a different intent as to the terms of the contract. Robert E Scott and Jody S Kraus, *Contract Law and Theory* (LexisNexis 2013) 542. According to Mindy Chen-Wishart, “The parole evidence rule ostensibly promotes certainty and predictability and avoids evidential difficulties. However, these advantages turn out to be more apparent than real because of the long list of *exceptions* to the rule necessitated by the equally legitimate demands of justice. Amongst the most important exceptions are when it is claimed that:

- the contract is vitiated, eg for misrepresentation, mistake, *not est factum*, duress, and undue influence...;
- the contract includes term *additional* to those contained in the contractual document, whether express (called ‘collateral’... or implied...);
- the contract should be *rectified* because its wording does not accurately record the parties’ agreement...

The collective width of these exceptions calls the rule into question since, in practice, it will rarely prevent a party from adducing the sort of evidence the rule theoretically prohibits. The rule is better understood as an easily rebuttable presumption that a document purporting to be the contract contains the whole contract.” *ibid* 418-119.

<sup>25</sup> While the Thai Civil and Commercial Code is a virtual copy of European civil codes, mainly the German and French Civil Codes, English civil procedure had a considerable influence on the Thai Civil Procedure Code.

<sup>26</sup> The Supreme Court explained that a document is purported to record the parties’ will: see Supreme Court Decision No 121/2491.

<sup>27</sup> Thai Civil Procedure Code, section 94(2).

permits extrinsic evidence as long as it is not a witness. Hence, written collateral terms or contracts are admissible to adduce a claim, by adding to, varying, or contradicting a document which contains the main terms. For example, the court may admit a document containing an amendment to the main contract in relation to the interest rate of a loan. However, it cannot accept a request by the defendant to call a witness to testify that the interest rate stated in the main contract has been amended. Those contracts which require neither the written form for contract formation nor written evidence to prove a claim do not fall within the purview of section 94. The fact that the parties put the contract in writing does not make section 94 applicable. The Supreme Court of Thailand, in Case No 2186/2517 (AD 1974), held that the defendant who entered into a work-for-hire agreement which was put in writing had the right to call a witness to prove an amendment to the floor plan which was included in the main contract, as the Civil and Commercial Code neither requires the written form to make a work-for-hire contract nor written evidence to adduce a claim arising from it.<sup>28</sup>

### 3.4 Implied Terms

In addition to express terms, a contract may also include implied terms. Similar to English law, Thai law recognizes both terms implied in fact and terms implied in law. According to Chen-Wishart, ‘terms may be implied into contracts from the *factual context* to give effect to the parties’ *unexpressed intention*.’<sup>29</sup> The general rule in Thai law is that an unexpressed intention cannot form a contract or part of a contract. In Case No 199/2545 (AD 2002), the Supreme Court held that the surety was not liable for the debt because the alleged surety contract which it signed did not contain the amount of debt, even though the contract did include a statement that the signee agreed to accept all liability incurred by the

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<sup>28</sup> Supreme Court Decision No 2186/2517.

<sup>29</sup> Chen-Wishart (n 16) 392.

debtor. In this case, the claimant prepared a surety contract template and only required the surety to fill in some blanks. The surety filled in all but the amount of debt. The Supreme Court refused to enforce the contract on the ground that the party had not expressed its intention as to the amount to which it agreed to be bound.<sup>30</sup> However, in a more recent case (AD 2012), the claimant handed the land title deed, a copy of his ID card, a copy of his household registration, and a blank sheet signed by himself to the defendant to guarantee a loan. The defendant later filled in the blank sheet, turning it into a power of attorney to mortgage the defendant's land, and then registered the mortgage at a land office. The claimant sought revocation of the mortgage registration on the grounds that by filling in the signed sheet without his consent, the defendant had not acted in good faith. The Supreme Court held that the claimant, by signing the blank sheet, could have foreseen a sales or mortgage of the land and 'impliedly' permitted the claimant to 'misuse' the property. The Court considered this to be 'gross negligence' and instead accused the claimant of violating the principle of good faith.<sup>31</sup> The question arises as to whether the Court regarded the mortgage as an implied contract.

In interpreting a contract, Thai law attaches greater importance to the parties' real intention than to the literal meaning of the words or expressions.<sup>32</sup> Where the parties have failed to include a term which they would have included had they thought about it, or had had the time to draft the contract properly, such a term may be implied into the contract. Unfortunately, Thai law has no test for implication. However, the Supreme Court has provided some examples. In one case, the claimant, a property development company, entered an agreement to buy a piece of land from the defendant for 43,000,000 Baht. Thereafter, the claimant borrowed

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<sup>30</sup> Supreme Court Decision No 199/2545.

<sup>31</sup> Supreme Court Decision No 14437/2555. See also Supreme Court Decision No 3922/2548.

<sup>32</sup> Section 171 CCC.

155,000,000 Baht from a commercial bank with 43,000,000 Baht proposed for the aval of a promissory note. The claimant followed the practice of paying the price of land by means of a promissory note availed by a bank. However, the agreement between the parties did not include such a practice. The defendant refused to accept a promissory note without an aval from the claimant. The claimant brought a claim for breach of contract against the defendant. The Supreme Court held that, even though there was no express term which required an aval of the promissory note, the contract contained an ‘implied term’ that did impose such a requirement.<sup>33</sup> In another case, the defendant entered an overdraft agreement with the claimant. In a second supplemental agreement, the defendant agreed to pay interest at the rates of 9.25, 12.5, and 13 per cent per year, depending on the amount of money withdrawn. A provision was included stating that the parties agreed to be bound indefinitely by all the terms of the second supplemental agreement. Later, the defendant entered into a third supplemental agreement that contained no interest rates. The defendant argued that, in the absence of a provision on interest rates, the claimant had no right to claim any interest on the sum withdrawn. The Supreme Court referred to the provision in the second supplemental agreement as grounds to apply the interest rates specified therein to the third supplemental agreement.<sup>34</sup> It might be more appropriate to maintain that the parties impliedly agreed to adopt the interest rates featured in the second supplemental agreement in another supplemental agreement.

### 3.5 Implied Duty of Good Faith

Terms may be implied into a contract by virtue of the principle of good faith. This is the most well-recognized type of implied term in Thai law. In truth, an implied duty of good faith may well justify every

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<sup>33</sup> Supreme Court Decision No 5678/2545.

<sup>34</sup> Supreme Court Decision No 13098/2555.

implication in fact.<sup>35</sup> The principle of good faith—a product of European legal science—is mainly reflected in section 5 CCC<sup>36</sup> and has been integrated into many other provisions across the Code. Section 5, which is situated in Book I on ‘General Principles’ designed to govern the entire Code, states:

Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.

Similarly, section 368 CCC, a principal rule of contract interpretation, states:

Contracts shall be interpreted according to the requirements of good faith, custom being taken into consideration.

In Thai law, good faith seems to have universal applicability.<sup>37</sup> It governs the exercise of rights and the performance of obligations, whether such rights or obligations derive from contracts or torts.<sup>38</sup> It has the power to override express contractual terms and to impose an implied duty on a contracting party. It is, however, unfortunate that Thai courts do not provide clear guidelines on the application of this principle, and there is little effort on the part of Thai legal scholars to systematize and intellectualize the relevant judicial decisions. The good faith principle is employed piecemeal and on a case-by-case basis.

Good faith can be applied to negate the sanctity of contract. In a case decided by the Supreme Court in 2012 AD, the defendant agreed to repay a loan in instalments and give the claimant the right to demand immediate repayment of the outstanding amount if the defendant resigned from the organization involved. The agreement also permitted the claimant

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<sup>35</sup> See Kittisak Prokati, หลักสุจริตและเหตุเหนือความคาดหมายในการชำระหนี้ (*Good Faith & Supervening Events*) (Winyouchon 2012) 60-61.

<sup>36</sup> Section 5 is a copy of an English translation of Article 2(1) of the Swiss Civil Code.

<sup>37</sup> Prokati (n 35) 60-61.

<sup>38</sup> For example, section 421 states: ‘The exercise of a right which can only have the purpose of causing injury to another person is unlawful.’

to enforce the mortgage in the event of default by the defendant. The defendant continued to pay in instalments at the agreed times after leaving the organization and the claimant accepted the payments without reservation. The claimant subsequently demanded immediate repayment of the balance of the loan. The Supreme Court dismissed the claim on the grounds that the claimant had forfeited its right to demand immediate repayment of the balance by continuing to accept the instalments even after the defendant had left the organization. The court found that the claimant had not acted in good faith.<sup>39</sup> In another case decided in 1959 AD, the claimant sold a piece of land to the defendant with the right to redeem it within a year. The claimant attempted to redeem the property, but the defendant craftily prevented the claimant from paying the price of redemption. The Supreme Court held that the defendant had not acted in good faith and that the claimant's attempts to redeem the land were a proper tender of performance. The court also cited the principle of good faith to negate the effect of section 94 of the Civil Procedure Code that no witness can be admitted to contradict a document. The claimant was permitted to call a witness to adduce the defendant's bad faith even though the contract for the sale of immovable property with a right of redemption must be in writing.<sup>40</sup> In this author's view, the claimant's right to redeem the property after expiry of the redemption period may alternatively be considered to include an implied term that the defendant has a good faith duty to extend the period of redemption where the claimant is unjustly prevented from redeeming the property.

A term may be implied into the contract by the dictates of good faith to impose a contractual duty on a party. In a case decided in 2006 AD, according to the agreement of acknowledgement of debt, the claimant

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<sup>39</sup> Supreme Court Decision No 11482/2555. See also Supreme Court Decision No 1728/2558.

<sup>40</sup> Supreme Court Decision No 339/2502. See also Supreme Court Decision Nos 1283/2508 and 1538/2508.

permitted the defendant to repay the debt in instalments of 7,000 Baht per month, which were to be deducted from the defendant's salary. However, the defendant was later dismissed by the claimant. This effectively rendered the agreed mode of payment ineffective. Before the September instalment was due, the defendant sent a letter to tender performance by bank transfer and requested details of the claimant's bank account. The claimant received the letter but did not reply, not even after receiving two reminders from the defendant. The defendant then decided to pay the instalment by postal order. The claimant refused to accept the payment, instead demanding immediate payment of the balance of the debt. The Supreme Court held that the claimant's demand was not based on the principle of good faith.<sup>41</sup> The court did not refer to implication in fact, but it might be more reasonable to claim that a term was implied into the contract to impose a good faith duty on the claimant to provide the defendant with information on the new mode of payment. In a case decided in 2004 AD, the defendant, who had 100 Baht in a savings account with the claimant, entered a credit card agreement with the same party. The agreement permitted the claimant to balance mutual debts with the defendant. The claimant did not do so at first, but waited for a year before making a set-off, mainly in order to prevent the period of prescription from lapsing. The Supreme Court found that the claimant had dishonestly exercised its right to earn more interest and interrupt the period of prescription. Such an act was contrary to the principle of good faith. It therefore held that the period of prescription had not been interrupted but had lapsed instead.<sup>42</sup> It might be better to view the claimant's act as a failure to comply with a term that was implied into the credit card agreement by virtue of good faith. The term imposed a good faith duty on the claimant to balance mutual debts with the defendant without delay.

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<sup>41</sup> Supreme Court Decision No 4091/2549.

<sup>42</sup> Supreme Court Decision No 6504/2547. See also Supreme Court Decision No 2591/2543. The period of prescription for a credit card debt is two years, according to Section 193/34 (7).

### 3.6 Implication by Law

In addition to implication in fact, a term may be implied into the contract by statute or custom. According to Chen-Wishart, ‘contracts that fall into *certain commonly occurring* types attract their own set of obligations as terms implied in law ... unless the parties contract out of (i.e. exclude) them.’<sup>43</sup> In Thai law, courts and legal writers are not familiar with the term ‘implied in law’. This may be the case in other civilian jurisdictions as well. Accordingly, no reference is found in Thai legal literature to the so-called ‘terms implied in law’. Thai contract drafters know that they do not need to include every term in the contract as the law always comes to their assistance whenever there is a dispute over a contracting party’s rights or duties. That is why its relevance to contracts may be considered as ‘express’ rather than ‘implied’ and ‘direct’ rather than ‘indirect’. However, for academic purposes, it may be sensible to recognize the existence of ‘implication in law’ in Thai law as a separate category of implied terms and as opposed to ‘implication in fact’. In Thailand, to form a contract, the parties are not required to settle every detail. They only need to agree on the essential terms.<sup>44</sup> Those of the parties’ rights and duties that are not stated in the contract can be implied from statutes, mostly the Civil and Commercial Code. In the English case *Liverpool City Council v Irwin* (1977 AD), the House of Lords found that, in tenancy agreements, landlords had an implied-in-law obligation to their tenants to take reasonable care to maintain the common parts of tower blocks, such as lifts, staircases, lighting and rubbish chutes.<sup>45</sup> Had the same situation occurred in Thailand and had the case been brought before a Thai court, in the absence of any term imposing on the lessor a duty to maintain the common parts, the court would have had to invoke section 550 CCC, which states that the lessor is

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<sup>43</sup> Chen-Wishart (n 2) 401.

<sup>44</sup> See sections 366 and 367 CCC.

<sup>45</sup> *Liverpool City Council v Irwin* [1977] AC 239, 254 (HL). See also Chen-Wishart (n 2) 402.

liable for any defects that arise in the course of the contract and must make any repairs that might become necessary, except those that are by law or custom the responsibility of the lessee. Despite the absence of any express term, the lessor's contractual duty to maintain the common parts is implied by this statutory rule.

The Civil and Commercial Code provides a number of default rules for all types of contract. While some default rules are subsumed under the general parts of obligations and contracts which apply to all types of contract, some are peculiar to specific contracts. Their interrelationship is known as general and specific rules. The parties can always contract out of, or contradict, any default rule as long as such a rule is not related to public order or good morals.<sup>46</sup> Section 195(1) CCC is an example of a general rule which may become an implied term of a contract. It states: 'When the thing which forms the subject of an obligation is described only in kind, if its quality cannot be determined by the nature of the juristic act or the intention of the parties, the debtor must deliver a thing of medium quality.' Section 203(1) CCC is another example of a general rule. It states: 'If a time for performance is neither fixed nor to be inferred from the circumstances, the creditor may demand the performance forthwith, and the debtor may perform his part forthwith.' Section 458 CCC is an example of a specific rule that is only applicable to sales contracts. It states: 'The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.' Most default rules in the Civil and Commercial Code, including all the above examples, are provisions that can be contracted out by the parties as they are not related to public order or good morals. There are, however, some default rules which cannot be deviated from. For example, an agreement to exempt the debtor's liability for fraud and gross negligence is void.<sup>47</sup> A non-liability clause cannot exempt

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<sup>46</sup> Section 151: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

<sup>47</sup> Section 373.

the seller from the consequences of its own acts or of facts which it knew but concealed.<sup>48</sup>

### 3.7 Implication by Custom

A term may also be implied into a contract by custom, as section 368 CCC affirms that ‘ordinary usage’,<sup>49</sup> must be taken into account when a contract is interpreted. In Thai law, customary law is generally regarded as a secondary source of law,<sup>50</sup> but on occasion it plays an equal role to that of statutory rules. For example, according to section 550 CCC, the lessor is liable for any defects that arise in the performance of the contract, and the lessor must make all repairs which may become necessary, except those which are by law or ‘custom’ to be done by the lessee. Section 552 CCC states that the lessee cannot use the property hired for any purpose other than that which is ‘ordinary and usual’, or which has been provided in the contract. However, Thai judges and legal scholars have difficulty in determining exactly what custom or commercial practice is and how it may be discovered. When Thai courts refer to ‘custom’ when interpreting a term or considering that a term should be implied into the contract, ‘good faith’ is often also mentioned. Their reference to ‘custom’ may be seen as part of a pattern of applying section 368 CCC, which contains both the expressions ‘good faith’ and ‘ordinary usage’ (custom or commercial practice). At times, Thai courts provide distinctive examples of terms implied by custom or commercial practice without relying on good faith. In a case that was

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<sup>48</sup> Section 485.

<sup>49</sup> The expression used in the English draft of the Civil and Commercial Code which was copied from an English translation of the German Civil Code. A more appropriate translation of this word would be ‘good commercial practice’.

<sup>50</sup> Section 4 CCC: ‘The law must be applied in all cases which come within the letter and spirit of any of its provisions.’

Where no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.’

decided in 1962 AD, the defendant hired the claimant to transport kenaf fibre from Thailand to Taiwan by sea. There was no contractual term requiring the claimant to have the goods bound up tightly during the transport, yet the Supreme Court held that this duty must be implied into the contract by 'good commercial practice'.<sup>51</sup>

In Supreme Court Case No 5678/2545 (AD 2002),<sup>52</sup> the court held that, even though the contract did not impose on the buyer the requirement to have a promissory note availed by a bank, 'good commercial practice' in buying and selling high-priced property, payment by promissory note requires an aval. The court cited sections 171 and 368 CCC to imply such a duty into the contract. In a case decided by the Supreme Court in 1999 AD, the defendant rented a piece of land next to his own from the claimant to plant an orange tree grove. The defendant needed an even surface that, in the circumstances, stretched across its own land and the rented parcel. The defendant dug up the soil in the rented land and used it to fill its own land to create a flat surface. The claimant terminated the lease on the grounds of breach of contract. The Court found that the defendant's use of the property accorded with 'common practice' under section 552 CCC and dismissed the claim.<sup>53</sup>

In the judicial application of good faith and custom, especially under section 368 CCC, the two concepts arguably appear to have been

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<sup>51</sup> Supreme Court Decision No 1375/2505.

<sup>52</sup> See the details of the case at n 33 above.

<sup>53</sup> Supreme Court Decision No 8602/2542. See also Supreme Court Decision Nos 7105/2546 and 1246/2504. In the latter case, the defendant rented a house and also a plot which extended from the house of the claimant. The defendant built a bathroom on the land and made a hole in the wall to ventilate it and receive sunlight. Since the air vent was made in the bathroom belonging to the defendant and could be demolished when the lease ended, the Court found that the defendant's use of the house and land followed 'common practice' and that he had not breached the contract.

amalgamated to the point of eclipsing the latter. The practical insignificance of custom in identifying and interpreting contractual terms may be explained by the fact that the Civil and Commercial Code is virtually a copy of various foreign legal sources which have taken the place of traditional Thai private law, which has become well-nigh extinct. What little has survived is to be found in family law and the law of succession.<sup>54</sup> When the Code can provide solutions to all legal problems, it is understandable that there is no need to resort to unwritten sources of law such as custom. Another reason may be that Thai courts seem to be more comfortable with invoking good faith to negate the sanctity of contractual terms or to imply a term into a contract. Good faith seems to be a panacea for difficult legal questions. It is relatively easy for the courts to determine that the exercise of a contractual right or the enforcement of a contractual term is inequitable and therefore that a good faith duty has been neglected, while to establish custom or commercial practice may require more effort to prove its existence and hand down a convincing judgment.

In contrast with English courts, Thai courts have no power to imply terms into a contract without statutory or customary support, since judicial decisions are not considered a source of law in Thailand.<sup>55</sup> However, they play a central role in identifying implied terms, especially terms implied in fact. The applicability of the principle of good faith in Thai law is largely determined by the courts. Despite being the most recognized means of implication, good faith is neither systematically deployed by the courts nor enthusiastically studied by Thai legal scholars.

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<sup>54</sup> See Pongsapan (n 17) 371-2.

<sup>55</sup> See Section 4 above.

#### 4. Interpreting Contractual Terms

‘Once courts have identified the binding terms of the contract, the next question is what those terms mean; in particular, whether and how they apply to the dispute before the court.’<sup>56</sup> When a contract requires interpretation, Thai legal scholars and judges often seek guidance from two general rules: sections 171 and 368 CCC. Section 171 stipulates that, in interpreting a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions used. Section 368 seems to supplement Section 171 by stating that contracts are to be interpreted according to the requirements of good faith, ordinary usage being taken into consideration. Since these two rules were copied from English translations of sections 133 and 157 BGB, respectively, Thai law inherited the ‘tension between more ‘subjective’ and more ‘objective’ interpretations – the ‘intention theory’ and the ‘expression theory’’, which ‘run through the whole of European legal history.’<sup>57</sup>

Until the late nineteenth century ‘subjective’ interpretation dominated legal literature, though whether it was equally dominant in practice is less certain. It figures in [original version of] the French Code civil (art. 1156: *On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes*), and most of the European civil codes have followed suit: § 133 BGB, for example, provides that in interpreting an expression of intention, “the real intention is to be ascertained without clinging to the literal meaning of the statement”. However, these provisions are often complemented by another rule which looks more to the “objective”

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<sup>56</sup> Chen-Wishart (n 16) 405.

<sup>57</sup> Kötz (n 1) 108.

meaning of the expression, and a discrepancy ensues which it falls to the judge to resolve in the individual case. Thus alongside §133 BGB we find §157, which provides that contracts are to be interpreted “in accordance with the dictates of good faith in relation to good commercial practice”.<sup>58</sup>

#### 4.1 Fictitious Intentions and Mistakes

Before expounding on sections 171 and 368 CCC, it is worth noting that some legal devices, notably the rules of mistake and the rules of fictitious intentions, can also be used to deal with the problems of defective declarations of intention that occasionally compete with the rules of interpretation. Where a declaration of intention is made fictitiously with the connivance of the other party, section 155 CCC nullifies such intention. However, the invalidity of the fictitious intention cannot be set up against third persons who are damaged by the fictitious declaration of intention and who act in good faith. If a contract is invented to conceal another contract, the invented contract becomes void because of its fictitious intention, while the concealed contract may be enforceable, depending on whether its formation meets the other essential requirements, namely the object and form of the contract, and the legal capacity of the parties.<sup>59</sup> There is no need to find the real intention behind a contract or contractual term which is fictitiously made, as the law finds it too defective to allow enforceability. This is also the case with mistakes.

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<sup>58</sup> Ibid 108.

<sup>59</sup> Section 155: ‘A declaration of intention made with the connivance of the other party which is fictitious is void; but its invalidity cannot be set up against third persons injured by the fictitious declaration of intention and acting in good faith.

If a declaration of fictitious intention under paragraph one is made to conceal another juristic act, the provisions of law relating to the concealed act shall apply.’

The Civil and Commercial Code recognizes two types of mistake. Section 156 CCC governs mistakes as to an essential element of a juristic act,<sup>60</sup> while section 157 CCC deals with the other type of mistake – mistakes as to an essential quality of a person or a thing.<sup>61</sup> The consequences of the two types differ; a section 156 mistake renders the contract void, while the contract becomes voidable if a party makes a mistake under section 157. Even among contract law experts, these two types are sometimes difficult to distinguish. A common dividing line is that a section 156 mistake occurs during the process of communicating the intention, while a section 157 mistake is formed during the process of decision-making.<sup>62</sup> For example, A wishes to sell a shirt to B for 1,000 Baht but erroneously writes down 100 Baht in the offer. B accepts the offer. A contract is formed but simultaneously becomes void under section 156.<sup>63</sup> The contract should be void because A's defective expression of intention led B into believing that the price was correct. If A had written down the correct price in the offer but B accepted the offer because it believed a counterfeit shirt to be a

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<sup>60</sup> Section 156: 'A declaration of intention is void if made under a mistake as to an essential element of the juristic act.'

A mistake as to an essential element of the juristic act under paragraph one is for instance a mistake as to the character of the juristic act, a mistake as to a person being a partner of the juristic act and a mistake as to a property being an object of the juristic act.'

<sup>61</sup> Section 157: 'A declaration of intention is voidable if made under a mistake as to a quality of the person or the thing.'

A mistake under paragraph one must be a mistake as to the quality of the person or the thing which is considered as essential in the ordinary dealings, and without which such a juristic act would have not been made.'

<sup>62</sup> See Sanunkorn Sotthibandhu, คำอธิบายนิติกรรมสัญญา (Text on Juristic Acts and Contracts) (19th edn, Winyouchon 2016) 131-2.

<sup>63</sup> However, A may not be able to benefit from the invalidity of the contract according to section 158 CCC which states: 'If the mistake under section 156 or section 157 was due to the gross negligence of the person making such a declaration, he cannot avail himself of such invalidity.'

genuine one, B's mistake as to the quality of the shirt would render the contract voidable. B would have the right to avoid or to ratify the contract.

Section 156 mistakes are relatively problematic. Referring to the first hypothetical situation above, B had seen A's advertisement offering the shirt for sale at 1,000 Baht, so he knew of A's real intention to sell the shirt at that price from the beginning. When B accepted the offer at the correct price, he did not at first notice the incorrect price written down in the letter. When B later discovered the difference he raised the issue of nullity under section 156 to refuse payment. What, however, if B had in fact noticed the incorrect price at the beginning and had doubts about it, but decided to keep silent so as to benefit from a potential error? Can section 156 still apply to both cases to render the contract void? Despite meeting the requirements of section 156, these two cases should not be solved by the mistake rule. In the first case, B intended to accept the offer at the correct price. It is feasible for us to find the parties' real intention to be bound by the contract for the sale of the shirt at 1,000 Baht. Here, we can invoke section 171 which states that, in interpreting an expression of intention, the real intention should be ascertained without bothering with the literal meaning of the statement. The result should be the same as the following hypothetical scenario. C and D make a written contract in the English language, although this is not their native tongue. Their contract says that C will sell 'sharkmeat' to D. Both parties erroneously believe that this word denotes the meat of whales, and in fact they both intended to conclude a contract for the sale of whalemeat. C tenders whalemeat to D. D cannot insist on sharkmeat as the common intention of the parties is to buy whalemeat. In the second case, D's dishonesty may enable us to apply section 368, which states that contracts are to be interpreted in accordance with the dictates of good faith in relation to good commercial practice. We may conclude that, in this situation, a sales contract was formed at the price of 1,000 Baht. D can neither benefit from the mistake nor raise the nullity of the contract.

To avoid confusion over the application of the rules regarding mistake and those regarding interpretation, the latter should apply only when the former are irrelevant. They should be not used concurrently. When the offeror makes a mistake in communicating its intention that leads to an acceptance by the offeree who is unaware of the mistake, section 156 can apply and the rules of interpretation should be disregarded. But where a mistake by one party does not impair the other party's expression of intention, there is no need to apply the rules of mistake. The parties' real intention can be identified with the assistance of section 171, and the contract may be enforceable in accordance with such intention. In a rather confusing case, A owned a piece of land which was registered as Plot 2924. A later sold it to B. Both parties erroneously registered the sale of Plot 2924 on the title deed as Plot 2949. C intended to purchase a piece of land which was registered as Plot 2946, but the parties erroneously registered the sales of Plot 2946 on the title deed of Plot 2924. Despite the fact that C was referred to in the title deed of Plot 2924 as the owner, C took possession of Plot 2946 and lived on it for many years. C later agreed to sell the land it possessed to D (Plot 2946). Both parties had jointly inspected the plot previously. They later registered the sale on the title deed of Plot 2924, which now had D as its owner. Both parties erroneously believed that the sale referred to Plot 2946. The Supreme Court held that, despite being mistakenly referred to as the owner of Plot 2924 in the official records, D was not its rightful owner since D and C intended to buy and sell Plot 2946, not Plot 2924.<sup>64</sup> It was noted that neither section 156 nor section 171 was cited by the Court. On the surface, this case seems to concern a section 156 mistake that occurred during the process of expressing the parties' intention, i.e. when registering the sale on the title deed of the wrong plot. The Court's decision to ignore section 156 is convincing. This case should not be resolved by the rule of mistake, since both parties made the same

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<sup>64</sup> Supreme Court Decision No 1707/2523. See also Supreme Court Decision No 2038/2519.

mistake and their real intention was not impaired. The Court set out to establish the real intention of the parties without expressly referring to section 171. Since the real intention of the parties could be identified, a straightforward, practical solution in this confusing case would have been simply to correct the names of the owners on the title deeds.<sup>65</sup>

Another complicated case was brought before the Supreme Court in 1997 AD. The Court applied both the rules of mistake and of interpretation. In this case, the claimant entered into an agreement with the defendant to buy a building in the belief that it was located on two pieces of land registered as Plots 614 and 616. In fact, it was located on Plot 615. The claimant became aware of the mistake when she registered the sales contract of the building and the two plots at the land office. She refused to sign the contract and set it aside. The defendant filed a counter-claim for damages on the grounds of breach of contract. The Supreme Court found that the building was located on a plot different from the plot that the claimant had contracted for. As the building was located on Plot 615, it became a component of this property and its ownership belonged to the land owner. The Court referred to ‘good faith’ and ‘commercial practice’ in section 368 to interpret the claimant’s intention. It observed that the claimant would never have bought the building knowing it was located on another property, and this pointed to the conclusion that the claimant made a mistake as to the quality of the subject matter of the contract under section 157. This mistake rendered the contract voidable.<sup>66</sup> The question arises as to whether the Court needed to refer to section 368 at all. I would suggest that contract interpretation is not at issue here. Section

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<sup>65</sup> See Supreme Court Decision 2143/2525. In this case, the claimant purchased insurance from the defendant, but the insurance policy named someone else as the insured person. The Supreme Court held that based on the real intention of both parties, the claimant was legitimately the insured person and thus had a right to make the claim against the defendant.

<sup>66</sup> Supreme Court Decision No 8056/2540.

368, as a rule of objective interpretation, in particular, is the wrong tool with which to address the main problem in this case as its purpose is to identify the objective meaning of contractual terms. It should rather be treated as a simple case of section 157,<sup>67</sup> where the Court needs to determine whether the quality of the thing is considered ‘essential’ in ‘ordinary dealings’. This is an essential requirement of section 157 which must be satisfied before a mistake can be established. What is considered to be essential in ordinary dealings is a question of ‘statutory interpretation’, not of ‘contractual interpretation’.

In another case decided by the Supreme Court in 1999 AD, the defendant entered an agreement to buy a piece of land with an area of 167 square *wa*<sup>68</sup> for 18,000,000 Baht from the claimant. The defendant relied on information on the land title deed which stated the correct area and the claimant’s confirmation of the property area. Before registering a sale of property at a land office, the defendant discovered that the actual area of the property was approximately 124 square *wa*, smaller than the area agreed. The defendant then requested a price reduction while the claimant demanded the full price. The Supreme Court cited section 368 to ascertain the parties’ real intention. It observed that the agreement to buy the property was not a ‘wholesale agreement’, where variations in size do not affect the agreed sum, and that the price of 18,000,000 Baht was calculated on an area size of 167 square *wa*.<sup>69</sup> The Court dismissed the claimant’s claim. It is unfortunate that the issue of fraud under section 159 CCC was not raised in court, even though the claimant was discovered to have been fully aware that the figure on the title deed was incorrect when it entered

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<sup>67</sup> It should also be considered a case of fraud under section 159 CCC. This provision states ‘A declaration of intention produced by fraud is voidable.

In order that fraud may make a contract voidable under paragraph one, it should be so serious that without it the juristic act would not have been made.’

<sup>68</sup> A Thai unit of measurement of land. 1 square *wa* is equal to 1 square metre.

<sup>69</sup> Supreme Court Decision No 8705/2542.

into the agreement with the defendant. The Court's failure to refer to fraud may have been because it was not disputed by the parties or because of the claimant's continued interest in enforcing the contract, which amounted to implied ratification.<sup>70</sup> However, from a scholarly point of view, in this case it should first be determined whether the contract was voidable on the grounds of fraud and, if so, whether the voidable contract was ratified. Once it is clear that the contract was ratified, we could seek to interpret the contractual terms and apply section 368 to determine whether the claimant intended to pay 18,000,000 Baht for the property in question, irrespective of its reduced size.

#### 4.2 When a Contract Needs Interpretation?

Bearing in mind the application of the rules of mistake outlined above, two points should be noted before proceeding to the interpretation of a contract. First, where there is a mistake in the process of expressing an intention, the rules of mistake apply, unless the parties' real intention can be ascertained. Secondly, statutory interpretation should be clearly distinguished from contractual interpretation. When the courts determine the meaning of a word or expression in a statutory rule, they may need to look beyond the common intention of the 'individuals involved'. They may need to look objectively into the common understanding or common practice of 'the people in society'.

The Supreme Court, in Case No 3325/2548 (AD 2005), held that contractual interpretation is required when a contract term contains unclear or conflicting words or expressions or when the parties differ as to what the words or expressions mean. If such a condition does not exist, there is no

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<sup>70</sup> According to section 181, 'if the party who has the right to avoid the voidable contract demands performance from the other party or do any other acts which imply ratification without reservation the contract is deemed to be ratified.'

need to interpret the contract.<sup>71</sup> Even if the contract is clearly written, a party may dispute the meaning of a word or an expression. Cases such as these should not be brought before the court as there is no valid ground for dispute. However, if the parties do not share a common understanding of the disputed word or expression, the court may need to intervene. In one case, one of the terms of a marine insurance policy stated ‘VOYAGE: At and from LAEM CHABANG, THAILAND TO HOCHI MINH’. Some insured goods were lost at the Port of Laem Chabang before the carriage commenced. There was disagreement as to whether the insurer was liable for this loss. The insurer argued that the insurance coverage commenced when the vessel carrying the insured goods left the port. The Supreme Court held that it was ‘clear’, according to the term, that the insured loss had occurred ‘at’ the Port of Laem Chabang.<sup>72</sup> In another case, a couple with two children made a divorce settlement that included a provision by which the husband agreed to pay 8,000 Baht in child maintenance for each child on a monthly basis until they had ‘completed their bachelor’s degree or reached the age of 20’. The woman continued to demand maintenance payments for a child who was now 20 years old but who had yet to complete his undergraduate studies. The man refused to pay. The Supreme Court referred to the word ‘or’ to hold that the word suggested that, if one of the two conditions was fulfilled for either child, the right to demand maintenance for that child was terminated.<sup>73</sup>

#### 4.3 Subjective Interpretation

Section 171 CCC, which reflects the subjective interpretation or intention theory, lays down a general rule of interpretation in Thai law that, when interpreting an expression of intention, the real intention rather than

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<sup>71</sup> Supreme Court Decision No 3325/2548. See also Supreme Court Decision Nos 679/2547 and 4932/2545.

<sup>72</sup> Supreme Court Decision No 4712/2546.

<sup>73</sup> Supreme Court Decision No 3618/2543.

the literal meaning of the statement is to be ascertained. This rule is the starting point of contract interpretation. While it dictates what is to be sought (the real intention), it provides no clues as to where and how to find it. So, where can it be found? Do we need to look at the ‘common intention’ of both parties? Or is the intention of one party sufficient? Supreme Court Decision 679/2547 (AD 2004) clearly answers this question. The Supreme Court opined that in resolving a dispute over the meaning of a statement or a term the court needs to ascertain the real intention that is ‘commonly’ shared by ‘both’ parties.<sup>74</sup> This is upheld by a recent decision, where the Supreme Court contended that, in interpreting a contract, the common good faith intention of ‘both parties’ must be ascertained in accordance with their common practice and good commercial practice.<sup>75</sup> However, the Supreme Court, in the Case No 8056/2540 (discussed above) only took the claimant’s intention into consideration in interpreting the contract. In that case, the Court had to determine whether the quality of the thing that the claimant mistook was essential in ordinary dealings. It should be emphasized that this question should not be resolved by the rule of contract interpretation which requires a search for a common intention of both parties.

#### 4.4 Objective Interpretation

As we now know that, in interpreting a contractual term, we need to ascertain the common intention of both parties,<sup>76</sup> the next important question is: how can this be done? According to Thai legal literature<sup>77</sup> and judicial decisions, this question is perfectly answered by section 368 CCC.

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<sup>74</sup> Supreme Court Decision No 679/2547. See also Supreme Court Decision No 3924/2551.

<sup>75</sup> Supreme Court Decision No 20348/2555.

<sup>76</sup> Seni Pramoj, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ (The Civil and Commercial Code on Juristic Acts and Obligations) vol 1 (Munin Pongsapan edn, Winyuchon 2016) 346.

<sup>77</sup> Ibid.

Thai courts often apply both sections 171 and 368 concurrently when they interpret contractual terms. Their connection is well illustrated by Supreme Court Decision No 20348/2555 (AD 2012) stating:

In interpreting a contract, the common intention of the parties is to be ascertained in the dictates of good faith in relation to their normal practice and good commercial practice. We cannot rely on one party's intention.

Words do not always represent the real intentions of both parties. This is why we cannot rely on the literal meaning of the statement of intention. Good faith and good commercial practice are seen as essential tools in establishing the common intention. They are often collectively employed by Thai courts, so that it is increasingly difficult for legal scholars to draw a distinction between the two. In one Supreme Court case, one of the terms of a land lease agreement stipulated that the lessee must not sublet the 'land' to other persons. The lessee built a factory and two apartments on the land, and later sublet the 'factory' to a third person. The lessor held the lessee liable for breach of contract. The lessee's argument was grounded on the literal meaning of the expression 'sublet the land'. The Supreme Court held that

Based on the normal commercial practice of lessors and lessees who act in good faith, in leasing property, the lessor does not intend the lessee to sublet the property. The reason lies in the trust that the lessor places in the lessee only. This is affirmed by section 544, which prohibits subletting without agreement. Therefore, the lessee must not sublet the property or let anyone dwell in it. To interpret the statement 'the lessee must not sublet the land', we must take the whole of the contract and the common intentions of the parties into consideration and must not be misled

by one side's intention. By subletting the factory which was built on the disputed land, the defendant let someone else use and dwell in it instead of himself. This is contrary to the purpose of the lease, which is to bar the lessee from subletting the land, which includes any buildings on it or letting anyone live in it.<sup>78</sup>

In another case, the claimant requested a court to evict the defendant from a piece of land. They later reached a settlement. The claimant agreed to give the defendant the disputed land with an area of 'approximately' 4 *rai* 3 *ngan* 78 square *wa*,<sup>79</sup> measured from the middle of the road from the north. An official measurement found that the actual area of the disputed land was some 6 *rai*. The defendant claimed the entire area. The Supreme Court dismissed the claim. It found that the fact that the size of the area was clearly stated indicated that this was essential to the agreement; if the parties had really agreed on the whole property, they would not have specified the area. The word 'approximately' did not mean 'whatever' area it turned out to be. It only expressed the parties' uncertainty about the actual area involved.<sup>80</sup>

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<sup>78</sup> Supreme Court Decision No 6843/2541. See also Supreme Court Decision 2231/2540. In this case, the defendant, a Buddhist temple, agreed to open its private street for 'use of the claimants' who agreed to pay compensation for each building which was completed on their land and used for commercial purposes. The claimants sold their vacant land to third persons who soon constructed several buildings on it. The claimants refused to pay compensation. The Supreme Court found that the main purpose of the agreement was to give the claimants a right of way to pass through the street in exchange for compensation paid to the defendant. As the third persons inherited the right to pass through the street from the claimants, the buildings they erected should be deemed to be the claimant's for the purpose of enforcing performance. The claimants were thus liable for compensation.

<sup>79</sup> Thai units of measurement of land. 1 *rai* is equal to 1,600 square metres. 1 *ngan* is equal to 400 square metres.

<sup>80</sup> Supreme Court Decision No 3766/2542.

In a case decided by the Supreme Court in 2009 AD, one of the terms of the lease agreement clearly stipulated that, if the building was severely damaged by fire, the agreement would automatically end and the lessor would have the right to have the security deposit paid to it forfeited ‘no matter what causes the fire’. The court held that the purpose of such a security deposit was to deter the lessee from causing any damage to the property. Therefore, the lessee’s fault was a determining factor for the forfeiture of the deposit.<sup>81</sup> In another case, one of the terms of a hire purchase agreement stated that the debtor agreed to pay interest on ‘any payments’ made to compensate for its default or breach of contract. The Court held that ‘any payments’ meant instalment payments only; compensation for breach of contract was not included.<sup>82</sup> In yet another case, one of the terms of a settlement agreement stipulated that both parties must register the sale of land and make a payment at the land office on ‘22 March 1999 at 13.00’. The defendant arrived before 13.00, whereas the claimant was 25 minutes late. Even though they met at the land office, the defendant refused to register the sale on the grounds of the claimant’s breach of contract. The Supreme Court held that the common intention of both parties was to register the title of the land and to receive payment ‘that afternoon’ by commencing the process of registration at 13.00 and that they did not regard a slight delay as a breach of contract.<sup>83</sup>

In view of the ‘parties’ common intention’ and ‘good faith’ approach taken by the Supreme Court in interpreting contracts in past cases, the result of the following hypothetical situation may be predictable. A commercial tenancy agreement between a landlord and tenant A, who is an optician, includes a clause providing that the landlord will not rent out space to another optician. One of the other tenants in the same building,

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<sup>81</sup> Supreme Court Decision No 4614/2552.

<sup>82</sup> Supreme Court Decision No 2755/2544.

<sup>83</sup> Supreme Court Decision No 8219/2544. See also Supreme Court Decision No 5911/2544.

tenant B, is an ophthalmologist who after a while begins to sell spectacles and contact lenses directly to his patients. The Supreme Court would probably not interpret the term literally but would rather search for the true intention of the parties, which is to prevent competition. The Court may then resort to the principle of good faith to hold that the landlord, who is aware of the ongoing competition, has an implied duty to prevent B from competing with A. Failure to perform this duty would give rise to a claim for damages for breach of contract.

The Supreme Court sometimes looks at ‘the whole contract’ and ‘parties’ conduct pursuant to it’ to determine their common intention. A contract was entitled ‘copyright assignment agreement’, but neither the contract price nor the parties’ conduct suggested it was an assignment agreement.<sup>84</sup> A contract was entitled a ‘car ownership transfer contract’, yet none of the terms mentioned the transfer of the car ownership. In fact, there was another term which implied that the true purpose of the contract was to put up the car as a guarantee for a loan repayment.<sup>85</sup> If both parties fictitiously form a contract to conceal another contract, whether or not the concealed or fictitious contract is enforceable is not a question of contract interpretation but a question of contract invalidity. According to section 155 CCC, the fictitious contract becomes void while the concealed contract may be enforceable, depending on whether its formation meets other validity requirements, namely the object, the form of the contract and the legal capacity of the parties (see the section on *Fictitious intentions and mistakes* above).

In exploring ‘the whole contract’ to determine the parties’ common intention, the Supreme Court never uses evidence of prior negotiations. It usually looks at both the main and the supplemental agreements. The ‘relevant documents’ may be taken into consideration in contractual

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<sup>84</sup> Supreme Court Decision No 679/2547. See also Supreme Court Decision 6843/2541 above.

<sup>85</sup> Supreme Court Decision No 1411/2505.

interpretation only when they are clearly connected to a valid agreement. In a case decided by the Supreme Court in 2011 AD, an insurance contract did not state a named beneficiary. The court expounded on the rule of interpretation in section 368 CCC by asserting that the interpretation of a contract following the dictates of good faith in relation to the parties' normal practice and good commercial practice should not be limited to the wording of the main contract but that it should also take into account 'relevant documents'. In the case at hand, the relevant documents included an invoice 'referred to' by an insurance policy document. The Court discovered the named beneficiary from that invoice.<sup>86</sup> Based on this decision of the Court, evidence of prior negotiations is unlikely to be considered as 'relevant documents'.

When prior negotiations contradict the normal practice of the parties or good commercial practice, the latter will most likely prevail. If the following hypothetical situation were to arise in Thailand, the result should not be surprising. A sells a piece of land to B. The exact price is to be determined on the date of conveyance, based on a formula specified in the contract. Among other things, the formula refers to 'the price to be paid for successful installation of water pipes by the developers.' On the date of conveyance, A argues that the formula refers to the price without value added tax (VAT); B argues that it refers to the price inclusive of VAT. Usually, businesses in the jurisdiction of A and B refer to prices exclusive of VAT. However, previous drafts of the contract which were exchanged between the parties explicitly refer to 'the price (VAT-inclusive) to be paid for successful installation of water pipes by the developers'. At some stage of the negotiations, the wording in brackets was dropped, although it is not clear why. If the question as to whether the formula refers to the price inclusive of VAT were to be raised in a Thai court, it is reasonable to believe

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<sup>86</sup> See Supreme Court Decision No 8724/2554.

that the court will refer to good commercial practice to rule in favour of prices exclusive of VAT.<sup>87</sup>

#### 4.5 Interpretation in Favour of the Party Who Incurs the Obligation

In addition to sections 171 and 368 CCC, there is another rule of interpretation which seems to supplement these provisions. Section 11 CCC states:

In case of doubt the interpretation shall be in favour of the party who incurs the obligation.

This rule was copied from Article 1162 of the 1804 French Civil Code.<sup>88</sup> There is no clear guidance as to who ‘the party who incurs the obligation’ is, but it is commonly understood among Thai lawyers to be ‘the debtor’. In ascertaining the common intention, unlike sections 171 and 368, which are often collectively cited, Section 11 is only occasionally employed independently. Arguably, it usually applies when the court has to determine the scope of the debtor’s liability. It may also be noted that section 11 is invoked when the main tools are ineffective, although it is sometimes referred to along with the latter. In one case, one of the terms of a surety agreement stipulated that the surety was to be responsible for all present and future debts owed to the bank and incurred by the debtor for a total amount of up to 1,500,000 Baht. The bank requested the surety to pay the debt incurred by the debtor. The Supreme Court referred to section 171 to determine the surety’s scope of liability. It contended that, in case of doubt, the search for a common intention must be in favour of the surety who may be liable for the disputed obligation. It held that the surety’s liability should be limited to the obligations that the debtor incurred as a

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<sup>87</sup> Please note that under the current Thai tax law regime, a sale of land is not subject to VAT.

<sup>88</sup> ‘Dans le doute, la convention s’interprète contre celui qui a stipulé et en faveur de celui qui a contracté l’obligation.’

principal debtor.<sup>89</sup> The surety agreement did not specify the amount of the debt, notwithstanding that the contract also included a statement that the surety agreed to accept all liabilities incurred by the debtor. The Court held that the agreement was unenforceable.<sup>90</sup> In an interesting case, which was decided in 2006 AD, one of the terms of the loan agreement stated the interest rate as 1 per cent per month. However, the next clause conflictingly stated the interest rate as 1.5 per cent per month. The court chose to enforce the latter, showing the higher rate, only to nullify it. According to a statute outside than the Civil and Commercial Code, the interest rate for a loan may not be higher than 15 per cent per year. Any provision on interest that is contrary to this rule becomes void, and as a result the loan contract contained no agreement on interest at all. This effectively means that the creditor cannot demand interest until the debtor is in default. In this case, only default interest is permitted. In the absence of a default interest agreement, the law offers a rate of 7.5 per cent per year.<sup>91</sup>

Where the interpretation of contract in favour of the debtor conflicts with the interpretation of contract according to the dictates of good faith, Thai law seems to incline towards the latter. This can be illustrated by the following hypothetical example. A builder undertakes to construct a building comprising three flats for a commercial developer. Clause 13 of the contract gives the builder 50 days to complete the work; Clause 14 provides for the payment of liquidated damages in the event of delay. The wording of the contract is not clear as to whether the 50-day period applies to the construction of just one flat or of the whole building. The builder finishes the first flat after 40 days but takes a further 30 days to complete work on the other two. An expert opinion given by an engineer (which is admissible

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<sup>89</sup> Supreme Court Decision No 5151/2543. See also Supreme Court Decision Nos 2393/2537 and 6955/2538.

<sup>90</sup> Supreme Court Decision No 199/2545. See also Supreme Court Decision No 8604/2544.

<sup>91</sup> Section 224 CCC.

under the relevant rules of procedure) states that the construction of a single flat of the kind agreed would normally take no more than 15 days. The question arises as to whether the developer can claim liquidated damages. The builder may cite section 11 CCC to reap the benefit of doubt, while the developer may resort to the principle of good faith under section 368 CCC to insist that the 50-day period applies to the construction of the whole building. It is likely that the developer would win the case and be awarded liquidated damages.

## 5. Conclusion

Since its two main rules of interpretation, sections 171 and 368 CCC, were copied from the German Civil Code, Thai law may be expected to follow in the footsteps of German law. However, while German legal scholars are enthusiastic about conceptualizing contractual interpretation, this aspect has so far received little attention in Thai legal literature. It is the Thai courts that provide the many examples that allow us to make some observations and comparisons. Unfortunately, they provide no indication as to a possible ‘Thai’ brand of contractual interpretation reflecting particular national or societal values or a particular outlook on standards of reasonableness that might differ from such standards in Germany. In Thailand, good faith has universal applicability in identifying and interpreting contracts. It assists the courts in implying a contractual duty into a contract and is the main tool used to interpret a contract. Despite being products of two conflicting theories, namely intention and expression theories, sections 171 and 368 CCC are often cited collectively when a contract is interpreted. Thai courts have combined these two provisions to establish common guidelines for interpretation to the effect that in interpreting a contract, the common intention of the parties must be ascertained in accordance with the dictates of good faith in relation to good commercial practice. Thai courts neither define nor distinguish between these two concepts. Their collective citation has become a pattern in the application of sections 171

and 368 CCC. Although we have yet to obtain clear criteria for invoking good faith and good commercial practice by the courts, it is clear that we cannot rely on the literal meaning of the words used in the contract to interpret contractual terms. Thai courts can revoke a term even if it is written in the clearest possible manner. This may improve the debtor's chance of relief from a contractual obligation.

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