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VOL.5

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Editor's Note

I am delighted to be able to introduce the latest edition of the Thammasat Business Law Journal.

The Journal's primary purpose is to provide a forum for publication of the work of students on the Master of Laws Program in Business Laws (English Program) at the Faculty of Law, Thammasat University. It is our hope that the Thammasat Business Law Journal will make a lasting contribution to the academic and legal development of Thailand and will provide a source of information for legal study and research for those interested in business law in Thailand.

I would like to take this opportunity to thank all professors, full and part time, the members of the Advisory Board and the Editorial Board, all our distinguished contributors, the Manager and staff for all of their efforts which have gone into the production of this edition of the Journal. Finally, I would like to offer sincere thanks to the Faculty of Law, Thammasat University, whose support and assistance is vital to the continuing operations of the Journal.

I hope you enjoy the latest edition of the Thammasat Business Law Journal.

Editor

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LEGAL MEASURES FOR CONTROLLING RECREATIONAL SCUBA DIVING BUSINESS IN THAILAND*

*Alisa Engkwan Sombatsubsin***

ABSTRACT

Many dive sites in Thailand are always ranked as top dive sites of the world because of the beauty and diversity of coral reefs, fishes and many more marine lives. The underwater world of Thailand can attract more than hundred thousand tourists each year to travel and discovery. Scuba diving industry is growing up and earning huge amount of income. However, growing of scuba diving business has caused many problems. Generally, problems are involved in public safety, human resources, and natural resources.

One major reason is that Thailand is not well-experienced in this field of business; therefore, Thai laws and legal measures may not be efficient to organize and control this business. The Tourism Business and Guide Act B.E. 2551 does not support tourism business license registrations of every scuba diving business. Moreover, without governmental organizations having experts in scuba diving to control and inspect quality of scuba diving operators and professionals and to lay down recreational scuba diving standards or policies, low quality services have caused scuba diving accidents.

In case of environmental protection, some dive areas outside national parks are not being legally protected on marine wildlife collection and feeding while scuba diving. There is also no limitation of diver in such areas that causes the over usage of marine resources. Besides, some diver-attractive animal are not under protection of any law even they are the highlight of scuba diving in Thailand.

This article aims to focus on legal measures of the United States, Australia and the Philippines which are used to conduct recreational scuba diving business, protect public safety, and protect natural resources in order to provide recommended ways that may be able to use to prevent problems from scuba diving business in Thailand.

Keywords: scuba diving, diving business, tourism business, public safety, marine resources, environmental protection

* The article is summarized and rearranged from the thesis “Legal Measures for Controlling Recreational Diving Business in Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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บทคัดย่อ

จุดดำนน้ำในประเทศไทยได้รับการจัดอันดับเป็นอันดับต้นๆของโลก ในเรื่องของความสวยงามและความหลากหลายของแนวปะการัง พันธุ์ปลาและสัตว์น้ำ โลกได้นำของไทยสามารถดึงดูดนักท่องเที่ยวต่างชาติให้เข้ามาท่องเที่ยวและค้นหาได้มากกว่าหลักแสนคนต่อปี อุตสาหกรรมการดำน้ำแบบสคูบ้าเติบโตขึ้นและสร้างรายได้มหาศาล แต่อย่างไรก็ตาม การเติบโตของธุรกิจดำน้ำแบบสคูบานั้น ก่อให้เกิดปัญหาหลายประการ โดยส่วนมาก ปัญหาจากธุรกิจดำน้ำแบบสคูบานั้นเกี่ยวข้องกับความปลอดภัยของส่วนรวม ทรัพยากรบุคคล และทรัพยากรธรรมชาติ

ด้วยเหตุผลหลักที่ประเทศไทยไม่มีประสบการณ์อย่างเพียงพอในธุรกิจประเภทนี้ กฎหมายและมาตรการทางกฎหมายของไทยจึงอาจไม่เหมาะสมในการจัดการและควบคุมธุรกิจนี้ได้ พระราชบัญญัติธุรกิจท่องเที่ยวและมัคคุเทศน์ พ.ศ. 2551 ไม่รองรับการจดทะเบียนใบอนุญาตให้กับธุรกิจดำน้ำแบบสคูบ้าได้ทั้งหมด นอกจากนี้ ยังไม่มีองค์กรใดของรัฐบาลที่มีผู้เชี่ยวชาญทางด้านการดำน้ำแบบสคูบ้า เพื่อควบคุมและตรวจสอบคุณภาพของผู้ให้บริการดำน้ำและบุคลากร รวมถึงการวางมาตรฐานหรือนโยบายที่เกี่ยวข้องกับการดำน้ำแบบสคูบ้า ดังนั้น การให้บริการที่มีมาตรฐานต่ำจึงส่งผลให้เกิดอุบัติเหตุจากการดำน้ำได้

ในกรณีของการคุ้มครองทรัพยากรธรรมชาติ จุดดำน้ำบางจุดนอกจากเขตของอุทยานแห่งชาติ ยังไม่ได้รับการคุ้มครองทางกฎหมายในเรื่องของการเก็บ จับ และให้อาหารสัตว์ป่าในทะเล ในขณะที่มีการดำน้ำ และในจุดดำน้ำดังกล่าวยังไม่มีมาตรการควบคุมกำหนดจำนวนนักดำน้ำที่เข้าไปดำน้ำ ทำให้เกิดการเข้าใช้ทรัพยากรธรรมชาติทางทะเลมากเกินไป นอกจากนี้ สัตว์น้ำบางชนิดที่ดึงดูดนักท่องเที่ยวเที่ยวดำน้ำ ยังไม่ได้รับการคุ้มครองทางกฎหมาย แม้ว่าสัตว์ดังกล่าวจะเป็นจุดดึงดูดสำคัญของการดำน้ำในประเทศไทย

บทความนี้มุ่งเน้นมาตรการทางกฎหมายของสหรัฐอเมริกา เครือรัฐออสเตรเลีย และสาธารณรัฐฟิลิปปินส์ ที่ใช้ในการจัดการธุรกิจดำน้ำแบบสคูบ้าประเภทนั้นหนาแน่น การปกป้องความปลอดภัยของสาธารณะและอนุรักษ์ทรัพยากรธรรมชาติ เพื่อเสนอข้อเสนอแนะที่จะสามารถนำมาปรับใช้เพื่อป้องกันปัญหาที่เกิดจากธุรกิจดำน้ำแบบสคูบ้าในประเทศไทย

คำสำคัญ: การดำน้ำแบบสคูบ้า, ธุรกิจดำน้ำ, ธุรกิจท่องเที่ยว, ความปลอดภัยของส่วนรวม, ทรัพยากรทางทะเล, การคุ้มครองสิ่งแวดล้อม

Introduction

Due to a plenty of famous beautiful dive sites and less expensive scuba diving packages compared to other countries.¹ A great number of diving businesses have popped up in several coastal areas in order to serve a huge number of foreign divers wishing to dive especially in the Andaman Sea and Gulf of Thailand.² Regarding the current situation, diving businesses in Thailand are partly owned and operated by foreigners, and inevitably offer less position of diving career for Thais. The incomes from scuba diving business do not fall on Thais as expected. As a result, the interests of getting diving jobs for Thais and the promotion of participation in this business for Thai investors should be concerned.

Scuba diving is a naturally hazardous activity based on special technique; therefore, the safety measure is necessary for divers' protection. In practice, scuba diving accidents are caused by the negligent of diving operators and behavior of personal diver. The legal measures relating to the safety standard will possibly reduce the number of fatalities and/or injuries to the divers. Hence, adequate legal measures will raise the standard of diving industry in Thailand to be more reliable and trustable to foreign divers and being the favorite diving destination in South East Asia.

In accordance with the current situation, there should be a comprehensive analysis on the specific legal measures to monitor and control the entire diving businesses as well as the appropriate strategies to deal with the legal issues regarding diving business operators, personal tourist divers, dive site limitation and safety protection. Whereas other countries such as the United States, Australia and also the Philippines have their legal measures to monitor and control diving activity and business, Thailand has only limited legal measures which seems to be insufficient. It is time to give precedence and analyze of the legal problems occurred to find out the way enhancing Thailand's law to control, monitor and protect national interests especially tourism incomes, native interests, public safety and environmental conservation.

¹ บริษัท แบรนด เมทริกซ์ รีเสิร์ช จำกัด, โครงการศึกษาสถานการณ์และแนวโน้มด้านการตลาด สำหรับการท่องเที่ยวกลุ่มดำน้ำ, รายงานชิ้นสุดท้ายนำเสนอต่อ การท่องเที่ยวแห่งประเทศไทย, กรุงเทพมหานคร, 26 ก.ค. 2554. (Brand Matrix Research Co., Ltd., *Study Project on Situation and Market Trend of Diving Tourism*, Final Report Submitted to Tourism Authority of Thailand, Bangkok, Jul. 26, 2011.

² สรุปผลการประชุม อนุกรรมาธิการปฏิรูปการจัดการทรัพยากรทางทะเลและชายฝั่ง ครั้งที่ 6 (25 ธ.ค. 2557) โดยสำนักงานเลขาธิการสภาผู้แทนราษฎร. (Minutes of the Coastal and Marine Resources Reform Sub-Committee, Number 6 (Dec. 25, 2014) by the Secretariat of the House of Representatives.)

1. Legal Measures for Controlling Scuba Diving Business in the United States of America

1.1 License

Diving business in USA is classified as a travel service business; it is controlled by the general consumer law. In some states, this type of business is classified as the “Seller of Travel” which has specific regulations controlling the licensing and duty of sellers.

1.2 Diving Standard

Because of having acknowledgement of certifying agencies and a highly competitive atmosphere among diving businesses, the US government is not too strict about the practices and operation standards. The operation of each diving business will follow the standard of diving agency contacted. In addition, there are international standards provided by the international recreational diving organization called the World Recreational Scuba Training Council (WRSTC) which shall be implied if such agency is a member of this organization.

1.3 Technical Regulation

1.3.1 Public Safety

The US has diver flag law that applies to most dive boats, vessels and personal divers. The Rule 27 of Navigation Rules of the United States Coast Guard and Section 3.23 (b) of the Code of Federal Regulation Title 36 specify that the boat which engaged in diving operation must exhibit an International Code flag “A”³ on board to ensure its all-round visibility. The exhibition of dive flag is to catch the attention from other boats to reduce the speed and make a caution while sail through such area.

1.3.2 Environmental Protection

The United States has place-based conservation tools called marine protected area (MPA).⁴ There are currently more than 1,700 place-based conservation areas established by hundreds of federal and state authorities.⁵ MPAs in the United States are diverse. They differ with respect to jurisdiction, purpose, size, and level of protection. Most MPAs allow multiple uses and less than 8 percent of the total area which is a part of no-take

³ The international A/alfa/alpha flag having blue-and-white swallow-tailed one.

⁴ Any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein; *see also* Exec. Order No. 13158, 65 Fed. Reg. 105 § 2(a) (May 26, 2000).

⁵ National Marine Protected Areas Center (NMPAC), *U.S. MPA Data from the MPA Inventory* (2014), available at <http://marineprotectedareas.noaa.gov/dataanalysis/mpainventor y/>.

reserves.⁶ MPAs are used to conserve natural and cultural heritages, and/or to support sustainable production of the marine resources.

1.4 Diving Professional Protection and Limitation

Under the Occupational Safety and Health Act of 1970, diving business owners as employers are responsible for providing a safe and healthful workplace for the diving employees as well as providing training and assistance. The Commercial Diving Operation Standard regulated by the Occupational Safety & Health Administration Operations (OSHA) commands the duty of employers to manage the safe diving operation. In case of career limitation, there is no limitation of diving professional career for native in US law.

2. Legal Measures for Controlling Scuba Diving Business in Australia

2.1 License

Diving business in Australia which offers tour packages for sale must register for tour operator license. However, the duty of all tour operators and relevant contractors will be regulated by the Competition and Consumer Act 2010 and some states' laws as well as territory fair trading laws.⁷

2.2 Diving Standard

Concerning the inherent danger of scuba diving, Australia government as well as the states' government have provided many standards and rules to be used as a guideline and to control scuba diving business by specifying the minimum requirements in scuba diving training, the practical guidance to prevent risk in a scuba diving workplace, the requirements for verification, inspection, testing and maintenance gas cylinders of compressed gases. In addition to the Australian standards, at states level, there are also regulations and codes of practice to guideline and control recreational diving activity and business that diving participants must comply with their instructions.⁸

⁶ Office of Ocean and Coastal Resource Management, NOAA Ocean Service, *Analysis of United States MPAs March 2012* 1 (2012), available at http://marineprotectedareas.noaa.gov/pdf/helpfulresources/mpa_analysis_2012_0320.pdf.

⁷ Commonwealth of Australia, *Travel and Accommodation: An Industry Guide to the Australian Consumer Law* (2013), available at <http://www.commerce.wa.gov.au/sites/default/files/atoms/files/actravelandaccommodationguide.pdf>.

⁸ Codes of Practice, <https://www.business.qld.gov.au/business/starting/starting-abusiness/codes-of-practice>. (last visited Jan. 15, 2015).

2.3 Technical Regulation

2.3.1 Public Safety

Australian Water Safety Council (AWSC) and associated State and Territory water safety groups, created the National Water Safety Plan (NWSP) 2004-07 to promulgate technical regulations for safety diving in case of the exhibition of a diving flag and lights.

2.3.2 Environmental Protection

All the state and territory Governments and the Australian Government have adopted international standards of MPA and management categories used by the International Union for Conservation of Nature (IUCN).⁹ MPAs in Australia are known as common wealth marine reserves which have different plans in each zone. The plans used in such zones are Sanctuary Zone, Marine National Park Zone, Recreational Use Zones, Habitat Protection and Conservation Park Zones, Habitat Protection Zone (Coral Sea), Special Purpose Zones and Multiple Use Zone.¹⁰

2.4 Diving Professional Protection and Limitation

Diving career is also a work controlled by Work Health and Safety Regulation 2011. A diving business has to ensure the health, safety, fitness and competence of employees who carry out general diving work and high risk diving work.¹¹ In addition to regulations and codes of practice, each state also has Occupational Health and Safety Regulations that apply to any diving employees and workplaces including those in the recreational type. In case of career limitation, there is no limitation of diving professional career for native in Australian law.

3. Legal Measures for Controlling Scuba Diving Business in the Philippines

3.1 License

According to the Tourism Act 2009 and Rules and Regulations Governing the Business of Sports Scuba Diving in the Philippines, business of sport scuba diving must get the accreditation of dive establishment from the Philippines Commission on Sports Scuba Diving (PCSSD) and the accreditation of tourism business from the Department of Tourism (DOT) before operation. The accreditation will recognize the holder as having complied

⁹ CAPAD: Protected Area Data, <http://www.environment.gov.au/land/nrs/science/capad> (last visited Jan. 12, 2015).

¹⁰ Commonwealth Marine Reserves, <http://www.environment.gov.au/topics/marine/marine-reserves> (last visited Jan. 12, 2015).

¹¹ *Work Health and Safety Regulations 2011* (Queensland, 2015), issued by Queensland Government Parliamentary Counsel. This is available at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WorkHSR11.pdf>.

with its minimum standards in the operation of the establishment concerned which can ensure the safety, comfort, and convenience of the tourist.¹²

3.2 Diving Standard

Details of the Rules and Regulations Governing the Business of Sports Scuba Diving in the Philippines (2009) are both regulations and standards for diving business. Under Chapter 6, there are certain standards controlling the following issues; insurance, advertisement, rental or loan or transfer of controlled scuba diving equipment, conduct of scuba diving courses, air fill station and equipment and repair service.

3.3 Technical Regulation

3.3.1 Public Safety

The Rules and Regulations Governing the Business of Sports Scuba Diving in the Philippines (2009) provides technical regulations that require diving business to be licensed by the Philippines Commission on Sports Scuba Diving (PCSSD) to ensure that the business meets the minimum standard and quality, and provide general provisions relating to business standards that diving business must perform.

3.3.2 Environmental Protection

The Philippines uses the establishment of marine protected areas (MPAs) to protect marine resources. There are 1,800 MPAs in the Philippines which are classified into four forms: 1) Marine sanctuary or no-take marine reserve 2) Marine reserve 3) Marine parks and 4) Protected landscape and seascape.¹³ Moreover, the Philippines government created the Joint Memorandum Circular No. 02 S. 2009 to manage dive sites among 45 cities/ municipalities, imposition and utilization of recreational scuba diver's fee. Dive sites are classified into 4 levels up to various environmental and facility condition.

Apart from the zoning of dive site, the PCSSD provides the prohibition of any actions while scuba diving which are 1) collection or destruction of corals 2) capture of or harm to endangered marine species 3) use of toxic chemicals in the course of diving 4) spear fishing using scuba diving and 5) salvage of or transferring with any sunken artifacts without the necessary permit from proper authorities.

3.4 Diving Professional Protection and Limitation

There is no specific rule governing the protection of recreational diving employees in case of special work place and operation. In case of career limitation, the Rules of PCCSD

¹² Rules and Regulations to Govern the Accreditation of Travel and Tour Services, Exec. Ord. No. 120, Rep. Act. No. 7160, § 1 (Sep. 26, 2995) (Phil.).

¹³ Cabral, Reniel B. Cabral, Porfirio M. Aliño, Adrian Chester M. Balingit, Christian M. Alis, Hazel O. Arceo, Cleto L. Nañola Jr., Rollan C. Geronimo & MSN Partners, *The Philippine Marine Protected Area (MPA) Database*, 7 Philippine Science Letters 300 (2014).

specifies that the manager of any scuba diving establishment has to be a citizen of the Philippines. Other staffs, apart from a manager, can be either Filipino or foreign nationalities.

4. Legal Measures for Controlling Scuba Diving Business in Thailand

4.1 License

The Tourism Business and Guide Act B.E. 2551 originally classifies the business servicing scuba diving as a tourism business which must be registered with filing more specific documents other than the regular tourism business; boat documents, certificate of dive professionals and crews, certificate of diving equipments and evidence of having accident insurance policy. However, the law does not definite the scope of business servicing scuba diving clearly.

4.2 Diving Standard

Department of Tourism provides the Standard Number Mor Tor Tor 407: 2556 that specifies qualification standards for scuba diving business and for the intendant of scuba diving activity in each area in Thailand to follow in order to appraise the level that indicates the quality of a company or a diving area. Nevertheless, the standard is not mandatory and does not have legal sanction.

4.3 Technical Regulation

4.3.1 Public Safety

There are regulations and measures relating to navigating of boat in national park areas which found in the Rules of the Department of National Park, Wildlife and Plant Conservation Regarding Entering the National Park B.E. 2552 and the Control Measures for Tourism Entrepreneurs in Marine National Parks (Scuba Diving and Relevant Activities). However, there is no regulation and measure relating to public safety applies to dive areas outside the national parks.

4.3.2 Environmental Protection

In the national park areas, the National Park Act B.E. 2504, relevant rules and proclamations specify the guideline and prohibition relating to scuba diving activity operated in the national parks including the classification of dive areas and limitation of number of diver. For overall the country, the Master Plan on National Coral Management specifies zoning, classification and protection of coral reefs areas in 12 provinces, and the ministerial regulation and proclamations under the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 specifies the environmentally protected areas (EPAs) only in 5 provinces. Apart from coral protection, EPAs have further protection for ornamental fish, sea turtle and seagrass. Besides, the Wildlife Preservation and

Protection Act B.E. 2535 specifies the protection of some aquatic animals especially corals, whale sharks, dolphins and whales.

4.4 Diving Professional Protection and Limitation

There is the Ministerial Regulation on Prescribing the Standards of Administration and Management of Occupational Safety, Health and Environment in Relation to Diving Work B.E. 2548 specifies the rules of diving work. However, the aim of these regulations is not appropriate to the practice of the recreational scuba diving. It seems to apply for the specific profession diver only in the business of commercial diving.¹⁴

5. Analysis of Legal Problems

5.1 The Problem of Incomplete Regulation relating to Registration of Tourism Business Servicing Scuba Diving under the Tourism Business and Guide Act B.E. 2551

5.1.1 The Definition and Scope of Tourism Business Servicing Scuba Diving

The Tourism Business and Guide Act B.E. 2551 specifies definition of tourism business broadly, and the scope of “tourism business servicing scuba diving” is not clearly defined. This gap allows violation by diving business operators. Some dive training schools, freelance dive instructors and dive centers do not register for the license before operating the business¹⁵ because of the excuse that their businesses are not considered as a tourism business.¹⁶ As a result, it causes non-profile operators to operate a diving business that should have high responsibility to tourist divers.

Moreover, some types of diving business such as diving equipment manufacturer, distributor and rental servicers are not under the control of this Act.

5.1.2 The Special Requirements of Registration

Analyzing through the requirements of additional documents that tourism business servicing scuba diving must file for registration, only full option dive centers and dive boat providers which have its own supplements can provide such documents. In practice, the small business operators which do not have their own boat or rental equipment will be forced to find documents from contracted charter boat provider.¹⁷ As a result, some

¹⁴ A type of diving professional relating to special skills especially the underwater construction and the diver are paid for their work. For example offshore diving is a commercial diving working in support of the exploration and production sector of the oil and gas industry.

¹⁵ Minutes of the Coastal and Marine Resources Reform Sub-Committee, Number 6 (Dec. 25, 2014), *supra* note 2.

¹⁶ Interview with Three Dive Instructors in Chonburi (Jan. 17, 2015), Phuket (Mar. 2-3, 2015) and Bangkok (May 3, 2015).

¹⁷ Telephone Interview with a Registrar of the Bureau of Tourism Business and Guide Registration Southern Area 2, Department of Tourism (Dec. 26, 2014)

small businesses choose not to register themselves while others choose to operate without license.¹⁸

5.2 The Problem of Lack of Specific Registration and Regulation Applied for the Entire Diving Business

As there is no specific registration/license applied to all types of diving business, there is no official statistic concerning the number of total scuba diving business. Moreover, diving business needs the specific supervision by specialist to control because its operation is involved in full of special technical procedures. The controlling for general tourism business under the Tourism Business and Guide Act B.E. 2551 is not enough. Besides, there is also no specific registration/license for the recreational diving professional to control his health conditions, skills and experiences as well as his operation. Therefore, lack of specific regulation prescribing duty, responsibility and liability of the diving businesses and its employees will affect the safety of tourist divers and cause many problems.

5.3 The Problems of Lack of Legal Measure Relating to Diving Professional Employment

5.3.1 Lack of Diving Professional Limitation

Thai people cannot compete with foreign divers in professional diving career because of the high expense to get dive certification and language barrier. As there is no special legal measure to support this career for Thais, foreign divers can work freely in these positions as long as they have valid visas and work permits. Foreign diving businesses rather chose to hire foreigners with full capability than Thais and, in some cases, they may unlawfully hire foreign divers who do not hold the valid work permits.¹⁹

5.3.2 Lack of Labour Protection for Recreational Diving Professional

The Ministerial Regulation on Prescribing the Standards of Administration and Management of Occupational Safety, Health and Environment in Relation to Diving Work B.E. 2548 under the Labour Protection Act B.E. 2541 does not clearly indicate whether recreational diving professional will be protected under this regulation. Because of unclear scope of this regulation, recreational diving professional is not granted specific rights under this regulation and related proclamations.

5.4 The Problem of Lack of National Diving Business Standard with Legal Effective to Entire Scuba Diving Business.

The Standard Number Mor Tor Tor 407: 2556 has no legal sanction. It is used for the marketing purpose rather than controlling purpose. The standard will apply only to the

¹⁸ Interview with Three Dive Instructors, *supra* note 16.

¹⁹ *Id.*

business based on intention and voluntary basis.²⁰ As a result, there is no national standard specifying duty and responsibility of diving business operator to ensure the quality of diving business whether it has met the minimum standard for safety.

5.5 The Problem of Technical Regulations for Public Safety and Environmental Protection for Entire Diving Area

5.5.1 Inadequate Technical Regulations for Public Safety

The Rules of the Department of National Park, Wildlife and Plant Conservation Regarding Entering the National Park B.E. 2552 and the Control Measures for Tourism Entrepreneurs in Marine National Parks (Scuba Diving and Relevant Activities) will be applied only to a business that engages an operation in the national park; nevertheless, there is no regulation governing the use of diving buoy or a diving flag. Besides, there is no specific technical regulation for scuba diving activity applying to diving business which engages operation outside the national park.

5.5.2 Inadequate Technical Regulations for Environmental Protection

Measures to protect environment within the national park areas are sufficient. Outside the national park areas, the Master Plan and the Ministerial Regulations and Proclamations on EPAs focus on the coral, ornamental fish and plant protection; however, they do not cover fish feeding and wildlife harming that also effect to food chain system and coral ecosystem.²¹ Besides, the Master Plan and the Ministerial Regulations were created more than 20 years ago; they may be unsuitable for the present environment condition, and the status of master plan is just a policy not legislation.

Besides, some diver-attractive animals such as manta ray and sea horse are not in the list of protected wildlife and ornamental fish. None of legal protection applied for them even though they are listed in Red List of Threatened Species of the International Union for Conservation of Nature (IUCN)²² and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),²³ which Thailand is a member of such organizations.

5.6 The Problem of Lack of Regulatory Organization Controlling Diving Business

Diving business has its procedures and operation that need special knowledge and technique. The controlling organization should consist of specialists who have specific

²⁰ Telephone Interview with an official of the Bureau of Tourism Services Development, Department of Tourism, Bangkok, Department of Tourism (Feb. 4, 2015)

²¹ Diversity in Coral Reef, http://marinegiscenter.dmcr.go.th/km/coral_doc8/#.VYKgYfmqqko (last visited Jun. 25, 2015).

²² International Union for Conservation of Nature

²³ Species List of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

and proper knowledge to control, manage, monitor and inspect business. However, the Minister of Ministry of Tourism and Sports still does not authorize any organization to be the controller of diving business as a special business; therefore, no experts to examine the exact quality of diving equipment and double check the quality of professional divers.

Conclusions and Recommendation

Conclusions

Comparing with the other countries, Thailand also has tourism business license applied to tourism diving business. However, Thailand does not have the specific license for entire diving business, business standard with legal enforcement, technical regulation relating to public safety and environmental protection for all dive sites, employment protection and employment limitation.

Diving business is directly concerned with the national marine resources. It is unfair that major interest from this business falls on foreign investors. The government as the responsible authority of the national marine resources must concern about the current situation and the appropriateness of relating laws. Revising the existing law, creating proper legal measures and enforcing the law strictly will solve the problems and also protect Thai national interests.

Recommendations

Policies

(1) Policy of the formation of regulatory organization (“new agency”) under the department of tourism.

(2) Policy of the research considering overall problems and finding out the best solution for national interests on scuba diving industry.

(3) Policy of the zoning and controlling measure classifying of scuba dive site

Legislation

(1) The issuance of the Act to control scuba diving activity and business. Such an Act should support at least the following issues;

1) Formation and authority of the new agency as mentioned in clause (1) of this recommendation (policies part). The new agency should have authority to plan the specific licenses, rules and standards relating to diving business including power of inspection

2) Legal enforcement to support scuba dive zoning and its controlling measure as mentioned in clause (3) of this recommendation (policies part)

3) Duty and limit of individual divers, professionals and business operators, and

4) Penalty

(2) The Rules of the Department of National Park, Wildlife and Plant Conservation regarding the permission of operating tourism business and lodging service within the National Park B.E. 2547 should be amended to indicate that the tourism business operators who provide scuba diving service must strictly follow the Control Measures for Tourism Entrepreneurs in Marine National Parks (Scuba Diving and Relevant Activities), otherwise the operator will not be eligible to apply for or renew the permit and will instead get penalty.

(3) The diver's flag must be issued with suitable penalty in the Navigation in Thai Territorial Water Act B.E. 2456

(4) The scope of tourism business servicing scuba diving of Clause 3 of the Ministerial Regulation of Tourism Business License B.E. 2556 should be amended for clarity. The supplement documents of each type of diving business should also be clarified. Besides, the organization that issues the supplement documents in this clause should be the new agency mentioned in clause (1) of this recommendation (policies part).

(5) The minimum requirement of Thai professional divers in each diving business should be specified. There should be a condition that requires a business that would like to employ a foreign employee to employ Thai native as a diving professional or trainee in a ratio of one Thai diving professional per one foreign diving professional.

(6) Ministerial Regulation on Prescribing the Standards of Administration and Management of Occupational Safety, Health and Environment in Relation to Diving Work B.E. 2548 must be amended to add the specific regulations for recreational diving profession.

(7) Divers' attractive animals such as manta rays and seahorses should be listed to be the protected animal in Thai law.

REFERENCES

Articles

Cabral, Reniel B., Porfirio M. Aliño, Adrian Chester M. Balingit, Christian M. Alis, Hazel O. Arceo, Cleto L. Nañola Jr., Rollan C. Geronimo and MSN Partners. “*The Philippine Marine Protected Area (MPA) Database*” **Philippine Science Letters** 7, no. 2 (2014): 300, 303.

Interviews

Interview with three dive instructors, January 17, 2015, March 2-3, 2015 and May 3, 2015.

Interview with a registrar of the Bureau of Tourism Business and Guide Registration Southern Area 2, Department of Tourism, December 26, 2014.

Interview with an officer of the Bureau of Tourism Services Development, Bangkok, Department of Tourism, February 4, 2015.

Report

บริษัท แบรนต์ เมทริกซ์ รีเสิร์ช จำกัด. โครงการศึกษาสถานการณ์และแนวโน้มด้านการตลาด สำหรับการท่องเที่ยวกลุ่มดำน้ำ. รายงาน
ขั้นสุดท้ายนำเสนอต่อการท่องเที่ยวแห่งประเทศไทย. กรุงเทพมหานคร: บริษัท แบรนต์ เมทริกซ์ รีเสิร์ช จำกัด, 26
กรกฎาคม 2554. Brand Matrix Research Co., Ltd. *Study Project on Situation and
Market Trend of Diving Tourism*. Final report submitted to Tourism Authority of
Thailand. Bangkok: Brand Matrix Research Co., Ltd., July 26, 2011.

Electronic Media

Australian Government, Department of the Environment, Australia's network of
Commonwealth Marine Reserves. “*CAPAD: Protected Area Data*”.
<<http://www.environment.gov.au/land/nrs/science/capad>> (accessed January 12,
2015).

-----, “*Commonwealth Marine Reserves*”. <[http://www.environment.gov.au/topics/
marine/marine-reserves](http://www.environment.gov.au/topics/marine/marine-reserves)> (accessed January 12, 2015).

Commonwealth of Australia. “*Travel and Accommodation: An Industry Guide to the
Australian Consumer Law*”. <[http://www.commerce.wa.gov.au/sites/default/files/a
toms/files/acltravelandaccommodationguide.pdf](http://www.commerce.wa.gov.au/sites/default/files/atoms/files/acltravelandaccommodationguide.pdf)> (accessed January 12, 2015).

National Marine Protected Areas Center (NMPAC). “*U.S. MPA Data from the MPA Inventory*”. <<http://marineprotectedareas.noaa.gov/dataanalysis/mpainventory>> (accessed June 28, 2015).

Office of Ocean and Coastal Resource Management. “*Analysis of United States MPAs, March 2012*”. <http://marineprotectedareas.noaa.gov/pdf/helpfulresources/mpa_analysis_2012_0320.pdf> (accessed June 28, 2015).

Queensland Government. “*Codes of Practice*”. <https://www.worksafe.qld.gov.au/data/assets/pdf_file/0006/58191/recreational-diving-recreational-technicaldiving-snorkelling-cop-2011.pdf> (accessed January 15, 2015).

----- . “*Work Health and Safety Act 2011, Work Health and Safety Regulation 2011*”. <<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WorkHSR11.pdf>> (accessed January 19, 2015).

กรมทรัพยากรทางทะเลและชายฝั่ง, ระบบฐานข้อมูลกลางและมาตรฐานข้อมูลทรัพยากรทางทะเลและชายฝั่ง. “*ความหลากหลายในแนวปะการัง*” (Department of Marine and Coastal Resources, Central Database System and Data Standard for Marine and Coastal Resources. “*Diversity in Coral Reef*”). <http://marinegiscenter.dmcg.go.th/km/coral_doc8/#.VbIHM9Kqqkp> (accessed June 25, 2015)

Other Materials

สำนักงานเลขาธิการสภาผู้แทนราษฎร, สรุปผลการประชุมอนุกรรมการปฏิรูปการจัดการทรัพยากรทางทะเลและชายฝั่ง ครั้งที่ 6, 25 ธันวาคม

2557, กรุงเทพมหานคร: สำนักงานเลขาธิการสภาผู้แทนราษฎร, 2557 (The Secretariat of the House of Representatives, *Minutes of the Coastal and Marine Resources Reform Sub-Committee no. 6, December 25, 2014*, Bangkok: The Secretariat of the House of Representatives, 2014.

LEGAL PROBLEMS ON COMMERCIAL SURROGACY IN THAILAND UNDER THE PROTECTION OF CHILDREN BORN FROM ASSISTED REPRODUCTIVE TECHNOLOGIES ACT, B.E. 2558*

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ABSTRACT

Thailand is one of the destination countries for Assisted Reproductive Technologies process and surrogacy arrangements. Today, Childless couples are increasingly looking for Thailand and elsewhere to allow them to have children through Assisted Reproductive technologies available where there are no laws prohibiting this and it is also affordable. The demand for surrogacy and other artificial conception procedures is rapidly increasing throughout the world. Thailand's reputation as a place where surrogate mothers can be found is growing. As a result of Surrogate Thai mothers being well regarded for their healthy lifestyle and, combined with Thailand's first class hospital services, surrogacy has become popular among both Thais and foreigners.

The controversy of concerning surrogacy occurred in August 2014. At that time, in the baby Gammy case, an Australian utilized a Thai surrogate mother through surrogacy arrangement in Thailand and then abandoned one of twins, called Gammy who was born severely handicapped (Down Syndrome). The couple took only the child's twin sister, called Pipah, back to Australia. The problem is who should be responsibility for the baby Gammy. The law in Thailand at that time could not be applied to this situation properly. However, commercial surrogacy was officially banned by the Medical Council of Thailand. Subsequently, shortly afterwards, it was discovered that a Japanese man was the father of a large number of children utilizing surrogate mothers through surrogacy in Thailand. The whole issue was sensitive to the society. The assumption of human trafficking via commercial surrogacy is of great important issue to be investigated. Later, a specialist in Assisted Reproductive technologies had been charged with a number of serious offences. The thing that should be considered in this case is properly legal regulation to solve this problem. That commercial surrogacy should be banned or not is considered upon the public order and morality. The expression of "commercial surrogacy" should be profoundly defined

In November 2014, Thailand's National Legislative Assembly approved the draft surrogacy law. In February 2015, the Thai Parliament passed the legislation of

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This article is summarized and rearranged from the thesis "Legal problems on commercial surrogacy in Thailand under the protection of Children born from Assisted reproductive Technologies Act, 2558

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prohibiting commercial surrogacy, called Protection of Children Born from Assisted Reproductive Technologies Act, B.E.2558. However, the provision of the Act concerned about commercial surrogacy is not clear enough for the foreigners to search for surrogacy arrangements through Assisted Reproductive Technologies in Thailand where is very famous in these kinds of treatment of infertility.

This thesis mainly studies commercial surrogacy in Thailand through Protection of Children Born from Assisted Reproductive Technologies Act B.E.2558 according to the theories and conceptual framework for Assisted Reproductive Technologies, analyzes this Act compared to the international surrogacy arrangement in some countries with legislation permitting commercial surrogacy and no legislation permitting commercial surrogacy, and provides some suggestions of this Act relating to prohibiting commercial surrogacy for foreigners who have infertility to search for Thailand where is famous for Assisted Reproductive Technologies in terms of high success rate and least complications.

Keywords: Assisted Reproductive Technologies process, surrogacy arrangements, commercial surrogacy law

บทคัดย่อ

ประเทศไทยนับได้ว่าเป็นประเทศจุดหมายปลายทางแห่งหนึ่งสำหรับการรับบริการทางด้านการแพทย์ช่วยการเจริญพันธุ์ทางการแพทย์และการตั้งครรภ์แทน ทุกวันนี้ภาวการณ์มีบุตรยากเพิ่มขึ้น คู่สมรสที่มีบุตรยากที่กำลังมองหาประเทศไทยและที่อื่นๆที่กฎหมายอนุญาตให้มีการตั้งครรภ์แทนด้วยเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์มีเพิ่มขึ้นเช่นกัน ความต้องการเช่นนี้มีมากขึ้นทั่วโลก เนื่องจากประเทศไทยนับได้ว่ามีชื่อเสียงในการหาหญิงที่มีสุขภาพอนามัยดีที่รับตั้งครรภ์แทนได้โดยทั่วไปและยังเป็นประเทศที่มีลำดับแรกๆในการให้บริการทางสุขภาพจากโรงพยาบาล จึงส่งผลให้การตั้งครรภ์แทนในเมืองไทยมีชื่อเสียงทั้งกับคนไทยและชาวต่างชาติ

ประเด็นข้อโต้เถียงที่เกี่ยวกับการตั้งครรภ์แทนเกิดขึ้นที่เมืองไทยเมื่อเดือนสิงหาคม พ.ศ. 2557 ในเวลานั้นมีปัญหาเกิดขึ้นเมื่อคู่สมรสชาวออสเตรเลียจ้างหญิงไทยเป็นแม่รับตั้งครรภ์แทนแล้วเกิดเด็กแฝด เด็กคนหนึ่งชื่อแอมมีเกิดมาพิการเป็น Down Syndrome ถูกทิ้งไว้ คงรับกลับไปแต่คู่แฝดอีกคนที่ชื่อพิพา ปัญหาคือใครจะเป็นผู้รับผิดชอบเลี้ยงดูแอมมาผู้พิการ เนื่องจากกฎหมายขณะนั้นยังไม่สามารถนำมาปรับใช้ได้กับสถานการณ์เช่นนี้ได้เหมาะสม ต่อมาไม่นานมีเหตุการณ์ที่ชายชาวญี่ปุ่นคนหนึ่งเป็นพ่อของเด็กจำนวนหนึ่งที่เกิดจากการรับจ้างตั้งครรภ์ของหญิงไทยหลายคนที่รับจ้างตั้งครรภ์แทนในเมืองไทย เหตุการณ์เหล่านี้สร้างความตระหนักให้กับสังคมไทยเป็นอย่างมากโดยอาจเข้าใจว่าเป็นขบวนการค้ามนุษย์จึงมีการตรวจสอบจากทางการอย่างใกล้ชิดในเวลาต่อมา เทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์จึงถูกกล่าวหาว่าเป็นการกระทำที่ผิดกฎหมาย สิ่งที่ควรได้รับการพิจารณาสำหรับกรณีนี้ก็คือการควบคุมโดยกฎหมายที่เหมาะสม

การรับจ้างตั้งครรภ์ในเชิงพาณิชย์เป็นข้อห้ามตามกฎหมายหรือไม่ต้องได้รับการพิจารณาโดยคำนึงถึงความสงบเรียบร้อยและศีลธรรมอันดีของประชาชนเป็นสิ่งสำคัญยิ่ง การอธิบายถึงคำว่าตั้งครรภ์ในเชิงพาณิชย์ต้องได้รับนิยามโดยกฎหมายอย่างท่องแท้

ในเดือนตุลาคม พ.ศ. 2558 สภานิติบัญญัติแห่งชาติได้เห็นชอบกับร่างกฎหมายตั้งครรภ์แทน ต่อมาในเดือนกุมภาพันธ์ พ.ศ. 2558 รัฐสภาได้ออกกฎหมายที่บัญญัติเกี่ยวกับการห้ามการรับจ้างตั้งครรภ์แทน โดยออกเป็นพระราชบัญญัติคุ้มครองเด็กที่เกิดจากเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ออกมาใช้บังคับอย่างใดก็ตามบทบัญญัติในพระราชบัญญัตินี้กล่าวถึงที่เกี่ยวข้องกับการรับจ้างตั้งครรภ์ในเชิงพาณิชย์ยังไม่ชัดเจนเพียงพอโดยเฉพาะสำหรับชาวต่างชาติที่ต้องการมารักษาการมีบุตรยากในเมืองไทยเพราะได้ชื่อว่ามีชื่อเสียงทางเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์และต้องกำหนดชัดเจนว่าเป็นการรักษาไม่ใช่เป็นการ

รับจ้างตั้งครรภ์เชิงการค้า

ในวิทยานิพนธ์เล่มนี้ได้ศึกษาถึงการรับจ้างตั้งครรภ์แทนในเมืองไทยตามพระราชบัญญัติคุ้มครองเด็กที่เกิดจากเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ พ.ศ. 2558 ตามแนวคิดทฤษฎีทางกฎหมายของเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ วิเคราะห์พระราชบัญญัติฉบับนี้โดยการเปรียบเทียบกับต่างประเทศบางประเทศทั้งที่มีข้อห้ามและไม่มีข้อห้ามการรับจ้างตั้งครรภ์แทนและเสนอแนะเกี่ยวกับการแก้ไขเพิ่มเติมบทบัญญัติของกฎหมายที่เกี่ยวกับข้อห้ามในการรับจ้างตั้งครรภ์แทนในเชิงพาณิชย์สำหรับชาวต่างชาติที่มาได้รับการรักษาการมีบุตรยากในเมืองไทยที่ได้ชื่อว่าเป็นประเทศที่เทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์มีชื่อเสียงในการรักษาที่ประสบความสำเร็จและเกิดภาวะแทรกซ้อนน้อยที่สุดจนเป็นที่ยอมรับทั่วโลก

คำสำคัญ: เทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์, การจัดการตั้งครรภ์แทน, กฎหมายการรับจ้างตั้งครรภ์แทนเชิงพาณิชย์

Introduction

Thailand is one of the destination countries for Assisted Reproductive Technologies process and surrogacy arrangements. The controversy of concerning surrogacy occurred in August 2014. At that time, in the baby Gammy case, an Australian utilized a Thai surrogate mother through surrogacy arrangement in Thailand and then abandoned one of twins, called Gammy¹ who was born severely handicapped (Down Syndrome). The couple took only the child's twin sister, called Pipah, back to Australia. The problem is who should be responsibility for the baby Gammy. The law in Thailand at that time could not be applied to this situation properly. That commercial surrogacy should be banned or not is considered upon the public order and morality. The expression of "commercial surrogacy" should be profoundly defined

In November 2014, Thailand's National Legislative Assembly approved the draft surrogacy law. In February 2015, the Thai Parliament passed the legislation of prohibiting commercial surrogacy, called Protection of Children Born from Assisted Reproductive Technologies Act, B.E.2558. However, the provision of the Act concerned about commercial surrogacy is not clear enough for the foreigners to search for surrogacy arrangements through Assisted Reproductive Technologies in Thailand where is very famous in these kinds of treatment of infertility.

This thesis mainly studies commercial surrogacy in Thailand through Protection of Children Born from Assisted Reproductive Technologies Act B.E.2558 according to the theories and conceptual framework for Assisted Reproductive Technologies, analyzes this Act compared to the international surrogacy arrangement in some countries with legislation permitting commercial surrogacy and no legislation permitting commercial surrogacy, and provides some suggestions of this Act relating to prohibiting commercial surrogacy for foreigners who have infertility to search for

¹ LR Schover, "Cross-border surrogacy : the case of Baby Gammy highlights the need for global agreement on protection for all parties", Fertility and sterility, 2014 fertstert.org, <http://www.ncbi.nlm.nih.gov/pubmed/25241370>

Thailand where is famous for Assisted Reproductive Technologies in terms of high success rate and least complications.

Assisted Reproductive Technologies (ART)

Assisted reproductive technologies (ART)² are all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy. The technologies are used to achieve pregnancy in the procedures as follows.

1) Fertility Medication (better known as fertility drugs) is concerned drugs which enhance reproductive fertility. It is used to stimulate follicle development of the ovary. There are currently very few fertility medication options available for men.

2) Artificial Insemination ³(AI) is the introduction of sperm into a female's uterus or cervix for the purpose of achieving a pregnancy through in vivo fertilization by means of other than sexual intercourse. It is a fertility treatment for humans, and is a common practice in animal breeding, including dairy cattle and pigs.

3) In Vitro Fertilization (IVF) is a process by which an egg is fertilized by sperm outside the body. The process involves monitoring and stimulating a woman's ovulatory process, removing ovum or ova (egg or eggs) from the woman's ovaries and letting sperm fertilizes them in a liquid in a laboratory. The fertilized egg (zygote) is cultured for 2–6 days in a growth medium and is then implanted in the same or another woman's uterus, with the intention of establishing a successful pregnancy.

The Definition of Surrogacy

Surrogacy is the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children⁴.

“Surrogacy” refers to the process through which a women intentionally becomes pregnant with a baby that she does not intent to keep. Moreover, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her. Surrogacy motherhood is defined as an arrangement under which a surrogate mother agrees to breed a child for commissioning parents.

² The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), *Revised Glossary on ART Terminology*, 2009, http://www.who.int/reproductivehealth/.../art_terminology2.pdf.

³ M Curie-Cohen, L Luttrell, S Shapiro, “*Current practice of artificial insemination by donor in United States of America*, ” *The New England journal of Medicine* 1979, <http://www.nejm.org/doi/full/10.1056/NEJM197903153001103>

⁴ <http://www.merriam-webster.com/dictionary/surrogacy>

“Surrogacy arrangement” refers to the process of a surrogacy pregnancy and birth and the organization of the process between the parties to the surrogate agreement. The arrangement commences with the planning and entering into of the surrogacy agreement and concludes with the delivery of the surrogate-born child to the commissioning parents.

“Commercial surrogacy” refers to the process in which an individual or couple pays a fee to a woman in exchange for her carrying and delivering a baby. At birth, the child is turned over to the individual or couple, either privately or through a legal adoption process. Couples with fertility problems, same-sex couples, and single people who wish to be parents are the most common types of people who seek surrogate mothers

Conceptual Framework for Surrogacy Law to Protect Children Born from Assisted Reproductive Technology

The Baby M case is a stimulant for many lawmakers to urge various legislative regulation of surrogacy⁵. In 1988 the New Jersey Supreme Court declared surrogacy contracts void against state public policy but then determined that the best interests of the child born to the surrogate mother required that custody of that child be awarded to the biological father and his wife, with liberal visitation rights later being granted to the biological mother⁶.

There are several different theories concerning with surrogacy legislation.

A. Parenthood by Intend

The important surrogacy case that established the theory of parenthood by intend was Johnson v. Calvert⁷. The Calverts went to court and sought a declaration that they were the parents of the child. Johnson filed a petition to be declared the mother, and the cases were consolidated. The trial court ruled that the Calverts were the genetic, biological and natural father and mother. They were found the contract enforceable and denied Anna’s claim to maternity. Anna appended. The Supreme Court of California conceded that both gestation and genetic ties can give rise to a presumption of motherhood under the Uniform Parentage Act.

B. Parenthood by Contract

⁵ Child, Court, *Whitehead, and Surrogacy* - **JRankArticles** , <http://law.jrank.org/pages/4604/Baby-M-in-Re.html#ixzz3cMAAZNWf>

⁶ In the Matter of Baby M, 109N.J. 396, 537 A.2d 1227 (N.J. 1988)

⁷ Johnson v. Calvert , 5 Cal.4th 84, 19 Cal.2d 494,851 P.2d 776 (1993).

Other courts in U.S.A. uphold surrogacy agreements on the contract principles. The Minnesota Court of Appeals, for example, applied tradition contract analysis to a surrogacy contract that the surrogate claimed, after childbirth, was invalid⁸. It affirmed that the District Court's finding that the parties had entered into a valid agreement that reflected the intentions of the parties, had not been coerced, and did not contravene state public policy. While Minnesota had no law sanctioning such agreements, it also lacked laws against them, and had other laws protecting the rights of those who used Assisted Reproductive Technologies.

C. Parenthood by Genes

Some courts in U.S.A. enforce surrogacy contracts under the theory that the parents are the ones with a genetic tie to the child. For example, in *Clark v. Belsito*, the Ohio Court of Appeals ruled that the law requires that those who provide the child with its genetic must be designated as the legal and natural parents⁹. The surrogate had no parental rights under Ohio law which provides that the individuals who provide the genes of that child are the natural parents.

D. Parenthood by Gestational

Some States such as North Dakota and Arizona statute that declare surrogacy contracts void in effects employ the doctrine of motherhood by gestation, refusing to grant a commissioning mother parental rights over the objection of the gestational mother. This approach employs the ancient common law presumption that the woman who gives birth is the mother, and also recognizes the bond established during the nine months of pregnancy. Many commentators note in this theory is that it interferes with private ordering and the right to enter voluntarily into contracts, as well as invading the constitutionally protected area of privacy to make decisions about reproduction and child.

LEGAL REGULATION ON SURROGACY ARRANGEMENT UNDER FOREIGN LAWS

1) Countries with legislation permitting commercial surrogacy such as United States of America (in some States such as California, Florida, Arkansas) Russia, Ukraine, Georgia (Country).

United States of America

Under the provision of The Ten Amendment to the United States Constitution and the theory of State Sovereignty, a state has the power to establish and regulate

⁸ P.G.M.v.J.M.A., 2997 WL 4304448 Minn.App.

⁹ Belsito v. Clark, 644 N.E.2d 760,762 (Ohio 1994).

parentage, not a federal. Each state determines which law will treat surrogacy arrangement and the parentage of the children¹⁰.

Russian Federation

Russia is one of the most favorable countries for human reproduction in Europe and allows almost everybody who wants to have a child of their own through assisted reproduction treatment to fulfill their dream. The legal situation about assisted reproduction treatment in Russia is famous. Surrogacy, gamete and embryo donation are permitted, even on a commercial level. Gestational surrogacy is an option for heterosexual couples and single women, although a court decision might be needed to register a surrogate child born to a couple who are not officially married or a single woman. However, it is neither explicitly allowed nor prohibited for single men¹¹.

Gestational surrogacy, even commercial, is legal in Russia, being available to practically all adults willing to be parents. There must be one of several medical indications for surrogacy such as absence of uterus, deformity of the uterine cavity or cervix, uterine cavity somatic diseases contraindicating child bearing, or repeated failure of IVF despite high-quality embryos.

2) Countries with legislation permitting ART for non-commercial purposes such as United Kingdom, Australia, Netherlands, Hungary, Israel, United States of America (in some States such as New York, Nebraska)

United Kingdom

Commercial surrogacy arrangements are not legal in the United Kingdom. Such arrangements were prohibited by the Surrogacy Arrangements Act 1985 in section 2. While it is illegal in the UK to pay more than expenses for a surrogacy, the relationship is recognized under section 30 of the Human Fertilization and Embryology Act 1990. Regardless of contractual or financial consideration for expenses, surrogacy arrangements are not legally enforceable so a surrogate mother¹²

¹⁰ Usha Rengachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India," **39 Cumb. L. Rev.** 15 (2008-2009), <http://www.docin.com/p-62194344.htm>

¹¹ Konstantin Svitnev, "Legal regulation of assisted reproduction treatment in Russia, *Reproductive BioMedicine*" **Online, Volume** 20, Issue 7, June 2010, (p. 892–894), <http://www.sciencedirect.com/science/article/pii/S1472648310001744>

¹² Brazier, it is noteworthy however that independent studies conducted by COTS indicate that even with the provision of compensation, there is no evident that women view surrogacy as a form of employment even in instance where is provide, Childless Overcome Through Surrogacy COTS), *Surrogacy: A workable solution, In Response to the review Team's Report* (1999), <http://www.surrogacy.org.uk>.

Australia

In all jurisdictions of Australia, altruistic surrogacy has been the only recently recognized surrogacy that has become legal. However, in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offense, although the Northern Territory has no legislation governing surrogacy at all and there are no plans to introduce laws on surrogacy into the North Territory Legislative Assembly in the near future. Moreover New South Wales, Queensland and the Australian Capital Territory have made it an offence for residents to enter into international commercial surrogacy arrangements with potential penalties extending to imprisonment for up to one year in Australian Capital Territory, up to two years imprisonment in New South Wales and up to three years imprisonment in Queensland.

3) Countries with no legislation permitting commercial surrogacy such as France, German, Belgium, Spain, Switzerland, Italy and Japan.

France

The Assisted Reproductive Technology in France develops continuously. In the past, this technology which helps the infertility was operated by private sector according to the ethical standard of physicians and the state did not take care of this technology.

However, in 1987 the government decided to sue the private sector who arranged surrogacy and the Supreme Court of Appeals judged that surrogacy is illegal. The surrogacy contract is void and contrary to public order and good morals¹³.

In France, since 1994, any surrogacy arrangement that is commercial or altruistic, is illegal or unlawful and is not sanctioned by the law (art 16-7 of the Code Civil).

Japan¹⁴

Japan has no current law that regulates surrogacy. The relevant government committee (Health, Labor and Welfare Ministry) as well as the Japan Society of Obstetrics and Gynecology have opposed surrogacy on the grounds that “people should not be used as a means of reproduction.” However, there are known cases where doctors have handled surrogate births, including one doctor in the Nagano Prefecture that has performed more than a surrogacy births. A much larger number of Japanese couples are believed to have had children through surrogacy in Thailand and other countries. There is a bill on assisted reproductive technologies. It would allow donations of sperm and ova from third parties for the purpose of having babies but also conditionally allow surrogate births. The bill allows a surrogate mother to carry a fetus to term for the intended parents if the woman cannot become pregnant for medical reasons. But the draft legislation does not fully regulate the practice, and leaves many aspects uncertain.

¹³ Laurabertilotti, “*The prohibition of surrogate motherhood in France*”, on January 31, 2012, <http://www.nyujilp.org/the-prohibition-of-surrogate-motherhood-in-france>.

¹⁴ <http://www.sensiblesurrogacy.com/japan-considers-conflicting-surrogacy-laws/>

4) Countries have no surrogacy legislation such as New Zealand, Singapore

New Zealand

In New Zealand, there is no legislation covering surrogacy. There are, however, several provisions of the ADOPTION ACT 1955¹⁵ that may be relevant to surrogacy arrangements.

Singapore

Surrogacy is illegal in Singapore¹⁶. It is also unlawful for local doctors to help in surrogacy. Singapore has proposed new laws on parentage of children born through ART process since 2012. The new laws to clarify the legal parentage and status of children born through assisted reproductive technologies (ART) have been proposed in Singapore. The Status of Children (Assisted Reproduction Technology) Bill 2011, which will be introduced to the Singapore Parliament next year, has been published for public comment. ART process should only have a single set of parents, that is, a legal mother and legal father.

CONCLUSIONS AND SUGGESTIONS

Conclusions

In the past, there was no law governing surrogacy in Thailand. It means that surrogacy was neither permitted nor prohibited by law. Under the Thai Civil and Commercial Code, it indicates that a woman who gives birth to a child is the sole person who has legal rights in respect of that child and the father of a child who is not married to the mother at the time of birth has no parental rights even if he is recorded on the birth certificate and /or can prove that he is the biological father with DNA testing. From this point of view, the surrogate mother and husband in law had the right to take care of a child. It tends to dispute between the commissioning parents and the surrogate mother. Consequently, to attempt to reduce such problems, Section 29 of the surrogacy law provides that a child born from a surrogate mother under the Protection of Children Born from Assisted Reproductive Technologies Act is considered to be the legitimate child of the commissioning parents who intend to have the child through ART process not the child of the surrogate mother or any persons who provide genetic material.

Under Section 25 and 26 provide some protections for the Thai surrogate mother. The law gives the Medical Council the right to stipulate requirements and condition concerning with expenses for maintaining health of surrogate mother before and during the period of pregnancy.

¹⁵ Jeanne Snelling, University of Otago, *Implications for Providers and Patients: A Comment on the Regulatory Framework for Preimplantation Genetic Diagnosis* in New Zealand, Ranking: 2013 SJR (SCImago Journal Rank) Score: 0.137 | 340/458 Law | 1205/1827 Medicine (Miscellaneous) (Scopus®)

¹⁶ <http://pregnant.sg/articles/surrogacy-in-singapore/#ixzz3d7QN20vr>

The provision in Section 24 prohibits commercial surrogacy. Without the definition of this term, it is doubtful how to enforce the prohibition for payment of expenses of the surrogate mother and for health maintenance.

Under the new surrogacy law, there are provisions which are not suitable to enforce it. Consequently, it is of great importance to study the principles and reasons of the law, the problems of the law and the analysis comparatively legal mechanism on surrogacy arrangement for seeking the model to revise and to implement of legal measures on surrogacy law in Thailand to promote, support the assisted reproductive technologies and to protect the children born from these technologies.

Suggestions

From the study, this Act provides some suitable legal regulation i.e. a baby is legitimate child of legitimate spouse desiring to have a child to be related to the gene of the spouse. The child has the right and duty according to Thai Civil and Commercial Code on Family and Succession. Later, commercial surrogacy is prohibited. The qualification of the physician and medical services for surrogacy are controlled by public organizers. As well as there are criminal penalties in this Act for those who violate this Act.

There are some suggestions as follows;

1) Thailand is famous for the innovation technique in Assisted Reproductive Technology. People around the world desire to enter into surrogacy arrangement in Thailand. However, the new law prohibits the foreigner couple and some kinds of people who need to be aided for having their own child through ART process. In Section 21(1) of the Act, these medical technologies should be served for any person who has infertility regardless of any nations or any status because this problem is concerned with medical health care to treat like other medical health cares. If someone has the problems in health care of infertility, it should be treated by physicians. Moreover, the research and treatment of ART is very advanced. The more patients Thai medical services are provided for, the more experience in ART are increased in favor of dissolving the infertility without medical complications. These technologies ultimately will serve Thai citizen who have infertility effectively and successfully without complications of genetic disorders such as chromosome abnormalities (Down Syndrome), single gene disorder (sickle cell anemia), multifunctional disorders (Alzheimer's disease) etc.

2) In Section 24 should be revised for clearer definition of commercial surrogacy. It is prohibited to perform a surrogacy for commercial purposes. It means that commercial surrogacy is absolutely prohibited. Consequently, It may affect the surrogacy arrangement of assisted reproductive technologies which are developed rapidly whereas Thailand is considered as one of the world in surrogacy. The law should promote and support the innovation technology in surrogacy. However, the definition of commercial surrogacy in the law is not clear enough for the limitation of the term. Moreover, the surrogacy law should be deemed correspondence with moral and social circumstance in Thailand. Owing to the innovation of technology, the regulation is inevitably brought to control the proper process not to interfere the society.

On the one hand, protecting public order and morality are of great significance issues to be concerned. On the other hand, human right is also acclaimed into the constitutional law in almost sovereignty countries. It means that the law should not ban the foreigner, or any persons who actually have infertility to bear their own child and cannot be cured through any means of medical methods except ART procedure. The provision of section 24 should be revised as follows.

In Section 24, it is prohibited to perform commercial surrogacy.

“Commercial surrogacy” refers to the process in which an individual or couple pays a fee to a woman in exchange for her carrying and delivering a baby. Any persons excepted in section 21(1) who need to perform surrogacy must be examined, investigated and diagnosed according to the surrogacy arrangement prepared by medical council approving of the committee. The Ministry of Health reviews and approves gestational surrogacy on a case-by-case basis.

There should be some criteria choose both commission couples and surrogate mother to avoid commercial surrogacy.

Even though it is prohibited of commercial surrogacy the law does not define this term. It is not clear how this prohibition will be enforced given a provision in Section 25 for not only payment of expenses of the surrogate but also for her support and maintenance. The Section 27 made it an offence to act as an intermediary or broker for surrogacy arrangements or to accept financial or other benefits in consideration for the engagement or management of surrogacy. The proposed Section 28 prohibited advertisements seeking women wishing to act as surrogates whether for commercial purposes or otherwise.

Foreign couples should not be eligible to use surrogates under Section 21. In my point of view, ART processes are advanced and developed for medical technology and Thailand is classified as world –class in Surrogacy. The surrogacy law ought to provide suitable regulation for foreigners to use surrogates.

In this Act, it is prohibited to perform a surrogacy for commercial purposes, to advertise the surrogacy arrangement, and to perform a media or broker for surrogacy arrangement. The advertisement is one of opportunity to search the information about the surrogacy before getting involved in this procedure. If the law prohibits the advertisement and the broker strictly, it will be difficult to some other surrogate mother, exception for the relatives. The advertisement should be permitted but controlled by the organizer in form of the volunteer women to the infertility couple. These women should register in the public or private hospital. These hospitals must inform the surrogacy arrangement clearly.

3) Doctors and health service centers for surrogacy

Medical Council should prepare the regulation for surrogacy arrangements practically and comprehensively which will apply to surrogacy in Thailand. There may be wrong doing in ART Procedures. The doctors who breach the surrogacy law should be

considered penalty according to the law and gives the reimbursement to the related persons at the same time.

4) Surrogacy is considered as human trafficking

Thailand has the Anti-Trafficking in Persons Act B.E 2551 (2008) . This Act contains certain provisions in relation to the restriction of rights and liberties of persons.

In the future, there may be human trafficking from commercial surrogacy by deceiving neighborhood country women to enter into the ART process. The best way to protect human trafficking through commercial surrogacy is to create the legal mechanism on assisted reproductive technology to solve the problems of enforcement on commercial surrogacy in Thailand.

REFERENCES

1 Books

A. E Anton L. and Neville Brown. Introduction to France Law. 3rd ed. F. H. Lawson. Oxford University Press, 1967.

Atiyah, P. S. An Introduction To the Law Contract. 5thed. Oxford: Clarendon Press, 1995.

Beal Hugh, Harkamp Arthur, Kotz Hein and Tallon Denis. Cases, Material and text on contrat law: Hart Publishing, 2002

Beatson J. & Friendman D. Good Faith and Fault in Contract Law. Clarendon press:Oxford, 1997.

Hoggett, B, D Pearl, E Cooke, & P Bates. The family Law and Society cases and Materials. 4th ed. London: Butterworths, Edinburgh, Dublin, 1996.

2 Articles

A Van Niekerk, L Van Zyl. The ethics of surrogacy: women's reproductive labour. J Med Ethics 1995;21:345-349 doi:10.1136/jme.21.6.345

Barbara Stark, "Transnational surrogacy and international human rights law," 18ILSA J. Int'l & comp. L. (2011-2012)

Boon Chin Heng, Proposed ethical guidelines and legislative framework for permitting gestational surrogacy in Singapore Reproductive biomedicine online, 2007 - Elsevier

Elizabeth S. Scott, "Surrogacy and the politics of commodification, Law and Contemporary Problems," Vol. 72, No. 3, Show Me the Money: Making Markets in Forbidden Exchange (Summer 2009), pp. 109-146, Published by: Duke University School of Law, Stable URL: <http://www.jstor.org/stable/40647246>

3 Electronic Media

<<http://www.ncbi.nlm.nih.gov/pubmed/25241370>>

<<http://www.humrep.oxfordjournals.org/content/15/11/2326.full.pdf+html>>

<<http://www.freedomtomarry.org/.../Bergman,%20Rubio,%2ree>>

<<http://famielsthrusurrogacy.com/uk/>>

<<http://www.sensiblesurrogacy.com/japan-considers-conflicting-surrogacy-laws/>>

<<http://www.gsp.sagepub.com>>

LEGAL PROBLEMS ON PARODY IN TRADEMARK LAW*

Au-arpa Sittipong **

ABSTRACT

The problems with the infringement in the Intellectual Property are significant legal issues to be concerned. They are not only a problem for the victims but also a global issue in a broad picture. Trademarks are a type of intellectual property which serves as an essential tool in world trade, as it refers to the source of goods or services that the consumers use to trace back to the producers. The link between the consumers and producers is an important connection. The intellectual property law, therefore, aims to protect and maintain such connection and make it long-lasting.

As there are many brands of goods or services competing in the market. Each producer, hence, requires a part or share in the market for his/her own product. Parodying trademark may also be another way to attract attention to the brands.

However, the purpose of parodying is to convey a message from the parodist to the public, in relation with the subject of parodying and in the area of trademark, to take other person's trademark and use e.g. parodying may increase the risk of infringement claims. Trademark parody usually takes a significant part of the original mark to refer back to the senior mark.

Legal analysis is required on whether or not parodying trademark is an act of infringement? The studying on the parodying trademark is conducted through the reviewing law articles, cases from the foreign countries in comparison to Thai Laws and searching electronic databases.

Keywords: Trademark; Parodying Trademark; Trademark Infringement

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บทคัดย่อ

ประเด็นปัญหาของการละเมิดทรัพย์สินทางปัญญาเป็นประเด็นในทางกฎหมายที่สำคัญ โดยประเด็นดังกล่าวไม่ได้เป็นเพียงปัญหาของบุคคลใดบุคคลหนึ่งแต่เป็นปัญหาของส่วนรวม เครื่องหมายการค้าเป็นทรัพย์สินทางปัญญาประเภทหนึ่งที่มีความสำคัญและมีบทบาทในเวทีการค้าโลก ซึ่งเป็นความเชื่อมโยงระหว่างผู้ผลิตสินค้าและบริการกับผู้บริโภค ความเชื่อมโยงนั้นเป็นสิ่งสำคัญที่กฎหมายทรัพย์สินทางปัญญามุ่งที่จะคุ้มครอง ในปัจจุบันมีแบรนด์สินค้าต่างๆเกิดขึ้นมากมาย ทำให้ผู้ผลิตสินค้าแต่ละรายต้องมีความพยายามในการที่จะหาส่วนแบ่งทางการตลาด การล้อเลียนเครื่องหมายการค้านั้นจึงเป็นหนึ่งในการกระทำที่เป็นการดึงดูดความสนใจได้เป็นอย่างดี

ทั้งนี้วัตถุประสงค์ของ “การล้อเลียน” นั้นเป็นการส่งสารจากผู้ล้อเลียนไปยังผู้รับสารซึ่งมีการอ้างอิงไปถึงต้นแบบแห่งการล้อเลียน ดังนั้นการล้อเลียนเครื่องหมายการค้าของผู้อื่นนั้นจึงมีประเด็นว่าจะเป็นการละเมิดเครื่องหมายการค้าหรือไม่ เนื่องด้วยหลักการของการล้อเลียนเครื่องหมายการค้าจะต้องมีการนำส่วนหลักของเครื่องหมายการค้าต้นแบบมาเพื่อทำการล้อเลียน มิฉะนั้นการนำงานบุคคลอื่นมาปรับเปลี่ยนแปลง หรือแก้ไข โดยไม่สามารถสืบทอดไปยังเครื่องหมายการค้าต้นแบบได้การไม่สามารถอ้างอิงได้ว่าเป็นการล้อเลียนสิ่งใด

การล้อเลียนเครื่องหมายการค้าจำเป็นต้องอาศัยการวิเคราะห์ ขบคิด ในทางกฎหมายเพื่อที่จะตอบคำถามว่าการกระทำดังกล่าวนั้นเป็นการละเมิดเครื่องหมายการค้าหรือไม่ การศึกษาในประเด็นการล้อเลียนเครื่องหมายการค้า นั้น จะได้ศึกษาผ่านทางบทความทางกฎหมาย คติความของศาลต่างประเทศ ในทางเปรียบเทียบกับกฎหมายของประเทศไทย รวมทั้งการศึกษาจากฐานข้อมูลอิเล็กทรอนิกส์

คำสำคัญ: เครื่องหมายการค้า การล้อเลียนเครื่องหมายการค้า การละเมิดเครื่องหมายการค้า

Introduction

In case of trademark parody, has become an incident which has drawn attention of many scholars as a legal issue. In some countries, they recognize the exclusion of trademark's infringement or dilution by including parody therein, as parodying considered being free speech and protected by provisions of the law allowing the free flow of thoughts. In addition to the statutory law, there are cases that have been brought to court. And by interpretation of the court, they became the source of references to the parodying case.

In Thailand, the provision of the law relating to trademark does not clearly stipulate on what actions could be considered as an exception of trademark infringement. The legal issue on trademark parody is now being studied and researched because it is unclear by the provisions of the law in Thailand as well as the court's decisions.

Therefore, it is important for Thailand to seriously consider providing a statutory exclusion of trademark infringement on whether the parodying or other fair

use action is an acceptable action or not. The scope of the parody exception should balance the rights of trademark owners and with the benefits to the public.

1. Overview of trademark

1.1 Definition of Trademark

A trademark is recognized as an intellectual property, which is generally categorized into the two major categories i.e. (i) Industrial Property and (ii) Copyright. Trademarks fall into the category of industrial property.

Each jurisdiction provides their own definition regarding trademarks as a guideline of what is protectable under their trademark law which mostly inferred to a distinctive “*Mark*” having connection with the goods or services.

1.2 Function of Trademark

A trademark is a mark that is associated with the exchange of goods and services. Its function is therefore related to commerce in designating the source of goods enabling the consumers to identify and distinguish the goods of one particular producer from other producers.¹

1.2.1 Indicate of origin function

This function allows the consumers to acknowledge the origin of the products as the mark is usually attached to goods or services serving the function in indicating of the origin and ownership of such goods or services. This function is based on the power of marks that the consumers will be able to recognize the origin or the producer of such goods.

1.2.2 Product differentiate function

This serves as a significant function to designate the origin of goods and services, it which would not be able to serve such function if all marks are similar or identical to each other. The understanding of consumers in relation with the mark to the producers is too difficult to be sought out. The confusion of consumers regarding a mark could occur and the designated function is most likely to fail when there is no difference between the trademarks.

1.2.3 Guarantee function

Rather than the indicating of original of the goods and services, the sellers or providers of goods or services will make efforts to maintain the quality associated with a mark, which is known as the “guarantee function”. The guarantee

¹ Dr. Shoen Ono, *Overview of Japanese Trademark Law 1* (2nd ed., Yuhikaku Publishing 1999) available at http://www.iip.or.jp/e/e_publication/ono/ch1.pdf.

function is taken from the viewpoint of consumers, in contrast to indication of origin or ownership, which is taken from the viewpoint of producers.²

1.2.4 Advertising function

The function of a trademark is not limited to only the designation of a source and the creation of expectation that the identical marks ensure consistent quality of goods and services, but also it serves other functions. Another function of trademark is regarding advertisements and promotions of goods or services. Consumers may feel an attachment to goods or services carrying certain marks and as a result of producers of goods focusing more on the advertisement of marks rather than advertisement of the goods and services in which the marks are attached.³

2. Legal concepts related to trademark law

2.1 Likelihood of confusion

Protection of trademark intends to grant the protection to the mark owner from any unauthorized action against their exclusive rights and to prevent confusion among consumers as to the source of the goods indicated by trademark. Therefore the likelihood of confusion is needed to serve as a tool to identify the action whether it will cause or is likely to cause confusion to the consumers whom the provision of the law seeks to protect.

The word “likelihood” under the concept of likelihood of confusion means “probability,” and it is considered to serve as a higher standard than the word “possibility” regarding the confusion.⁴ A successful claim of infringement requires the likelihood of confusion, which refers to the probability that the public may understand the origin of goods or services altered from the actual circumstance. Under this legal concept, the actual confusion may not likely to be occurred. It provides the guide line to test an infringement action.

The likelihood of confusion may still occur even the public is able to distinguish between the marks themselves, they could believe that such goods or services originate from the same source or are economically-linked to each other.⁵

2.2 Dilution

Legal concept of trademark dilution was first introduced by Frank Schechter in United States, as he believed that trademark deserved protection more than what was

² *Id* at 37-38.

³ *Id*.

⁴ Steven M. Perez, *Confronting Biased Treatment of Trademark Parody under the Lanham Act*, 44 **Emory L. J.** 1487, 1451 1995.

⁵ *Id*.

provided by trademark law⁶ covering a remedy for the unauthorized use of well-known marks on non-competing products, even when there is no consumer confusion, because such uses diminish famous marks' value.⁷ Schechter mentioned at that time the law on intellectual property was focused on the prevention of unauthorized use of mark which constituted actual confusion to consumers; however, the brand could be harmful by any other way without the factor of confusion.⁸

Such harm has been referred to as "...whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public consciousness, and the greater its need for protection against vitiation or dissociation from the particular product in connection with which it has been used."⁹

Trademark dilution does not require the confusion factor from the part of consumers.¹⁰

3. Trademark parody

Traditional parody has its own value serving in the society as they are the foundation of entertaining, criticizing for a long period of time which may carry information, knowledge from the parodist to the audience. Therefore, "parody" could be found in any field not only on music, movie, ads, but also social, political, cultural or even intellectual property area. An effective parody could convey one or more messages with a powerful effect to the receiver which may be in a form of political statement, social commentary, commercial speech, a joke, ridicule of a brand name, criticism of commercialism, or just aim solely on humor.¹¹

In the trademark law context, a parody is defined as a simple form of amusement conveyed by the irreverent representation of the trademark with the idealized image created by the mark's power.¹²

⁶ Deborah R. Gerhardt, *The 2006 Trademark Dilution Revision Act Rolls Out a luxury claim and a Parody Exemption*, 8 **N.C. J. L. & TECH.** 205, 207 (2007) (citing Frank Schechter, *Rational Basis of Trademark Protection*, 40 **HARV. L. REV.** 813, 831.-32 (1926.-27).

⁷ *Id.*

⁸ Frank I. Schechter, *The Rational Basis Of Trademarks Protection*, 40 **Harv. L. Rev.** 825 814 (1926-1927).

⁹ *Id.*

¹⁰ David S. Welkowitz, **Trademark Dilution: federal, state, and international law**, The Bureau of National Affairs, 62, 2002.

¹¹ Gary Myers, *Trademark Parody: Lessons from the Copyright decision in Campbell v. Acuff-Rose Music, Inc.*, 59 **Law and Contemporary Problems** 181 (Spring 1996).

¹² Corina I. Cacovean, *Is Free Riding Aided by Parody to Sneak Between the Cracks of the Trademark Dilution Revision Act?*, 31 **Hastings Comm. & Ent. L.J.** 441, 447 (2008-2009); (citing Andrew M. Gold, *Gold on Trademark Parody, Survey Evidence*

The most cited academic definition of parody is “a parody must convey two simultaneous-and contradictory-messages: that it is the original, but also that it is not the original and is instead a parody.”¹³ It could be inferred that the parody must inherently indicate that it is not the original but rather it is parody. This could be the challenge as parody trademarks shall employ the original mark; under that situation it is likely to confuse the consumers as to the source, sponsorship, or to what the scope of the law seeks to protect.¹⁴

The conflict between policy to protect the rights of the mark owner and the rights to the freedom of expression¹⁵ e.g. parodying as stated under the provision of the law in the scope of freedom of expression which encourages the legal question on how the parodying take place in the area of intellectual property law which also aims to protect the rights of the trademark owner. Then the parodying of a trademark could be consider as the infringement or dilution under the provision of the law resulting from the nature of parodying i.e. the parodying is always taking the material of the original trademark and this lead to studying in balancing such policy.

3.1 Trademark Parody in the International Rules and Foreign Laws on Trademark

▪ The Paris Convention for the Protection of Industrial Property

The Paris Convention is the first convention on protection of Industrial Property in the broad scope, including patents, trademarks etc.

In relation to parody, the Paris Convention provides protection to trademark owners from actions leading to confusion as well as grants protection to well-known mark which is also adopted into Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”). The provision allows the competent authority of Contracting

and Dilution by Tarnishment in *Smith v. Wal-Mart*, 537 F. Supp. 2d 1302 (N.D. Ga. 2008), 2008 EMERGING ISSUES 2540 (citing *Louis Vuitton Malletier v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007)).

¹³ Eric Sonju, “*Likelihood of Confusion*” is confusing enough: *Why the concept of parody has no place in a likelihood of confusion analysis*, 38 **AIPLA Q. J.** 349, 366-367(2010); (citing *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490, 494, 12 U.S.P.Q.2d (BNA) 1289, 1291 (2d Cir. 1989), *quoted in* *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366, 60 U.S.P.Q.2d (BNA) 1109 (4th Cir. 2001); *see also* *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1486, 4 U.S.P.Q.2d (BNA) 1216, 1219 (10th Cir. 1987).

¹⁴ *Id.* at 367.

¹⁵ Samuel M. Duncan, *Protecting Nominative Fair Use, Parody, and Other Speech-Interest by reforming the inconsistent exemptions from Trademark Liability*, 44 **University of Michigan Journal of Law Reform**, 219, 237 (2010).

Parties to the Paris Convention to determine whether the protectable mark is established or not.¹⁶

▪ **Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”)**

Through cooperation of The World Trade Organization or “WTO”, “TRIPs” provides its provision as the minimum standard that contractual parties shall implement the provision as their national level. The contractual parties may provide a higher provision standard but shall not contradict to the TRIPs statement.¹⁷

The protection of the mark therein not only focuses to the rights for the mark owner in the trademark area but under the provision of TRIPs, it provides the exception to the trademark infringement in the light of fairness.¹⁸ In Article 7 which stipulates that *“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”* It allows the contracting party to have their decision on imposing intellectual property protection in which promoting the information transfer in a manner that supports the public welfare. However, there is clarification by the scholar on the scope of exception under TRIPs to cover the parodying in the shade of fair use circumstance.¹⁹

▪ **Trademark Parody in the United States**

In the Federal level and, trademarks are not compulsory to be registered in order to grant protection under Trademark Act of 1946²⁰, also known as the Lanham Act. The Lanham Act provides two causes of action i.e. infringement and dilution claims, to holders of protectable trademarks to keep others out of using their marks without their authorized permission.²¹ Whereas infringement claims depend on the condition of likelihood of confusion by consumers, which could arise from the use of similar or

¹⁶ Article 6 bis (1).

¹⁷ Article 1.1.

¹⁸ Article 17.

¹⁹ เอกรินทร์ วิริโย และ วุฒิ ศรีธีระวิศาล, *การล้อเลียนเครื่องหมายการค้า: กรณีศึกษาเปรียบเทียบระหว่างสหรัฐอเมริกาและไทย*, ดุลพาห 221, 226 กันยายน-ธันวาคม 2556 (Aekarin Viriyo & Wut Sritheeravisan, *Parodying Trademark: Comparative Study between United States and Thailand*, Dulpaha 221, 232 September-December (2013)); citing Lisa P. Ramsey, Free Speech an International Obligations To Protect Trademark, 35 Yale J. Int. L. 406 (2010)).

²⁰ § 1 (15 U.S.C. § 1051) et seq.

²¹ 15 U.S.C. §1051-1141

identical unlicensed marks, dilution claims assert that the unauthorized use fundamentally changes how consumers understand the mark of trademark owner.²²

*Campbell, aka Skyywalker, et al. v. Acuff Rose Music, Inc.*²³ is the landmark case in relation to the parody, which is based on the dispute of parodying of a copyrighted work; however, so many later cases in trademark law have followed the principles provided under this case. Although *Campbell* focused on copyright parodies, the case also provides some essential principles for analysis of parody in trademark law.

In the United States, the Court may have the different approaches to the case of parody; however, the landmark case *Polaroid Corp. v. Polarad Electronics Corp.*,²⁴ which divides the likelihood of confusion standard into eight factors, so called the “Polaroid test”. The factor refers to the standard of analyzing the likelihood of confusion.

▪ Trademark Parody in the United Kingdom

In the United Kingdom, the provision of trademark law is absent on the case of parody; however, there was the lesson from the court on how the judge interpreted the provision of the law related to the case of parodying. Without a provision regarding this issue, the Court judgment came out with inconsistency.

4. Trademark Parody in Thailand

“Trademark parody” is for the purpose of humor, entertainment, criticizing or even expressing of opinions of the original trademark which the nature of parody commonly consist of the composition of the original trademark.²⁵ Parodying work is also having the transformative value in connection with the original mark whereas this is considered as a new created work.²⁶

In the context trademark law, it is a significant legal issue to be analyzed on the possibility of parody to be acknowledged or accepted by the provision of the law. The question regarding the trademark parody is to distinguish parody and infringement. As the nature of parody is to convey the message on the original mark, the parodied work therefore shall contain the substantial part of the original mark so that there will be the

²² See *supra* note 15 at 224.

²³ (92-1292), 510 U.S. 569 (1994).

²⁴ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961).

²⁵ เอกรินทร์ วิริโย และ วุฒิ ศรีธีระวิศาล, การล้อเลียนเครื่องหมายการค้า: กรณีศึกษาเปรียบเทียบระหว่างสหรัฐอเมริกาและไทย, ดุลพาห 221, 226 กันยายน-ธันวาคม 2556 (Aekarin Viriyo & Wut Sritheeravisan, *Parodying Trademark: Comparative Study between United States and Thailand*, Dulpaha 221, 226 September-December (2013)); (citing Michael Spence, *Intellectual Property and the Problem of Parody*, Law Quarterly Review, no. 114, 1998, page 594.).

²⁶ *Id.* at 225; (citing Esther Miline, Parody: Affective Registers, Amatuure Aesthetics, and Intellectual Property, Cultural Studies Review, Vol.19 No.1, 2013, page 197.

link between those two marks. There will be no cause for a parody action if parodied work could not be traced back to the original work. The main provision regarding to the infringement in which parodying could fall in to this criteria is Section 109.

Section 109 states that *“Any person who imitates a trademark, service mark, certification mark or collective mark registered in the Kingdom by another person in order to mislead the public into believing that it is the trademark, service mark, certification mark or collective mark of such other person shall be liable to imprisonment not exceeding two years or a fine of not exceeding two hundred thousand baht or both.”*

By analysis the provision, definition of imitation should also mean no intension no faking the trademark but intend to create a trademark similar to the origin trademark which could constitute confusion.

Recommendations

To adopt trademark parody with conditions seems to suit Thailand the most. Conditions according to the recommendation shall refer to the similarity in goods or services that the trademark parody has been used for the similar goods or services; it may lead to the confusion of consumers and then be considered as an infringement. To recognize without any condition could bring the difficulty to trademark owners and give a disadvantage rather than the advantage as the trademark owners may suffer from damages to their own trademark by the parodying beyond the scope that could be acceptable.

Should parody be an exemption to the trademark infringement in the scope that the true trademark parody will communicate the message and by means of indicating that it is not the original mark. Then the parodist could claim that there is no intention of confusing the public. Moreover, trademark parody shall not be pointed out as the harmful conduct to the trademark. It should also be referred to as the promotion or even the advertisement of the trademark subjected to the parody. The trademark owners may be granted the benefit from the parodying of their own trademark in the way that the perception to their trademark will expand to the broader area through the parodying.

Parody exception in author's view refers to the protection of the use of trademark in good faith. An analysis has to be conducted carefully as to grant protection to trademark parody automatically, it could affect the rights of the trademark owners causing that their marks to be a target. The meaning of parody shall be defined in the precise way. The value of parody is not only to support the creativity, the trademark

parody that has been transformed from the original trademark in the way that indicating the difference between the senior and junior marks also created a new work.

REFERENCES

BOOK

English Book

Welkowitz, David S., *Trademark Dilution: Federal, State, and International Law*, The Bureau of National Affairs, 2002.

Thai Book

สุพิศ ปารณิตพลกรัง. *คดีเครื่องหมายการค้า*. พิมพ์ครั้งที่ 2. กรุงเทพฯ: อทตยา มิเลเนียม, 2549

(Supit Praneetpolkrung, *Trademark Case*, 2nd ed., Bangkok: Athataya Millennium, 2004).

ARTICLES

English Articles

Cacovean, Corina I.. “Is Free Riding Aided by Parody to Sneak Between the Cracks of the Trademark Dilution Revision Act?” *Hastings Commerce & Entertainment Law Journal*, Volume 31 (2008-2009).

Deborah R. Gerhardt. “The 2006 Trademark Dilution Revision Act Rolls Out a luxury claim and a Parody Exemption.” *North Carolina Journal Of Law & Technology*, Volume 8, Issue 2. (Spring: 2007).

Duncan, Samuel M., “Protecting Nominative Fair Use, Parody, and Other Speech-Interest by reforming the inconsistent exemptions from Trademark Liability”, *University of Michigan Journal of Law Reform*, Volume 44, (2010).

Eric Sonju, “Likelihood of Confusion” is confusing enough: Why the Concept of Parody has no place in a likelihood of confusion analysis.” *38 AIPLA Q. J.* (2010).

Myers, Gary, “Trademark Parody: Lessons from the Copyright decision in *Campbell v. Acuff-Rose Music, Inc.*”, *Law and Contemporary Problems*, Volume 59 No.2 (Spring: 1996).

Perez, Steven M.. “Confronting Biased Treatment of Trademark Parody under the Lanham Act”, *44 Emory L. J.* (1995).

Schechter, Frank I.. “The Rational Basis Of Trademarks Protection.” *40 Harv. L. Rev.* (1926-1927).

Thai Articles

เอกรินทร์ วิริโย และ วุฒิ ศิริธีระวิศาล, “การล้อเลียนเครื่องหมายการค้า: กรณีศึกษาเปรียบเทียบ

ระหว่างสหรัฐอเมริกาและไทย”, ดุลพาห 221, 226 กันยายน-ธันวาคม 2556 (Aekarin Viriyo & Wut Sritheeravisan, *Parodying Trademark: Comparative Study between United States and Thailand*, Dulpaha 221, 226 September-December, 2013).

ELECTRONIC DATABASES

Dr. Shoen Ono, *Overview of Japanese Trademark Law 1* (2nd ed., Yuhikaku Publishing 1999). <http://www.iip.or.jp/e/e_publication/ono/ch2.pdf.>

FRAUD RULE IN INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT UNDER THE UN CONVENTION*

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ABSTRACT

The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 is drafted to accommodate the independent guarantees and stand-by letters of credit used to facilitate international businesses. To overcome the misuse by the beneficiary who makes demand for payment against the guarantor, the Convention contains the provisions on fraud rule in independent guarantees and stand-by letters of credit as an exception to payment..

Thailand is not a party to the Convention. Thailand therefore has no obligations under the Convention. However, the significance of the independent guarantees and stand-by letters of credit in international trade is well recognized when Thai business entities enter into contracts with their foreign business partners and require independent guarantees and stand-by letters of credit as the financial security to ensure performance of the contract.

Independent guarantees and stand-by letters of credit are used by private section i.e. banks and financial institutions in Thailand with no specific law or ordinary usages on the transactions. However, fraud exception to withhold the payment is still not covered by Thailand's domestic laws. This issue would lead the contractual parties additional difficulties when the principle basis of independent guarantees and stand-by letters of credit on the fraud rule is not recognized by Thai courts which are unable to grant a provisional order to withhold the payment due to the unavailability of applicable law issue. The study reveals that currently Thailand does not have any law on the fraud rule as stipulated under the Convention. It would lead the applicant or principal to face with significant difficulty to protect itself from the fraud demand by the beneficiary. Thailand has a draft law to deal with commercial documentary credit contracts but its contents are still unable to cover independent guarantees and stand-by letters of credit especially on the fraud rule.

Keywords: Fraud Rule, Fraud Exception, Independent Guarantees in Thailand, Stand-by Letters of Credit in Thailand, United Nation Convention

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บทคัดย่อ

อนุสัญญาองค์การสหประชาชาติว่าด้วยอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ค.ศ. 1995 ได้ถูกยกย่องขึ้นเพื่อรองรับอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิตที่นิยมใช้กันในระดับระหว่างประเทศ และเพื่อมิให้มีการแสวงหาประโยชน์โดยมิชอบจากการที่ผู้รับประกันเรียกให้ผู้ค้าประกันจ่ายเงินตามอินดิเพนเดนซ์การันตีโดยมิชอบ อนุสัญญาดังกล่าวจึงได้กำหนดหลักเกณฑ์เรื่องฉ้อโกงในอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ในการยกเว้นมิให้ผู้ค้าประกันจ่ายเงินให้กับผู้รับประกันในกรณีที่มีการเรียกให้ชำระเงินนั้นมียกประกอบของการฉ้อโกงอยู่ด้วย

ประเทศไทยนั้นมิได้เข้าเป็นภาคีในอนุสัญญา จึงไม่มีพันธกรณีใดๆ ที่จะต้องปฏิบัติตามหลักเกณฑ์ในอนุสัญญาดังกล่าว แต่ด้วยเหตุที่อินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิตมีความสำคัญอย่างยิ่งในการค้าระหว่างประเทศ เนื่องจากคู่สัญญามักใช้เป็นหลักประกันให้คู่สัญญาอีกฝ่ายปฏิบัติตามสัญญา ประเทศไทยจึงสมควรอย่างยิ่งที่จะมีกฎหมายเกี่ยวกับเรื่องนี้เพื่อรองรับปัญหาของอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิต โดยเฉพาะอย่างยิ่งการใช้หลักฉ้อโกงที่เป็นการยกเว้นการจ่ายเงิน ซึ่งการที่ไม่มีกฎหมายเฉพาะมาปรับใช้กับเรื่องดังกล่าว จะทำให้เกิดความยุ่งยากและไม่แน่นอนในการที่ศาลไทยจะนำกฎหมายไทยมาปรับใช้ในการตัดสินกรณีคดีที่เกี่ยวกับเรื่องนี้

จากการศึกษาค้นคว้าในวิทยานิพนธ์ฉบับนี้ ปรากฏว่าประเทศไทยมิได้มีกฎหมายบัญญัติเกี่ยวกับหลักฉ้อโกงในอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิต แม้ประเทศไทยจะมีความพยายามในการร่างพระราชบัญญัติสัญญาให้สินเชื่อกทางพาณิชย์ที่มีเอกสารประกอบเพื่อรองรับเลตเตอร์ออฟเครดิต แต่เนื้อหาของกฎหมายก็ทำได้ครอบคลุมเรื่องการฉ้อโกงในอินดิเพนเดนซ์การันตีและสแตนด์บายเลตเตอร์ออฟเครดิตไม่ อันจะนำไปสู่ปัญหาในการคุ้มครองผู้ขอออกตราสารที่สุจริต จากการที่ผู้รับประกันเรียกให้ผู้ค้าประกันหรือผู้ขอออกตราสารชำระเงินให้แก่ตนโดยมิชอบซึ่งเข้าหลักเกณฑ์การฉ้อโกงในอนุสัญญา โดยข้อเสนอแนะจากวิทยานิพนธ์ในการแก้ไขปัญหาคือ (1) เพิ่ม คำว่า “อินดิเพนเดนซ์การันตี” เป็นส่วนหนึ่งของนิยามคำว่า “สัญญาให้สินเชื่อกทางพาณิชย์” (2) เพิ่มเติมนิยามบัญญัติในทำนองที่ สันนิษฐานไว้ก่อนว่าผู้รับประกันกระทำการโดยสุจริตและรับรองว่าไม่มีองค์ประกอบการฉ้อโกงในการเรียกให้ผู้ค้าประกันชำระเงินแก่ตน (3) อธิบายเรื่องหลักการฉ้อโกงอันเป็นเหตุยกเว้นการจ่ายเงินให้ผู้รับประกัน (4) เพิ่มเติมนิยามบัญญัติเฉพาะเรื่องการใช้สิทธิทางศาลโดยผู้ขอออกตราสาร ในการระงับการจ่ายเงินให้กับผู้รับประกัน

คำสำคัญ: หลักฉ้อโกง, ข้อยกเว้นเรื่องฉ้อโกง, อินดิเพนเดนซ์การันตีในประเทศไทย, สแตนด์บายเลตเตอร์ออฟเครดิตในประเทศไทย, อนุสัญญาสหประชาชาติ

Introduction

Independent guarantees and stand-by letters of credit provide various mechanisms for making payment. The most attractive element is to allow the guarantee payable upon the first demand namely “unconditional guarantee”. The beneficiary shall be entitled to receive payment from the bank, which is guarantor/issuer without proving that the principal/applicant acting as debtor/exporter, committed default of contract.¹ Such first demand for payment can be abused easily due to the fact that the beneficiary does not need to prove that the contract is breached by the principal/applicant or to prove that the beneficiary suffers from the damage or any other risk. The guarantee was to provide protection of this situation. That is why the guarantor/issuer is liable to make payment to the beneficiary according to such demand with required tendered documents. Nevertheless, the unfair or abusive calling is of considerable important problem in

¹ R Bertrams, Bank Guarantees in international trade, 3rd edition, Kluwer law international, 3 (2004)

international practice as this could be considered as fraud.² Fraud is one of a rigid issue between the beneficiary and bank because it is an exception for the bank to withhold payment although the beneficiary is able to provide the documents according to the credit.³

Most commercial states, having their business with the United States or the European Union, normally become the contracting parties to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit 1995 (“the Convention”) in order to resolve this specific issues.⁴ Even though the contracting states have joined the Convention, the problematic fact regarding 1) how to manage or deal with the case that the beneficiary call fraudulently for payment by exploiting independence and strict compliance rules to obtain the payment and 2) how to maintain the balance between (a) the purpose of independent guarantee mechanism that the beneficiary expects certainty in the business and (b) fraud rule which is an exception to payment that can protect the principal/applicant who acts *bona fide*⁵ but suffering from the fraudulent act of the beneficiary calling for demand and 3) how do the principal/applicant and the bank (issuer/guarantor) maintain their position or manage its role in relation to beneficiary’s fraudulent calling.

I. Independent Guarantees and Stand-by Letters of Credit under the Convention

The United Nations Convention on Independent Guarantees and Stand-by Letter of Credit (the Convention) was adopted by the United Nations General Assembly on 12 December 1996. The Convention entered into force on 1 January 2000. The Convention incorporates current understanding and compromise positions on the law and practice of independent guarantees and stand-by letter of credit. It applies to independent (autonomous) and international undertakings issued in a state that become a party to the Convention or where the conflict of laws rules lead to the application of the law of a state party to the Convention. Furthermore, an international letter of credit, which does not exactly fall within the definition of “undertaking”, is governed by the Convention if such letter of credit expressly states that it is subject to the Convention. An undertaking falling within the Convention's scope may, however, exclude the application to the Convention.

The Convention describes an independent guarantee (referred to as, e.g. demand, first demand, simple demand, demand guarantee or bank guarantees)⁶ and stand-by letter of credit jointly as “undertaking” (“Undertaking”). An undertaking is issued by a

² Grace Kayembe, *The Fraud Exemption in Bank Guarantee*, (2008), 3

³ Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees*, The Federation Press, 2003. 123

⁴ Khemjuta Suwanjinda, *Possibility of Thailand’s Accession to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, 1995 (2012), 83

⁵ *Bona fide* means “good faith”

⁶ UNCITRAL Explanatory Note by UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, w. 8, U.N. Doc. A/CN. 8/431 (July 4, 1996).

guarantor, which could be a bank or other institutions or even persons, to pay the beneficiary a certain amount upon simple demand or upon demand accompanied by required documents according to the terms or documentary conditions of the undertaking.⁷ The condition may indicate that payment is due because principal/applicant is in default in the performance of obligation, or another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant of such undertaking.⁸

II. Concept of the Fraud Rule

An undertaking is a device providing certainty to the beneficiary that he will receive payment. It means that there is a balance between certainty of payment for the beneficiary and risk of losing payment by the principal if the transaction is committed by fraud⁹

Fraud harms the basic principles of equity, business and justice. Protecting the bank's obligation of payment under an undertaking without exception, when documents fulfill the terms and conditions, would therefore lead to protection of fraud. To prevent unlawful outcome that may result on fraudulent action from the part of the beneficiary, courts have attempted to form a balance between the commercial utility of bank guarantees and needs of preventing the fraud transaction. Such balance has been achieved through the fraud exception.¹⁰

If the guarantor or issuer discovers the fraud under the Convention that was tendered by the beneficiary, it is entitled to refuse to make payment to the beneficiary. This situation conduces that the beneficiary would have tendered documents that did not strictly comply with the terms of the undertaking if he had been truthful in his representations. However, the fraud which enabling the guarantor/issuer to stop payment must be obvious and evident to the guarantor or issuer without the need of further proof or any investigation on the actual circumstances surrounding the underlying contract. It reflects a balance between all deference of interest in a particular country involving undertaking. In the event that standard is too low, an applicant, who is not willing to make the payment, will easily commit the fraud. It will affect commercial function of an

⁷ Article 2 of the UN Convention

⁸ *Id.*

⁹ J Browne, *The fraud exception to standby letters of credit in Australia : Does it embrace statutory unconscionability?*, vol.11, Bond Law Review. 101 (1996)

¹⁰ Xiang Gao and Buckley, *A comparative analysis of the standard of fraud required under the fraud rule in letter of credit law*, vol 13, 293, (2003)

undertaking definitely. On the other hand, if the standard is too strict, this would encourage fraudulent maneuvers on the part of the beneficiary. Therefore, extreme standards of fraud should be avoided as they represent only the interests of the beneficiary or the principal.¹¹

1. Fraud Rule under the Convention

Exception to payment for a demand is generally known as "fraud". Although the word "fraud" is not expressly used in the Convention, it is clear that the exception to payment obligation provided for in Article 19 of the Convention reflects the "fraud" concept. Fraud is considered as an innovative step taken by the Convention since the issue of fraud is not clearly addressed and provided for in other rules of independent guarantees and stand-by letters of credit.

2. Elements of the Fraud Rule under the Convention

Article 19 of the Convention provides three major elements of the fraud rule as the exception to payment as follows;

a) Any Document Is Not Genuine or Has Been Falsified.

In the event that the document required to support the payment under an independent guarantees or stand-by letters of credit is not genuine or has been falsified, it shall be the ground for the guarantor or issuer for holding with payment to the beneficiary.¹²

b) No Payment is Due on the Basis Asserted in the Demand and the Supporting Documents

The demand, regardless of due consideration, therefore shall be considered on a case by case basis because the payment under stand-by letters of credit or independent guarantees is due on multiple basis, such as, on the basis of the fixed date in the demand relating to documents or on the basis of a contingency event e.g. the failure to make payment under the loan by the principal or applicant or defective/non-performance of certain conditions in construction contracts by the principal or applicant as the contractor or on the simple basis of the breach of the underlying contract.¹³

c) The Demand has no Conceivable Basis Judging by the Type and Purpose of the Undertaking.

Article 19 (2) of the Convention especially focuses on the kind of situations under which the demand will be considered as having no conceivable basis. Comparing to the specific grounds for withholding payment stipulated in Article 19 (1)

¹¹ *Id.*

¹² Article 19 subparagraph (a) of paragraph (1) of the Convention

¹³ Khemjuta Suwanjinda *supra* note 4, at 41.

(a) and (b) of the Convention, the ground under Article 10 (1) (c) is much more general in terminology since the Convention does not provide definition or meaning of the term “no conceivable basis”.¹⁴ Nevertheless, Article 19 (2) of the Convention articulates the situation in which a demand has no conceivable basis by providing the purposes of paragraph (1) subparagraph (c) of Article 19. The guarantor or issuer of the undertaking becomes the offensive party to look into the underlying transaction for good cause prior to make such payment in relation to the grounds for withholding payment to the beneficiary under Article 19 (2) (a), (b), (c) and (d) whilst subparagraph (e) of paragraph (2) of the Article 19 gather the role of the beneficiary and the guarantor or issuer on the notice that payment needs to be justifiably made by good course.¹⁵

3. Filing Application with the Court to Stop Payment

Court measures provided in Article 20 of the Convention, clearly establishes an important judicial mechanism to stop payment to the beneficiary in case where fraud under an independent guarantee or a stand-by letter of credit is established by the guarantor or issuer. The right to seek such provisional court measures is conferred by Article 20 of the Convention upon the principal or applicant or instructing party in the case of counter-guarantee.¹⁶ While the guarantor or issuer has the right to withhold payment to the beneficiary in the event where guarantor or issuer found the identity of fraud element in an undertaking¹⁷, Article 20 provides an ultimate solution to stop or to freeze payment under the undertaking, through provisional court order, against the guarantor or issuer who ignores to exercise the right to withhold payment to the beneficiary. This Article allows the principal or applicant to obtain a court order to block or freeze the payment proceedings under the independent guarantees and stand-by letters of credit if any of them are in with Article 19 of the Convention.¹⁸ Furthermore, Article 19 also creates a standard of proof upon the evidence presented to the court in order to obtain such provisional measures. The standard provided by Article 19 are on the basis that the principal or applicant must be able to present strong evidence immediately leading to the high possibility of fraudulent or abusive circumstance, committed by the beneficiary.¹⁹ In addition, the principal or applicant is further required to convince the court that it would be likely to suffer serious harm in the absence of such provisional measures and the possibility of the court to require a security from the principal or applicant in certain amount to ensure that the beneficiary shall not be suffering from the provisional court measures granted to the principal or applicant claiming false allegation or acting in *mala fide*.²⁰ However, Article 20 of the Convention limits judicial procedure usage by the principal or applicant to prevent the principal or applicant intervene operation of the undertaking, by granting the provisional court measures only in the cases provided for under Article 19 of the Convention. In addition, the Article also allows the court to grant provisional court order to the principal or applicant to withhold payment or freeze its procedure if the relevant undertaking is used for criminal purpose.²¹

¹⁴ Michelle Kelly-Louw, *International Measures to Prohibit Fraudulent Calls on Demand Guarantees and Stand-by Letters of Credit*, 1 *George Mason Journal of International Commercial Law*, at 109.

¹⁵ Charles Debattista, *Performance Bonds and Letters of Credit: A Cracked Mirror Image*, *Journal Business Law*, 298 (1997).

¹⁶ *Id.*

¹⁷ Article 19 of the Convention

¹⁸ Khumjuta Suwanjinda, *supra* note 4, at 44

¹⁹ *Id.*

²⁰ UNCTRAL Explanatory Note, *supra* note 17, comment 50.

²¹ *Id.* comment 51.

III. Fraud Rule under Thai Laws

Regarding this matter, Thailand does not have any direct law or specific provisions on independent guarantees nor letter of credit. In the event of any dispute in relation to documentary credit, focusing on fraud issue of undertakings, is brought before Thai courts whilst Thailand's Civil Procedural Code states that the Judge shall not deny to pass judgment by claiming that no specific law has been enacted to deal with the issue.

As Thailand has no applicable law covering fraud in independent guarantees or stand-by letters of credit, the fraud rule therefore is not recognized by Thai courts. The current applicable statutory laws applying to the undertaking is the autonomy of contract reflected in Section 151 of the CCC, which is allow the principal or applicant to be bound with the guarantor under the terms of the contract for issuing the undertaking whilst the guarantor or issuer is bound with the beneficiary under the contract. The concept of the undertaking is the payment method and the assurance to the creditor (beneficiary) that the bank will make payment for debtor's (principal or issuer) breach of the contract. The purpose of the contract to issue the undertaking, made between the applicant or principal and the issuer or guarantor, is not void because such agreement does not violate public order or good moral under Section 151 of the CCC.²² Nevertheless, as this financial method is a special tool used in international business, it shall be definitely confusing and uncertain to apply the laws in case the dispute in relation to the undertaking arises, which would require specific law to resolve the dispute.

Then this issue needs to be reconsidered in Section 151 of the CCC especially when fraud occurred and the bank has been notified by the principal that the documents submitted by the beneficiary are forged or falsified, thus the guarantor or issuer cannot withhold the payment by invoking the fraud rule due to nowhere in Thai laws designates the fraud rule under the undertaking. The guarantor/issuer, therefore, has to comply with the contractual duty under the agreement between the guarantor or issuer and the beneficiary by making payment under the undertaking. It would be different if the parties were to incorporate the fraud rule as an exception to payment into the contract, or make the Convention apart of the agreement, which will entitle the guarantor or issuer to be able to exercise their contractual right in relation to the fraud rule.

However, Section 16 paragraph two of the Draft simply provides for general situations under which payment under a stand-by letter of credit may be suspended until

²² Section 151 of the CCC An act is not void on account of its difference from a provision of any law if such law does not relate to public order or good morals.

proven otherwise, or security against damage is placed. Apparently, the wordings used in Section 16, paragraph two, confers broader discretion upon the issuing financial institution, confirmer, authorized, or nominated person, to suspend payment under the stand-by letter of credit than that allowed under Article 19 of the Convention because Section 16, paragraph two, uses the phrase “in case there is a reasonable ground for believing that...” while Article 19 of the Convention uses the phrase “if it is manifest and clear that”. It thus can be said that Section 16 of the Draft appears of be more flexible than Article 19 of the Convention in the sense that fraud does not need to be “manifest and clear” as required by Article 19 (1) of the Convention, but is merely based on a “reasonable ground for believing that”. This flexibility therefore allows broader discretion for the issuing financial institution, confirmer, authorized, or nominated person, to refuse payment under the stand-by letter of credit. However, in situations where the fraud rule can be invoked to withhold payment to the beneficiary, it appears that the situations under Article 19 of the Convention is broader than those specified in Section 16 of the Draft Act. In addition, Article 19 of the Convention does not specify the persons involved in the fraud while Section 16 of the Draft specifies the persons involved in the fraud, who are the beneficiary or employees or agents of the beneficiary and the bank has been aware or notified thereof. By comparison, it appears that in terms of the persons involved in the fraud, which can be interpreted to include persons other than the beneficiary, employees or agents of the beneficiary as specified in Section 16 of the Draft, the latter is more flexible than Article 19 of the Convention in terms of the situations under which the fraud rule can be invoked and of persons involved in the fraud.²³

Right of the Principal/Applicant to Commence Lawsuit to Stop Payment or Withhold its Process in Thailand

The procedural mechanism to stop payment through provisional court measures as provided for in Article 20 of the Convention to strengthen the enforcement of the fraud committed under Article 19 of the Convention, is not found in Thai law or the Draft. Without such procedural mechanism, effective enforcement of the fraud rule to stop payment by a court order is not possible especially when the guarantor or issuer fails to exercise the right to withhold payment under Section 16 of the Draft. Even though the Civil Procedural Code of Thailand authorizes the court to order an injunction, it remains unclear as to whether such injunction covers what is provided for in Article 20 of the Convention. In the case where the guarantor or issuer refuses to withhold payment to the

²³ Khemjuta Suwanjinda, *supra* note 4, at 81

beneficiary under the undertaking, when fraud has been invoked by the applicant or principal, no unilateral application for injunction under Section 254 (2) of the Civil Procedural Code can be filed with the court because there is no right of the principal or applicant being disputed from the consequences of the guarantor or issuer's refusal to withhold payment. Besides, there is no specific statutory law allowing the principal or applicant to pursue his right through the competent court according to Section 55 of the Civil Procedural Code. The provisions of Section 55 cannot to be applied to this matter because the money from the guarantor or issuer does not belong to the applicant or principal. No right of the principal or applicant is affected by the beneficiary's demand for payment accompanied with fraud elements because such is a contractual right between the beneficiary and the guarantor or issuer. Indemnity agreement between the applicant/principal and guarantor/issuer is a separate matter from the consequences of fraudulent demand of the beneficiary. Further, there is no law in Thailand affording the principal or applicant protection under the fraud rule in an undertaking. In conclusion, the provisional court measures as provided in Article 20 of the Convention do not exist under Thai law. The method in the Convention should therefore be adopted in Thai law to ensure the effective enforcement of Section 16 of the draft Documentary Credit Act.

Recommendations

Thailand must ensure that its law deals with independent guarantees and stand-by letters of credit as well as the fraud exception rule, together with the relevant procedural matters. Furthermore, it needs to formulate laws or to improve its existing Draft to accommodate commercial functions of the undertaking and the fraud rule concept under the Convention. Both the concept of the Convention and of existing non-mandatory rules and practices; such as, UCP600, ISP98 and URDG758, should be incorporated in the Draft in order to cover and improve in terms of clarity, the fraud rule in the undertaking under Convention. Contents of the Draft should be revised to be in line with the Convention as follows:.

1. The Draft should clearly cover “independent guarantees” as a part of the definition of the term “commercial documentary credit contract”.

2. The Draft should contain provisions dealing with the presumption under Article 15 (3) of the Convention that the beneficiary shall be deemed to certify that his demand for payment is not in bad faith and none of the fraud elements, stipulated in Article 19 subparagraphs (a), (b) and (c) of paragraph (1) of the Convention, are presented by the beneficiary.

3. Although the existing contents in relation to the fraud rule in the Draft i.e. Section 16, is more flexible than those under Article 19 of the Convention with respect to conditions to invoke the fraud rule, the Draft still should also describe the situations under which the fraud rule can be invoked in order to withhold the payment to the beneficiary, as stipulated under Article 19 of the Convention. The situations of fraudulent demands for payment in Article 19 are broader than those provided for in Section 16 of the Draft. In addition, Section 16 of the Draft should be amended to identify the persons involved in the fraud under the Convention.

4. The Draft should consider the provisions of Article 20 of the Convention with respect to provisional court measures to stop payment to the beneficiary in case where fraud under Article 19 of the Convention has been invoked. This procedural mechanism is quite important because it empowers the court of competent jurisdiction to issue a provisional order to prevent the beneficiary from receiving payment, or an order that the guarantor or issuer to hold the amount under the undertaking, including an order to freeze the proceeds of the undertaking and to block the payment to the beneficiary. Insofar as the undertaking is concerned, this kind of specific procedural mechanism is not found in the Draft or any other law in Thailand. Therefore, for the purpose of effective enforcement of the fraud rule as reflected in Section 16 of the Draft, the procedural mechanism of provisional court order spelt out in Article 20 of the Convention should be adopted by Thai law

REFERENCES

Books

Bertrams, Roeland. **Bank Guarantee in International Trade**. Third Edition. Kluwer Law International, 2004.

Mugasha, Agasha. **The Law of Letters of Credit and Bank Guarantee**. The Federation Press, 2003.

Articles

UNCITRAL Explanatory Note by UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, w. 8, U.N. Doc. A/CN.9431 (July 4, 1996).

Gao Xiang. “The Fraud Rule under the UN Convention on Independent Guarantees and Stand-by Letters of Credit: A Significant Contribution from an International Perspective”, **George Mason Journal of International Commercial Law**, Fall 2010.

Gao, Xiang & Buckley, Ross P. “A Comparative Analysis of the Standard of Fraud Required under the Fraud Rule in Letter of Credit Law”, **Duke Journal of Comparative and International Law**, Spring 2003.

J Browne, The fraud exception to standby letters of credit in Australia : Does it embrace statutory unconscionability?, vol.11, *Bond Law Review*. 101, 1996.

Debattista, Charles. “Performance Bonds and Letters of Credit: A Cracked Mirror Image”, **Journal of Business Law**, 1997

Thesis

Kayembe, Grace Longwa. *The Fraud Exception in Bank Guarantee*, 2008.

Suwanjinda, Khemjuta. *Possibility of Thailand’s Accession to The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, 1995.

THE PROPOSED LEGAL FRAMEWORK FOR LIBERALIZATION OF THAI POSTAL SERVICE*

*Chanikan Sukkasermasuk***

ABSTRACT

This research aimed to explore the legal evolution concerning the postal regulation in Thailand, factors affecting the change, and legal limitations, as well as relevant laws of postal regulation in Thailand comparing to those in overseas. Hence, from the research, this author found that purpose to establish the postal business was generally aimed at providing public services, maintaining security of state, peace and order as well as social morality. Originally, postal business was set up as a government agency, i.e. a ministry or a department. However, this form of postal business had created a delay in operation, overlapping procedures, and the lack of business flow. Thailand had adopted this form in the beginning under the state operation by the Post and Telegraph Department under the Postal Act. Now, the Thai postal business is being operated by the Thailand Post Company as a monopoly in the state enterprise status.

At present, postal business is under the control of the state. With the increase in advanced technologies, e-commerce business and electronic post, this has resulted in the decline of the letter delivery business. On the other hand, certain demand in some postal business such as logistic has created certain competition such as the transport business. Moreover, there is a need to reduce the government workload by revising the laws that will enable free trade, allow independent operation, and promote fair competition.

Based on the analysis result, recommendations were provided. In order to solve mentioned problem support smooth postal business operation, promote neutrality, reduce power overlapping, and to encourage the private sector's engagement in postal service competition, Thailand Post and the government should reorganize a regulating agency as an independent agency and revise the authority of the postal commission, including its structure and qualification of commission members to facilitate the effectiveness of postal operation. In doing this, the power and duty of independent agency can be identified in similar to those of foreign countries. The power of service operator with legal benefit should be reduced, i.e. Thailand Post, the sole operator.

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Legal framework should be redefined to reduce the monopoly in postal business and stimulate the liberalization.

Keywords : Postal Service, Postal business

บทคัดย่อ

จากการศึกษาพบว่า โดยทั่วไปการจัดตั้งกิจการไปรษณีย์ เพื่อเป็นการให้บริการสาธารณะ รักษาความมั่นคงของรัฐ เพื่อความสงบเรียบร้อยหรือศีลธรรมอันดีของประชาชน โดยเดิมจัดตั้งในรูปของหน่วยงานราชการเป็นกระทรวงหรือกรม ซึ่งมีความล่าช้า ขั้นตอนการทำงานที่ซ้ำซ้อนและขาดความคล่องตัว ประเทศไทยเริ่มดำเนินการกิจการไปรษณีย์โดยภาครัฐ จัดตั้งเป็นกรมไปรษณีย์โทรเลข ภายใต้พระราชบัญญัติไปรษณีย์ พ.ศ. ๒๔๗๗ ซึ่งปัจจุบันกิจการไปรษณีย์ได้ถูกดำเนินการโดยบริษัท ไปรษณีย์ไทย จำกัด ซึ่งเป็นการผูกขาดโดยหน่วยงานภาครัฐ ในรูปรัฐวิสาหกิจ

ปัจจุบันกิจการไปรษณีย์มีลักษณะเป็นการจำกัดอำนาจอยู่ที่ภาครัฐ แต่เมื่อมีความเจริญก้าวหน้าและพัฒนาทางเทคโนโลยี ส่งผลให้เกิดธุรกิจประเภท e - commerce และการส่งจดหมายทางอิเล็กทรอนิกส์เพิ่มสูงขึ้น ส่งผลต่อจำนวน ปริมาณการส่งจดหมายมีแนวโน้มลดลง รวมถึงความนิยมในธุรกิจที่เกี่ยวข้องกับกิจการไปรษณีย์อย่างเช่น ธุรกิจโลจิสติกส์ ที่ได้รับความนิยม จนก่อให้เกิดการแข่งขันในกิจการ ประกอบกับเริ่มมีความต้องการลดภาระการดำเนินงานของรัฐ จึงเริ่มดำเนินการปรับปรุงกฎหมายให้ทันสมัย และมีอิสระในการบริหารและการบริการ และสร้างกลไกทางตลาดที่ก่อให้เกิดการแข่งขัน โดยสรุปกิจการไปรษณีย์ได้รับผลกระทบจากการพัฒนาดังกล่าว ผู้ศึกษาจึงสรุปปัญหาที่พบได้ 2 ประการสำคัญ คือ ปัญหาทางเศรษฐศาสตร์ และปัญหาทางโครงสร้างกฎหมาย

ผลของการศึกษาให้ข้อเสนอแนะว่า เพื่อให้สามารถแก้ไขปัญหาข้างต้นได้ และส่งเสริมให้ภาคเอกชนเข้ามาแข่งขันในการให้บริการไปรษณีย์ รัฐบาลควรปรับปรุงองค์กรที่ทำหน้าที่กำกับดูแลกิจการไปรษณีย์ที่อยู่ในรูปแบบองค์กรอิสระ และปรับปรุงอำนาจของคณะกรรมการดูแลกิจการ ปณท รวมถึงพิจารณาโครงสร้าง คุณสมบัติของคณะกรรมการดังกล่าว เพื่อให้เกิดประสิทธิภาพในการดำเนินงานไปรษณีย์ โดยอาจกำหนดให้มีอำนาจหน้าที่ดังเช่น องค์กรอิสระในต่างประเทศ รวมถึงลดอำนาจของผู้ให้บริการที่ได้รับประโยชน์ทางกฎหมาย ซึ่งประเทศไทยมีเพียงรายเดียว คือ บริษัท ไปรษณีย์ไทย จำกัด รวมถึงการกำหนดกรอบของกฎหมาย เพื่อลดอำนาจการผูกขาดการดำเนินกิจการ ปณท เพื่อเปิดเสรีการดำเนินกิจการ ปณท

1. AN OVERVIEW OF THAI POSTAL BUSINESS AND RELATED THEORY¹

In the early days, postal service was provided by a government agency. However; technological advancement and industry liberalization in the telecommunication sector has changed the regulatory and market landscapes. Hence, to regulate and increase the capabilities and efficiency of postal operation, it is necessary to establish an independent regulatory body. The concept of a regulatory body is contained in the State Enterprises Privatization Master Plan²; however, the Plan does not include independent regulatory organizations in the postal business. Even though there is a Postal Committee, it does not have any duty to supervise or regulate the postal business. Therefore, the ‘regulatory body’ in the postal business is not acting like an actual regulatory body. In order to further investigate the postal regulatory scheme, the telecommunication regulatory regime will be used as the starting point since the postal business could be considered as part of the telecommunication sector. Hence, the regime to regulate this sector may be applicable to the postal sector as well. Moreover, nowadays the international telecommunication market has been greatly improved by new technology which extends the effectiveness of service network to the consumer and creates more competition. By the same token, the postal sector is experiencing a similar transformation.

The postal service in Thailand has been corporatized, i.e. transformed from a government agency into a company in which the government owns all of the shares. At the same time, the Postal Committee was established by Royal Decree to act as a regulator. Despite its transformation into a company, Thailand Post still maintains certain governmental powers and privileges.

The privileges or certain advantages that Thailand Post has over other service providers appear in section 78 of the Postal Act B.E. 2477. The Act empowers postal officers to search, arrest, or detain any individual who violates or there is probable cause that he violates the postal law. Furthermore, Thailand Post’s privileged status is also evident in the Postal Directive. Thailand Post can issue regulations, conditions as well as other details in relation to the exemption of service fees. Other

¹ กระทรวงเทคโนโลยีสารสนเทศและการสื่อสาร. ฐานข้อมูลกิจการไปรษณีย์. วิกิพัฒนาการกิจการไปรษณีย์ไทย. สำนักนโยบายและยุทธศาสตร์กลุ่มงานกิจการไปรษณีย์กระทรวงเทคโนโลยีสารสนเทศและการสื่อสาร. *ข้ามขอบฟ้ากรมไปรษณีย์โทรเลข*. <http://postact.mict.go.th/>. (The Ministry of Information and Communication Technology Postal Database, “The Revolution of Thai Postal Business, Office of Policy and Strategy, Postal Group, Ministry of Information and Communication Technology. *Across Skylines with Post & Telegraph Department*. <http://postact.mict.go.th>. N.d.)

² สำนักงานเลขาธิการคณะรัฐมนตรี. 2540. แผนแม่บทการพัฒนากิจการโทรคมนาคม. (The Secretariat of the Cabinet. B.E. 2540 (1997). *The Master Plan of the Development of the Telecommunication Sector*.

sections of the Act also empower Thailand Post to formulate regulations or directives that appear to conflict with its other role as an operator.

It can be concluded that Thailand Post has a privileged status over the private service providers in the same type of service. Its regulatory powers should belong to an independent regulatory organization acting as a central agency to regulate, establish service standards, and provide consumer protection.

2. LAW AND REGULATION ON THAILAND INTERNATIONAL POSTAL BUSINESS

From the history of Thai postal, there are 3 important postal laws and regulation for directing the postal business which are as follows;

2.1 Postal Act B.E. 2477

The Postal Act B.E 2477 (1934) is the successor of the first postal law enacted in Bangkok Era 116. Currently, the Minister of Information and Communication Technology is the competent authority under this Act. By virtue of sections 5 and 6 of the Act, absolute authority over the postal service is vested in the government postal agency. Furthermore, under section 7, the law also prohibits other operators, apart from a designated authority, to deliver, accept, collect and dispatch any postal items, which are letters, postcards, post parcels and EMS through the postal route. Moreover, the Act imposes punishment for those who violate sections 6, 7, 61, 62 and 63. The current Postal Act has therefore made Thailand Post, which is the only designated government agency to provide a postal service throughout the country, an absolute monopoly with the power to control postal services in Thailand.

2.2 The Royal Decree B.E. 2546 Determining the Authorities, Rights and Benefits of Thailand Post

This is the organic law of the State Enterprise Capital Act B.E 2542, section 26. This royal Decree sets up the Postal Affairs Committee to act as the regulator, but this objective has not yet been realized. The purpose of this royal decree also continues the operation of Thailand Post with being separated from the postal service and communication service.

The law defines the powers and duties of Thailand Post to operate postal business according to section 5 of the Postal Act B.E. 2477. Section 4 of the Decree states that in the operation of postal business and other postal- related businesses including businesses that are linked, similar or beneficial to postal business, Thailand Post is vested with the power, enjoys the privilege or protection under the law governing postal business as previously enjoyed by the Communication Authority of

Thailand (CAT), or other laws enacted for CAT, except as stipulated in sections 6, 12, and 13

2.3 The Postal Directive B.E. 2557³

The Postal Directive is a collection of rules, regulations, orders or announcements related to the provisions of postal service generally dealt with under the Postal Act B.E. 2477 and the Act of the Universal Postal Union (UPU) by which the UPU member countries must abide. The Directive is amended from time to time accord with the decisions made by the UPU Congress, which is held every 4 years and complied with the present UPU acts. This directive is focused on international postal service. Most of directive defines about the international postal regulation and the most important regulation relate to including part 1 to 9 such as payment of service charges, postal service, postal money order service etc.

3. THE OVERVIEW OF POSTAL LAW AND REGULATION IN OPERATION IN FOREIGN COUNTRIES AND INTERNATIONAL ORGANIZATIONS

3.1 International postal regulation and organization

Universal Postal Union (UPU)⁴ is the postal organization which attempt to support the postal liberalization, but UPU does not directly address postal liberalization at all. Its Constitution, which contains general regulations, rules of procedure and legal statutes, with commentary by the UPU International Bureau, clearly states the intention of the UPU in postal operations in article 1, Section 1, Organic Provisions, Chapter 1, General. The scope and objective of the Union is to support a single postal territory and freedom of letter transit to allow the UPU's members to improve their postal service. The objective is to support the development and improvement of the worldwide postal network through the development of infrastructure, products and services, and through the use of information and communication technologies.

Meanwhile, exempt from the UPU's law and rule, there is other international policy of privatization and liberalization in the public service sector was set by the European Commission called, the EU Policy. The purpose of EU Policy is to

³ Ministry of Information and Communication Technology. B.E. 2557 (2014). "Postal directive B.E 2557." In *Executive summary*. Bangkok.

⁴ Universal Postal Union. 2015. "Status and structure of postal entities, Universal Postal Union, (UPU)" Accessed May 27. <http://www.upu.int/en/the-upu/forums-on-postal-regulation/about-forums-on-postal-regulation.html>.

make high – quality public service in the European social model affordable, with open and competitive internal markets and also set the policy area of liberalization to include the postal service since it provides vital communication throughout the EU market. Hence, the European Commission enacted the EU law that consists of three postal directives: Directive 97/67/EC of 1997, as amended by Directive 2002/39 and Directive 2008/6/EC, aiming to gradually liberalize postal services and to make clear to citizens that the postal services would remain accessible everywhere and to everyone under the same conditions as the universal service with high quality and low price provided by both the incumbent and alternative postal operators.

3.2 The foreign postal regulatory law and regulation

3.2.1 United States of America⁵

In the US, there are two regulations related to the postal operation, which are key to the development of effective US postal business.

First, the Postal Accountability and Enhancement Act of 2006 (PAEA) addresses postal regulation and the role of postal regulator, revising some sections in US Code relating to the postal service and its products.

Second, The US Code mainly addresses the postal regulation in the United States, and the regulation in PAEA which is also addressed under this US Code. The major postal regulation and organization are as follows:

In the US regulatory postal service, Postal Regulatory Commission (PRC)—formerly the Postal Rate Commission—the independent agency of the executive branch that has exercised regulatory power over the postal service since the initiation of Postal Reorganization Act of 1970. Their responsibilities were expanded under the Postal Accountability and Enhancement Act of 2006.

3.2.2 United Kingdom⁶

The UK postal business was established in 1635 and gradually developed including the establishment of the general post office and uniformed postmen. The post office maintained a monopoly, including one over the telegraph service, until 1969, when the business became a nationalized industry. In 1981, the telecommunication division was spilt off from the post office to create British Telecommunication.

⁵ United States Postal Service. 2012. “The postal service begins.” In *The United States Postal Service: An America History 1775 – 2006*.

⁶ Binchata, Constantina. 2012. *Regulation of UK Postal Services 2002*. Thesis, University of Bath.

Regarding regulation, in 2000 the Postal Services Act was enacted. This Act began the process of market liberalization and, along with the Postal Services Regulations 1999, ensured that the United Kingdom complied with European law on postal services. This Act initiated the new system of licensing and regulation for postal service operators, which brought them in line with the European Union's (EU) liberalization initiatives. Moreover, the law gave the established independent regulator, the Postal Services Commission (Postcomm), new powers and duties to protect the interests of postal service patrons.

The Postal Services Act 2000 constituted the main legal framework introduced by the government to reform the UK Post Office. The Act neither privatized the post office nor removed its existing monopoly. It did, however, attempt to reform the post office in line with the European Union's liberalization initiatives. The Act introduced a new system of licensing and regulation for postal service operators and gave the established independent regulator, Postcomm, new powers and duties to protect the interests of users of postal services as a new and fully independent regulator.

There were regulatory reforms in 2011. The government passed the Postal Services Act 2011, declaring a major change in the regulatory framework that governs the one-price-goes-anywhere, six-days-a-week universal service. Moreover, as per part of the 2011 Act, POSTCOMM was incorporated as the communications regulator, the Office of Communications (OfCOM), on 1 October 2011. that was enacted the duties and responsibilities of Ofcom's focus on protecting the United Kingdom's Universal Service and set the price of royal mail regulation fee. Recently, the UK postal service provider is divided into two types, as follows: (1) The government designated Royal Mail as a designated operator for providing the universal postal service regulated by Postcomm. (2) Postal operators are the private companies that need to receive licences from the regulator, Postcomm. Licences are issued for a rolling ten-year period.

3.2.3 Sweden⁷

The Swedish postal system operates in one of the most liberalized mail markets in the world. The postal business in Sweden was established as The Royal Postal Agency in 1636 by the Swedish dynasty. The business was operated as a government agency into the 1990s. It was then transformed into a government-owned limited company. In 1993, the national post, called Posten at the time, lost its monopoly privileges on letter mail and began to transform into a private corporation. In 1994, the

⁷ PostNord. 2015. "AB, Mission and Vision." Accessed August 1. <http://www.postnord.com/en/about-us/mission-and-vision/>

government officially privatized the business, and Posten became a new entity called Posten AB. This entity remains entirely owned by the Swedish government as of 2015. Moreover, this transformation triggered the liberalization of the postal market. After the transformation, the national Telecom Agency was given responsibility for postal matters and became the Swedish Post and Telecom Authority (PTS).

Postal service centres, run by Posten, were maintained for business clients only. The largest service for Posten AB distributors was regular mail, but it was under increasing competition from private companies. On 24 June 2009, Posten AB merged with Post Danmark and became a new holding company called PostNord AB. PostNord is owned by the Swedish (60 per cent) and Danish (40 per cent) governments. Sweden has The Swedish Post and Telecom Authority (PTS) as its regulator. PTS is a public authority which monitors the electronic communications and postal sectors in Sweden and reports to the Ministry of Enterprise, Energy and Communications. PTS is managed by a board appointed by the government.

3.2.4 Japan⁸

Japan's postal service was started in 1871 by Hisoka Maejima and the post boxes were set up while the service was made available to the public. Maejima also proposed related postal businesses including postal money orders and postal savings services. Starting in 1878 and before the Second World War, postal savings were used for social capital throughout Japan, and this became widely known among the Japanese people. In 2001, the new Postal Services Agency was established to expand the independent investment of postal savings. In 2003 the agency was reorganized as Japan Post under the ownership of the government. The Ministry of Public Management, Home Affairs, Post and Telecommunication (MPHPT) operated under the Japan Post law. The government also released the "basic policy on the privatization of the postal services" in September 2004. The basic policy imposed that Japan Post would be privatized in 2007 after a transitional period based on the following five principles on advancing the privatization of postal services: revitalization, consistency, convenience, resource utilization, and consideration.

In 2005, the Postal Service Privatization Act was enacted by the Japanese government. In 2006, Japan Post Holdings Co., Ltd was founded to plan for the privatization of postal services. In 2007, Japan Post's businesses were separated into four companies (a mail delivery company, an over-the-counter services network firm, a postal savings company, and an insurance services company) called Japan Post Network

⁸ Japan Post Bank. 2013. *Annual report, year ended march 31, 2013*. Accessed July 27, 2015. <https://www.japanpost.jp/en/group/disclosure/2013/>.

Co., Ltd, Japan Post Service Co., Ltd, Japan Post, Bank Co., Ltd and Japan Post Insurance Co., Ltd. The shares of these companies were 100 per cent-held by Japan Post Holdings, but it requires the JAPAN POST HOLDING⁹ as the parent company to list and sell the shares, but during the transition period, the shares are to be sold up to two – thirds of the shares of the parent company. Accordingly, the Japan Post Group would continue to provide customers with better postal, basic banking and insurance services at post offices nationwide. Following the earthquake at the end of 2012, the Japanese government disclosed the plan to dilute the shares of the JAPAN POST HOLDING Co., Ltd within three years¹⁰.

4. THE PROBLEM AND ANALYSIS OF POSTAL BUSINESS IN THAILAND

4.1. Problem of monopolized service of Thailand Post

At present, the operation of postal services involves a number of agencies under the government and private sectors which include Thailand Post, DHL, FEDEX, and travel agencies that lawfully and unlawfully provide delivery service. However, the letters and postcards delivery business is under the sole operation of Thailand Post. Theoretically, monopoly is a crucial problem in economics.

4.1.1 *Economic problems from the author's analysis found that in economic theory,*

this type of monopoly business of Thailand post will result negatively on postal service in the 2 aspects. First, there are impact on operators because lack of motive to improve the product design or increase service efficiency to compete with competitors. Second, there are impact on consumers because monopoly provides a direct impact on postal service consumers due to no other available alternative choices. This differs from the market with a large number of providers where consumers can turn to other providers if they are not satisfied with the service of a provider.

4.2 The problems of legal structure are as follows;

4.2.1 *Irrelevance of existing laws to the current postal situation*

Postal related law has long been in force but it appear not to be in accordance with the change in postal affairs at present such as the improvement of some

⁹ Japan Post holding Co., Ltd. 2007. "Overview of privatization." In *Annual report 2007.9*

¹⁰ Campbell, James I. Jr., and Amelia Porges. 2008. "How much postal reform in Japanese Postal privatization?" In *Handbook of Worldwide Postal Reform*. Cornwall: MPG Books Ltd.

postal service liked logistics business which is not defined or updated in existing Postal Act.

4.2.2 Postal regulatory structure

It seems that there is no governance structure of Thailand Post, as found in foreign countries. Even though there is the Postal affair committee, its role and responsibilities are ambiguous. Moreover, there is no clear and overlapping of governance power among Thailand Post, Postal Affairs committee and Ministry of information and communication technology.

4.3 The comparison of Thai and foreign legal structures

In reviewing the postal affairs in overseas countries, it is found that most of them were initially operated by the government and later developed, improved, and changed into private sector operations. An independent agency is typically established to act as a regulatory body on service standard, price, consumer protection, and on the establishment of a fair and free competitive condition for consumer services. Any rules prescribed are typically in line with the government policies by which the policies and direction of business operation are identified. The evolution, role, and duty of concerned organizations in postal affairs are summarized as follows:

	Thai	US	UK	SWEDEN	JAPAN
Law	The Postal Act B.E 2477, the Royal Decree B.E. 2546 Determining the Authorities, Rights and Benefits of Thailand Post,the postal directive B.E 2557	US Code and Postal Accountability and Enhancement Act 2006	Postal Services Act 2000 and Postal Services Act 2011 etc.	Postal Service act 2010 and Postal Service Ordinance 2010	The Act for Partial Revision of the Postal Service Privatization Act and others, the amended legislation, the Postal Service Privatization Act, and the Law Concerning Correspondence Delivery provided by Private Sector Operator
Government	Ministry of Information and	US Department of State Bureau	Secretary of State for	Ministry of Enterprise,	The Ministry of Internal Affairs

	Communication Technology	of International Organization Affairs.	Culture, Media and Sport	Energy, and Telecommunications	and Communications (MIC)
Regulatory	-	Government regulatory commission (Postal Regulatory Commission)	OFCOM (formerly Postcomm)	Swedish national post and telecom agency (Post-och telestyrelsen, PTS)	No independent regulatory organization (governed by MIC for policies and JP holding for operation)
Designated operator	Thailand Post Company Limited	USPS	Royal Mail Ltd under Part 1 Section 2 (6)	Posten Sverige AB	Japan Post Group
Monopoly/ reserved services	Under section 5 of Postal Act B.E 2477	There is a postal monopoly under the Private Express Statutes (PES) and the mailbox rule	Full competitive market in 2006	Full competitive market	There is a monopoly in correspondence , but it has been liberalized
License system	-	License system	Without license system in the postal sector under the Postal Service Act 2011	License system in private postal operator	License system

The table shows that postal principles are similar, even though some postal services are operated as government agencies while others operate with a public company structure. It depends on the development of technology, entry into the postal competition environment, the expansion of new business like e-commerce and also the continual decline of letter and post card delivery. Besides, the framework set by the

European Commission states that postal operation should reduce monopoly power, and it encourages the revision of regulations to support competition. However, universal postal service still exists in all governments which designates an operator and sets up a universal service obligation. In most countries the government attempts to define the standards of private and public postal operation by creating licensing systems and independent regulatory authorities, as is the case in the United Kingdom and Sweden. The postal system in Japan, however, is directly controlled by the government as the shareholder of Japan Post Holding co., Ltd.

At present, the operation of postal services involves a number of agencies under the government and private sectors which include Thailand Post, DHL, FEDEX, and travel agencies that lawfully and unlawfully provide delivery service. However, the letters and postcards delivery business is under the sole operation of Thailand Post. Theoretically, monopoly is a crucial problem in economics

4.4 Analysis of problem solving approach

Now, there are several problems of postal service. It deals with legal structure such as irrelevance of existing laws, postal regulatory structure, and lack of clearness in the role and status. This is because the government policies in the past have imposed postal affairs under a monopoly system. In this respect, several problems occur in relation to existing postal laws. The author's investigation pointed out many problems regarding legal structure.

The author offers the ideas to solve the postal problem as follows;

4.4.1 Liberalization of letter collection and delivery service

The government should liberalize the service of letters collection and delivery by revising section 5 of postal act B.E 2477 because it will create more effective regulatory and liberalized system for good and effective service

4.4.2 Revision of relevant legal provisions

For the practical liberalized system, the government should establish the independent regulatory organization.

There should be the establishment of an independent agency adopting the concept of neutrality and standards of regulation upon separate operations between the government, providers and clients. The concept to support this proposal was introduced in international bodies such as EU and World trade organization. Most of the foreign countries studied followed this concept but some of them, such as, the US, did not employ an established regulatory agency. Instead a government designated Commission with the duty to provide the transparency and accountability of the United States Postal Service to support the universal mail system was established. The

Commission also establishes and maintains an effective system of rate and product regulation. In the UK or Sweden, unlike the US, their postal development progresses through a complete independent agency on their own operational structure and program. The agency's Commission comprises knowledgeable and expert members from the private sector who were appointed by the minister of relevant ministry. Its role and duties are to oversee postal business, set the standards for services and business operation, define the scope and requirements for granting license, and to promote competitive atmosphere in postal business.

It is suggested to abolish certain provisions of existing law, particularly the Postal Act, section 5, that confers sole authority to Thailand Post which gives rise to several problems discussed earlier.

This agency should be intended to regulate postal business and provide definite operational direction in line with the government policies, and to set the standard criteria for client protection. As suggested by the investigation of the way in which an independent agency was set up in a standard characteristic in the UK, the operational structure of such agency should be implemented by an independent commission under the law that specifies its qualifications and guideline for practice.

4.4.3 Harmonizing with the liberalized concept,

The concept which the author agrees is to establish the licensing system. To establish a licensing system, the regulator should formulate rules and regulations to apply for a license as standard criteria to be fulfilled by all service operators for their license application. According to the country models examined in chapter 4, Sweden displayed an authentic licensing system in which standards were set for private operators who require license and Swedish post and telecom agency (PTS) was assigned to determine licensing rules. Sweden distinguished licensing rules and regulation between private operators and basic services operator, with clear standards for determining the license. At present, there are as many as private operators showing their interest to engage in postal business. This has led to competitive standards, while people can access to quality service and coverage.

4.4.4 Establishment of Universal Service Obligation (USO) in postal service section.

Recently, there is no USO concept in postal service because it is under the monopoly of Thailand Post operation. The concept of universal service obligation came from the intention to serve the universal service. The framework of universal postal service is in "EU Directive 97/67/EC" which set up a new EU framework for the regulation of postal service. The provision was defined to ensure the universal postal

service in each member state. This defined the minimum characteristics of this universal service as:

- one collection from appropriate access points every working day
- one delivery to all addresses every working day
- to include postal items and packages up to 20 kilograms; plus
- a service for registered items and insured items

This directive aims to all UPU's member countries to guarantee that the customers will enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory at affordable prices

5. CONCLUSION

This study shows the gradual development of postal business since the establishment of state postal office as the national communication channel operated by the government. At that time the postal operation is in the monopoly system as public service. However, at present, the dramatic development of technology and transportation makes communication easier than before within country and between nations, which results in reducing the role of government in the operation of postal. Even though there are other communications channels, some of kind of business still has to rely on a mail delivery system. Currently some countries imply the liberalization of postal system in postal affairs businesses, especially developed countries. Hence, the author believes that the continuation of the current monopoly postal affairs system will prolong the problems in a regulatory system such as lack of enthusiasm to develop their business for supporting the service competition with the private sector. For this reason, the method to liberalize Thai postal services are; first, revising the related postal system, second, improving regulatory postal structures, third, establishing an independent organization separate from the government, and finally creating a regulatory system such as a licensing system and also USO system which allow the benefits and good effective postal service for people .

REFERENCES

1. Books and Book Articles

1.1 English

- Binchata, Constantina. 2012. *Regulation of UK Postal Services 2002*. Thesis, University of Bath.
- Institutes of Research and Development for Public Enterprise. B.E. 2557 (2014). “*The industry environment.*” In *Performance report of Thailand Post Company limited in B.E 2557*. Bangkok.
- Ministry of Information and Communication Technology. B.E. 2557 (2014). “Postal directive B.E 2557.” In *Executive summary*. Bangkok.
- United States Postal Service. 2012. “The postal service begins.” In *The United States Postal Service: An America History 1775 – 2006*.

2. Articles

2.1 Thai

- สำนักงานเลขาธิการคณะรัฐมนตรี. 2540. แผนแม่บทการพัฒนากิจการโทรคมนาคม. (**The Secretariat of the Cabinet. B.E. 2540 (1997). *The Master Plan of the Development of the Telecommunication Sector.***

2.2 English

- Campbell, James I. Jr., and Amelia Porges. 2008. “How much postal reform in Japanese Postal privatization?” In *Handbook of Worldwide Postal Reform*. Cornwall: MPG Books Ltd.
- Consumer Postal Council. 2013. “Executive summary.” In *Universal postal service in major economies*.
- Japan Post holding Co., Ltd. 2007. “Overview of privatization.” In *Annual report 2007.9*.
- Japan Post Group. 2014. “Japan Post Group Corporate Governance System.” In *Annual report 2014*.

3. Electronic Media

3.1 English

- OFCOM. 2015. “Condition imposed by OFCOM, Regulatory Conditions.” Accessed June 5. <http://stakeholders.ofcom.org.uk/post/conditions/>.
- PostNord. 2015. “AB, Mission and Vision.” Accessed August 1. <http://www.postnord.com/en/about-us/mission-and-vision/>.

Swedish Post and Telecom Authority (PTS). 2015. "PTS's postal sector activities."
Accessed June 3. http://www.pts.se/upload/Faktablad/En/2014/Faktablad-post-2014_ENG.pdf.

Universal Postal Union, (UPU)" Accessed May 27. <http://www.upu.int/en/the-upu/forums-on-postal-regulation/about-forums-on-postal-regulation.html>.

LEGAL CONTROL ON COOKIES*

*Chatchom Suwanno***

ABSTRACT

Cookies are equipment, used by third parties including website owners and third-party advertisers, collecting and tracking internet users' personal data and privacy while internet users are surfing on the internet. In this regards, website owners and third-party advertisers use cookies without internet users' knowledge and consent by installing cookies on internet users' terminal equipment such as computers, laptops, and mobile phones. Therefore, the aforementioned action of website owners and third-party advertisers shall be deemed as infringement of internet users' right of privacy and personal data.

In Thailand, website owners and third-party advertisers also use cookies without internet users' knowledge and consent because while surfing on the internet, there is no any notice of the use of cookies on the sites. Therefore, it shall be deemed that most internet users have no idea of what cookies are, how harm cookies are and what the purposes of cookies are. In this regards, the current Thai law are not sufficient to control the use of cookies since there is no specific law to apply for this matter.

However, the developed states are aware of the infringement of internet users' privacy and personal data; therefore, they changed several legal provisions to control the use of cookies.

Regarding this matter, this thesis aims to study on the problems of the use of cookies and analyze the current and proposed Thai law whether they are suitable to control the use of cookies. Furthermore, it also provides and analyzes the principles of foreign legislations in accordance with the legal control on the use of cookies in the following states or countries: the European Union, the United Kingdom, Italy, and the United States of America. Then, it will provide recommendation to solve this matter in Thai law.

Keywords: Cookies, The Use of Cookies, Privacy, Personal Data

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บทคัดย่อ

คุกกี้เป็นอุปกรณ์ชนิดหนึ่งที่ใช้สำหรับเก็บข้อมูลของผู้ใช้อินเทอร์เน็ต และติดตามพฤติกรรมของผู้ใช้อินเทอร์เน็ตในขณะที่กำลังใช้อินเทอร์เน็ตเพื่อกระทำการใดๆ โดยบุคคลที่สามซึ่งรวมไปถึง เจ้าของเว็บไซต์ และนักโฆษณาที่เป็นบุคคลภายนอก ซึ่งในกรณีดังกล่าว เจ้าของเว็บไซต์ และนักโฆษณาที่เป็นบุคคลภายนอกจะติดตั้งคุกกี้บนเครื่องมือที่สามารถเข้าถึงอินเทอร์เน็ตได้ อันได้แก่ คอมพิวเตอร์ คอมพิวเตอร์มือถือ และมือถือ โดยปราศจากการรับรู้และความยินยอมของผู้ใช้อินเทอร์เน็ตแต่อย่างใด โดยการกระทำดังกล่าวเป็นการละเมิดต่อสิทธิในข้อมูลส่วนบุคคล และสิทธิความเป็นส่วนตัวของผู้ใช้อินเทอร์เน็ตเป็นอย่างมาก

ในประเทศไทย เจ้าของเว็บไซต์ และนักโฆษณาที่เป็นบุคคลภายนอก ก็ใช้คุกกี้โดยปราศจากการรับรู้และความยินยอมของผู้ใช้อินเทอร์เน็ตเช่นกัน เนื่องจากเมื่อผู้ใช้อินเทอร์เน็ตมีการเข้าถึงหน้าเว็บไซต์ต่างๆ ก็ไม่ได้มีข้อความใดๆที่ระบุถึงการใช้คุกกี้ของเว็บไซต์ให้แก่ผู้ใช้ใช้อินเทอร์เน็ตทราบ ดังนั้นอาจจะสันนิษฐานได้ว่าผู้ใช้อินเทอร์เน็ตส่วนใหญ่ไม่มีความรู้ที่คุกกี้คืออะไร คุกกี้มีผลเสียอย่างไร และคุกกี้มีไว้เพื่อใช้ทำอะไร ซึ่งในกรณีนี้ กฎหมายไทยที่บังคับใช้ในปัจจุบันไม่สามารถบังคับได้เพียงพอกับการใช้คุกกี้ ดังนั้นจึงไม่มีกฎหมายโดยเฉพาะที่ควบคุมการใช้คุกกี้แต่อย่างใด

อย่างไรก็ตามสำหรับประเทศที่พัฒนาแล้วได้มีการตระหนักถึงการละเมิดสิทธิส่วนบุคคลและสิทธิในข้อมูลส่วนบุคคลของผู้ใช้อินเทอร์เน็ต ดังนั้นประเทศเหล่านี้ได้มีการแก้ไขเปลี่ยนแปลงบทกฎหมายที่ใช้สำหรับการควบคุมการใช้คุกกี้

ดังนั้นวิทยานิพนธ์ฉบับนี้จึงมุ่งศึกษาถึงปัญหาที่เกิดจากการใช้คุกกี้และวิเคราะห์ว่ากฎหมายที่บังคับใช้ในปัจจุบันและร่างบทบัญญัติที่ถูกเสนอเกี่ยวกับเรื่องการควบคุมคุกกี้ในประเทศไทยนั้นเหมาะสมและเพียงพอหรือไม่ นอกจากนี้ ยังมีการศึกษาถึงบทบัญญัติเกี่ยวกับการควบคุมการใช้คุกกี้ในประเทศต่างๆ ได้แก่ สหภาพยุโรป สหราชอาณาจักร อิตาลี และสหรัฐอเมริกา และพิจารณาว่าควรจะมีข้อเสนอแนะเกี่ยวกับการแก้ไขปัญหานี้ในประเทศไทยอย่างไร

คำสำคัญ: คุกกี้ การใช้คุกกี้ สิทธิส่วนบุคคล สิทธิในข้อมูลส่วนบุคคล

Introduction

Generally, people usually understand that personal information is the information about their lives such as names, addresses, birthdays, telephone numbers, credit cards' numbers or ages but in the eyes of law, personal information is not only information about one's life but it is also deemed as human fundamental right, which includes information privacy, territorial privacy, bodily privacy and communication privacy as declared in section 12¹ of Universal Declaration of Human Rights or UDHR 1948.²

In the current business environment, most companies serve consumers more

¹ Section 12 of UDHR 1948 states that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

² นันทิพย์ บุญเกิด, ความรับผิดทางอาญากรณีละเมิดข้อมูลส่วนบุคคล: ศึกษาเฉพาะกรณีข้อมูลส่วนบุคคลที่จัดเก็บในระบบคอมพิวเตอร์, หน้า 1 (เมษายน 21, 2548) (Namthip Boonkerd, **Criminal Liability for the Transgression of Personal Data: Particularly Study about Personal data which be Kept in the Computer System**, 1 (April. 21, 2005)).

convenient by creating their own websites; therefore, consumers can easily search on the internet about the needed products or information, but this convenience might bring some drawbacks to consumers themselves. As the internet provides new opportunities to trade business and to communicate with third parties, it also gives more opportunities for third parties to collect internet users' personal data and track internet users' behavior while surfing the internet without their knowledge and consent by using an instrument called "Cookie".

Cookies are essential for online shopping websites since cookies are used to remember products that the internet users choose in the shopping basket. In addition, several websites use cookies for the purpose of remembering emails and passwords of internet users. As aforementioned, it seems that cookies provide benefits to internet users since it can help transaction on online shopping website to be completed and it can save time for internet users to enter into emails or websites.

However, several website owners and/or third-party advertisers also use cookies in bad faith for tracking internet users' behavior and collecting internet users' personal data regarding interest of product, then place web ads on each internet users for each interest of advertisement in order to promote brand and increase sale. In addition, the information received from such collection can be sold to any person interested in personal data, which cost enormous value.

In this regards, since internet users have their own right on their personal data and privacy; therefore, using cookies for collecting internet users' personal data without their prior consent shall be deemed as infringement of personal data. In addition, using cookies for tracking internet users' behavior without internet users' knowledge and consent is also deemed as infringement of privacy.

As aforementioned, many developed countries; for example, the United States of America and the European Union, realized on the damages caused by the use of cookies to the internet users' personal data and privacy. They amended their legal provisions to apply for the use of cookies. However, Thai laws provide neither specific legal provision to be applied for the use of cookies nor legal provision to be controlled for website owners or third-party advertisers. It therefore becomes questioned that whether current Thai laws are sufficient to be applied with the infringement of personal data and privacy from the use of cookies by website owners and/or third-party advertisers. In addition, since there are various organization drafting Data Protection Act B.E...., this shall be realized whether the provisions provided in the draft are sufficient to cover the use of cookies.

Problems of the use of cookies

Cookies are used by website owners and third-party advertisers without internet users' knowledge and consent. Although cookies provide facility to internet users if cookies are used in good faith; for instance, it provides consistency for websites, it helps to complete online shopping, it provides security purpose for bank transaction. However, cookies are also used in an inappropriate manner to deceive internet users for the purpose of commercial ads on marketing; for example, third-party advertisers disguise cookies to track and collect internet users' personal data without internet users' knowledge and consent while internet users are surfing internet in order to scope targeted advertisement and place interested web ads on each internet user's webpage once internet users open websites.

Furthermore, website owners collect internet users' personal data and sell this information to others such as insurance company and marketing company, which may cost annoyance and damages to the owner of data since these companies might call or send emails to the owner of data in order to offer or sell their products. In addition, if

anyone has large amount of information for both online and offline data, he may be able to create internet users' profiles; for instance, DoubleClick case³.

However, not all type of cookies are dangerous to internet users, only the use of cookies for some purposes is effected to right of personal data and privacy of internet users.

Legal Control on Cookies in Foreign Countries

The European Union

Regarding legal control on the use of cookies, at the beginning, Section 5(3) of the Directive on Privacy and Electronic Communications 2002/58/EC of the European Union Parliament (the Directive 2002/58/EC) states that *“(3) Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC⁴, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.”*

Referred to section 5(3) of the Directive 2002/58/EC, it can be concluded that if website owners would like to use cookies in order to gain access to information stored in the terminal equipment of the internet users, such website owners are required to inform internet users of such use of cookies clearly and comprehensively. However, there are two exemptions, which are not required to follow the rules, which are the use of cookies for sole purpose to carry out the transmission of communication over the network and the strictly necessary used, which are explicitly requested by internet users.

Although the Directive 2002/58/EC provides the rules for the use of cookies, it might not help to decrease the infringement of privacy and personal data. Hence, the European Union (the EU) had changed the rules in Section 5(3) by issuance the Directive on Privacy and Electronic Communications 2009/136/EC (the Directive 2009/136/EC), which states that *“Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.”*

³ DoubleClick used cookies for collecting internet users' personal data and tracking internet users' behavior. Hence, DoubleClick had been investigated into privacy breaches. In this regards, DoubleClick had to pay \$1.8 million for the settlement.

⁴ The Data Protection Directive (officially Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data) is a European Union directive adopted in 1995 which regulates the processing of personal data within the European Union. It is an important component of EU-privacy and human rights law.

In this regards, Section 5(3) of the Directive 2009/136/EC provides that in the event that website owners wish to use cookies, they are required to inform the internet users of purpose of the use of cookies clearly and require prior consent from internet users, which shall be shown expressly and freely given. The method to give notice and receive consent may be in form of pop-up window and if internet users consent or refuse the use of cookies, internet users can represent their intention by ticking in or off the box, provided in pop-up window notice.

Nevertheless, the exemptions of the rules are the same as provided in Section 5(3) of the Directive 2002/58/EC.

The United Kingdom

The United Kingdom (the UK) is the first country of the EU that changed their regulations in order to comply with Section 5(3) of the Directive 2009/136/EC. The amendment of the use of cookies is in Regulation 6 of the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, which are similar to the details of Section 5(3) of the Directive 2009/136/EC, details of this provision are stated as follows:

“(1) Subject to paragraph (4), a person shall not use an electronic communications network to store information, or to gain access to information stored, in the terminal equipment of a subscriber or user unless the requirements of paragraph (2) are met.

(2) The requirements are that the subscriber or user of that terminal equipment

— (a) is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and

(b) is given the opportunity to refuse the storage of or access to that information.

(3) Where an electronic communications network is used by the same person to store or access information in the terminal equipment of a subscriber or user on more than one occasion, it is sufficient for the purposes of this regulation that the requirements of paragraph (2) are met in respect of the initial use.

(4) Paragraph (1) shall not apply to the technical storage of, or access to, information

(a) for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network; or

(b) where such storage or access is strictly necessary for the provision of an information society service requested by the subscriber or user.”

Referred to the above section, if website owners wish to use cookies in order to gain access to information stored or use cookies to collect information, website owners are required to provide clearly and comprehensively of the purpose of the use of cookies and provide internet users opportunity to consent or refuse of such use of cookies by showing their intention expressly. However, there are also exemptions of this rule, which are the same as provided in the Directive 2009/136/EC.

If website owners fail to perform as the legal control provided in Regulation 6 of the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, stated in the aforementioned, website owners have to be fined in the amount of not exceeding £500,000, determined by the Commissioner. After website owners have been fined, the monetary penalty shall not be kept by the Commissioner but shall be paid to the Consolidated Fund, which is owned by HM Treasury.⁵

⁵ Affilinet, *EU Cookie Law : Understand the EU's ePrivacy Directive*, 17, (2011).

Italy

Referring to Section 5(3) of the Directive 2009/136/EC, Italy had amended their legal control on the use of cookies by issuance of Personal Data Protection Code, Legislative Decree No. 69 of 28 May 2012, regarding consent and privacy policy for using cookies is held by the Italian Data Protection Authority.

Regarding the use of cookies, Italy had divided cookies into two major types, which are technical cookies and profiling cookies. In this regards, technical cookies are installed by website owners only, third-party advertisers are not involved and the use of technical cookies is not harmful to internet users because technical cookies are used for the two following purposes: (i) carrying out the transmission of a communication on an electronic communication and (ii) strictly necessary using to provider of information society services that has been explicitly requested by internet users, such as online shopping for the process of purchasing item system and authenticating themselves to access certain sections. In addition, functional cookies and analytical cookies are in the scope of technical cookies. Technical cookies neither require requesting consent from internet users nor informing the use of cookies to Italian Data Protection Authority (“Garante”). Nevertheless, website owners are still required to send notification of the purpose of the use of cookies to the internet users.

On the other hand, profiling cookies are used for the purpose of creating users’ profiles by accessing and collecting internet users’ personal data. Website owners would send advertisement messages in line with the preferences shown by the users during navigation. Hence, before the website owners or third-party advertisers use this type of cookies on their websites, they need to inform the internet users of the purpose of the use of cookies, which briefly state in short notice providing clickable link that provide more details of such cookies, and need to receive prior consent from the internet users, which the implied consent is acceptable – if internet users do not tick in a box of refuse to use cookies and click anything provided in websites, such action shall be deemed as “consent” for the use of cookies.

Failure to perform as the law said, website owners are required to be punished categorized as follows: (i) Failure to provide adequate notice to internet users, they shall be fined €6,000-30,000; (ii) Failure to receive prior consent before installation of cookies from internet users, they shall be fined €10,000-120,000; and (iii) Failure to submit a complete notification to the Garante, they shall be fined €20,000-120,000.

The United States of America

The United States of America (the US) had concerned on the individual’s privacy and personal data regarding the use of internet for several purposes. In addition, the most awareness would be the use of cookies for online behavioral advertising by third-party cookies because third-party cookies are commonly used to track internet users across different websites by companies that are hidden on websites, which falls in the scope of privacy infringement. According to the legal control on cookies, especially for the online behavioral advertising, the US has legislated Do-Not-Track mechanism to control anyone using cookies for this purpose.

Do-Not-Track mechanism would allow internet users to choose whether they want all websites to collect information about their internet activity and use to deliver targeted advertisements and for other purposes.⁶

Under the Do-Not-Track proposal, by using a universal setting through the browser, a user could switch between allowing third-party cookies tracking for all

⁶“Do Not Track”, *available at* <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/do-not-track> (last visited June 21, 2015).

purposes, allowing tracking for certain narrow purposes, never allowing tracking at all, simply with the click of a button.⁷ A Do-Not-Track mechanism is technologically method because it would avoid banning certain technologies over others.⁸ Instead, it would alert ad-networks not to track a specific user, no matter what technology was used.⁹

Legal Control on Cookies in Thailand

Thai Civil and Commercial Code B.E. 2535

Section 420 of Thai Civil and Commercial Code B.E. 2535 or Section 420 of TCCC states that “*A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.*”

Regarding the use of cookies, website owners or third-party advertisers intentionally use of cookies for the purpose of tracking and collecting internet users’ personal data while surfing the internet. In addition, website owners use cookies without internet users’ knowledge and consent of such use – website owners neither send prior notice to internet users nor receive prior consent from internet users. Furthermore, such use of cookies causes damages to internet users because if internet users’ information is collected in vast amount and sold to third party, that third party can build each internet user profile or third party may cause telemarketing and spam mails, which annoys users. However, such damages are mental injury and it is hard to bring wrongdoer to be punished under this law.

Thai Penal Code B.E. 2499

Regarding the legal provisions provided in Thai Penal Code B.E. 2499, there is no any legal provisions that can protect internet users’ right of personal data and privacy from the use of cookies. In addition, because internet users’ personal data are intangible property, several actions are not deemed as committing offences under criminal law; for instance, approaching users’ information shall not be punished by criminal sanction since it requires physically action to access the immovable property.

Draft of Data Protection Act B.E. ...

There are two draft of Data Protection Act B.E.... in the stage of legislative process. One proposed by Office of the Official Information Commission, hereinafter referred to as “OIC”, and the other one proposed by Electronic Transactions Development Agency (Public Organization), hereinafter referred to as “ETDA”.

(i) Draft of Data Protection Act B.E. ... proposed by OIC

According to the Draft of Data Protection Act B.E. ... proposed by OIC, section 3 provides the meaning of personal data, which is any information identified individual such as education, financial, profile of health, profile of criminal action, or others that providing name or code that can be identified individual such as finger print, photo, or

⁷ Matthew S. Kirsch, *Do-Not-Track: Revising the European Union’s data protection framework to require meaningful consent for behavioral advertising*, 18 **Rich. J.L. & Tech.** 1, 41 (2011-2012).

⁸ *supra* note 7, at 42

⁹ *supra* note 7, at 44

recorder. Also, it includes any data specifically identified the dead. In this case, the information that using cookies for gaining access, collecting and tracking internet users' personal data is under the scope of this section.

Furthermore, section 5 under this draft also provides the meaning of personal data controller and it can be concluded that personal data controller is the person having authority to manage with the business management of personal data, including the collection of the personal data of third person. Thus, website owners are the personal data controller in accordance with this section. In addition, third-party advertisers, who use cookies for the purpose of business or commercial – collecting internet users' behavior and placing targeted advertisement on internet users' terminal equipment in order to promote and make profit from sale, such third-party advertisers are also personal data controller.

Referring to this draft, it provides that if personal data controller wishes to use cookies, such personal data controller has to inform the internet users of the purpose of the use of cookies, other relevant information related to cookies such as name, period of collection and way to contact personal data controller. However, there are also exemptions thereof, which are related to virtue of law, court's order and benefits of internet users. Therefore, if the use of cookies is in the scope of aforementioned, the personal data controller is not required to notify of the use of cookies and to receive internet users' prior consent for the use of cookies.

(ii) Draft of Data Protection Act B.E. ... proposed by ETDA

Referring to this draft, the meaning of personal data under Section 5 means that any information related to person, which can be identified to that person directly or indirectly. In this regards, the information collected by cookies are in the scope of personal data under this draft.

Furthermore, personal data controller under this section is the person that has authority to manage of personal data management including collection, use and disclosure. In this regards, it shall mean website owner only, not including third-party advertisers.

Regarding this draft, if personal data controller wishes to use cookies, the personal data controller is required to inform the owner of personal data of such collection before or at the time of collecting period. The details to be notified to the internet users are (i) purpose of collection; (ii) details of information to be collected; (iii) people or organization that collect personal information; (iv) information of personal data controller such as contact method or place; and (v) right of owner of personal data. However, personal data controller is not required to receive prior consent from internet users before installation of cookies. In this regards, if internet users have perceived the use of cookies and they are not agree to have cookies installed on their terminal equipment, they can opt-out of such use.

Conclusion and Recommendation

Internet users' right of personal data and privacy are human rights; therefore, the use of cookies for accessing, collecting and tracking internet users' personal data while they are surfing the internet without internet users' knowledge and consent infringes the internet users' right, especially the use of cookies for behavioral advertising – using cookies to remember each internet user's interests and place web ads of interesting products on the website that internet users are opening by pop-up window.

Referred to the aforementioned problems, foreign states are aware of their internet users' right of personal data and privacy. They therefore had amended their legal control on the use of cookies; for example, the EU applied opt-in method instead

of opt-out method – informing internet users for the purpose of cookies and receive prior consent before installation of cookies. The UK and Italy also apply the rules set out in the EU into the UK and Italian law; therefore, the legal control on cookies in the UK and Italy also use the method of opt-in required prior notice to internet users and prior consent from internet users before installation of cookies. However, the consent in Italian law requires only implied consent, which is different from the UK, which requires expressed consent. In addition, the USA use Do-Not-Track policy to provide opportunity to internet users to choose whether they agree to have website owners use cookies while internet users are surfing internet.

Nevertheless, there are no specific current Thai laws to control on the use of cookies. However, the proposed laws, i.e. Draft of Data Protection Act B.E. ... proposed by OIC and Draft of Data Protection Act B.E. ... proposed by ETDA, have several provisions that can be used for protection of internet users' right of personal data and privacy. Therefore, if these drafts would be enacted into law, it will be useful for internet users because there would be legal control and punishment to protect internet users' personal data. In addition, both drafts provide that prior notice for the use of cookies is required and internet users' personal data and privacy can be collected in case of by virtue of law, internet users' benefits, court's order and other circumstances related to the aforementioned. However, the writer opines that the draft proposed by OIC is more applicable to Thai society because this draft not only provides notice declaring purpose of cookies but also requests internet users' consent before the use of cookies. Furthermore, the draft proposed by OIC also provides both legal control for general personal data controller, i.e. website owners, and personal data controller for business or commercial purpose, i.e. third-party advertisers; therefore, this draft is more concise than the other one. Nonetheless, there are several provisions are required to be added into this draft in order to make it more effective, the details of which set out below:

(i) Definition of personal data

The definition of the draft is too narrow. It should provide both identified and identifiable data to the owner.

(ii) Form of notification

According to the draft, it does not state how to inform internet users; for instance, providing pop-up window. In addition, it also does not inform that the prior consent required from internet users shall be explicitly or impliedly consent.

(iii) Exemption of the rules

Referred to types of cookies, the draft does not state clearly of the types of cookies to be used for the rules. The draft states only all collection of cookies requires prior notice and consent. In addition, the draft states the exemption thereof, which is related to benefits of data owners, by virtue of law or by court's order. Although these exemptions are reasonable, they are not clearly enough. The writer is of the opinion that several purposes of the use of cookies, i.e. strictly necessary for websites and transaction cannot be done without cookies, such as security process for bank transaction or completion of online shopping websites, the use of cookies for those purposes shall be exempted from prior notice and consent before the use of cookies.

(iv) Access and Tracking of personal data

The legal provision in the draft states only the event of collecting, using and disclosing the personal data, but does not state about the access to personal data or tracking of internet users' behavior. Therefore, if personal data controller accesses to personal data of internet users or tracks internet users' behavior without any collection or use or disclosure, such personal data controller shall not be liable for such action since the draft does not provide specific provision to apply for accessing and tracking internet users' personal data. The writer's opinion is that the provision in the draft should increase the action of accessing to personal information and tracking of internet users' behavior as well.

REFERENCES

Books

Affilinet, “*EU Cookie Law : Understand the EU’s ePrivacy Directive*”, (2011). 17.

Articles

Matthew S. Kirsch. “*Do-Not-Track: Revising the European Union’s Data Protection Framework to require meaningful consent for behavioral advertising.*” **18 Rich. J.L. & Tech.** 1. (2011-2012): 41-44.

Electronic Media

“Do Not Track.”<https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/do-not-track> (accessed June 21, 2015).

Other Materials

น้ำทิพย์ บุญเกิด. ความรับผิดทางอาญากรณีละเมิดข้อมูลส่วนบุคคล: ศึกษาเฉพาะกรณีข้อมูลส่วนบุคคลที่จัดเก็บในระบบคอมพิวเตอร์. มหาคัณต. นิตินาสตร ธรรมศาสตร. 2548. [Namthip Boonkerd. **Criminal Liability for the Transgression of Personal Data: Particularly Study about Personal data which be Kept in the Computer System.** Master of Laws8. Faculty of Law. Thammasat.2005]

LEGAL PROBLEM RELATING TO HOMESTAY ACCOMMODATION BUSINESS IN THAILAND*

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ABSTRACT

Tourism plays an important role in the economic and social development of Thailand. It is made up of many segments, the principal one being transportation, accommodation, food service, shopping, travel arrangements, and activities for tourists, such as history, culture, adventure, sports, recreation, entertainment, and other similar activities. Tourism figures among the top priorities in The Eleventh National Economic and Social Development Plan (2012-2016) that aims to restructure the economy toward quality growth and sustainability. As tourism is in the service sector, management needs to maintain a balanced and sustainable growth by focusing on activities that are creative and environmentally friendly in consideration of the carrying capacity of tourist attractions to elevate the standards of service businesses. The quality and sufficiency of service should be increased.

In the promotion of tourism, accommodation sector constitutes the most important segment. Tourism is, to a great extent, dependent on the type and quality of accommodation available. Hotels have been and still are the principal form of accommodation. However, there has been a growth and development of some other forms of accommodation over the years. This is popularly known as supplementary accommodation and is, in fact, an important segment of tourism.

Homestay is specialized term referring to types of accommodation where tourists or guests pay to stay in private homes. It can be seen as incorporating a number of other terms, including bed and breakfast, guesthouse, and farmstay. Homestay is not only accommodation service but also the alternative tourism that has been proposed to attract tourists. Currently, homestay has increased greatly to provide tourist accommodation and it is formed differently according to circumstances of each local community including the difference in physical structure of building, facilities, and type of service.

Since, homestay has been promoted as alternative tourism; this can attract more tourists to come to local community. The legislation in form of anti-market or has some restrict of right is necessary in order to accomplish the goal of sustainable tourism, ecotourism and community based tourism that pay attention to nature, environment and well-being of local people. In part of accommodation, homestay provide service to general public. The quality standard of service and the public safety are the most important issues that have to be considered.

The study found that the application of Hotel Act B.E. 2547 on homestay accommodation business is not appropriate because homestay has been established with the differently special aspects and purposes. Besides, the Announcement of Department

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of Tourism on Thai Homestay Standard B.E. 2554 is still undefined and it does not provide the compulsory single standard for all homestay operators. The lack of definite laws controlling and encouraging homestay accommodation business may affect the adverse results on nature, environment, local people and tourism development. Then, this research intends to recommend the introduction of specific law for regulating homestay accommodation business in Thailand.

Keywords: homestay, accommodation, tourism

บทคัดย่อ

การท่องเที่ยวมีบทบาทสำคัญต่อการพัฒนาเศรษฐกิจและสังคมของประเทศไทยเป็นอย่างมาก ซึ่งก่อให้เกิดการพัฒนาของอุตสาหกรรมด้านอื่นๆ ที่เกี่ยวข้อง ไม่ว่าจะเป็นทางด้านการคมนาคมขนส่ง ด้านที่พัก การบริการอาหาร การขายสินค้า การบริการการท่องเที่ยวและกิจกรรมต่างๆ แก่นักท่องเที่ยว และยังรวมไปถึงกิจกรรมที่เกี่ยวข้องกับประวัติศาสตร์และวัฒนธรรม กีฬา สันทนาการ นันทนาการ ผจญภัย รวมทั้งกิจกรรมอื่นๆ ในทำนองเดียวกัน การท่องเที่ยวจึงเป็นยุทธศาสตร์สำคัญในแผนพัฒนาเศรษฐกิจและสังคมแห่งชาติ ฉบับที่ 11 (2012-2016) ที่มีจุดมุ่งหมายสำคัญในการปรับโครงสร้างเศรษฐกิจไปสู่การพัฒนาที่ยั่งยืน ในภาคการท่องเที่ยวซึ่งถือเป็นธุรกิจบริการนั้น การบริหารจัดการการท่องเที่ยวที่จะก่อให้เกิดความสมดุลและการพัฒนาที่ยั่งยืนจะต้องคำนึงถึงกิจกรรมที่สร้างสรรค์และเป็นมิตรต่อสิ่งแวดล้อม ความสามารถในการรองรับนักท่องเที่ยวของสถานที่ท่องเที่ยว อีกทั้งการยกระดับมาตรฐานของธุรกิจบริการในด้านต่างๆ รวมถึงคุณภาพและความพึงพอใจของบริการเหล่านี้ควรต้องพัฒนาเพิ่มมากขึ้น

ในการส่งเสริมการท่องเที่ยวนั้น การบริการด้านที่พักถือว่าเป็นส่วนที่สำคัญที่สุด ดังนั้น การท่องเที่ยวที่จะอยู่ในระดับที่ดี จะต้องขึ้นอยู่กับประเภทและคุณภาพของสถานที่พักที่มีอยู่ โดยโรงแรมยังคงเป็นสถานที่พักที่ให้บริการเป็นหลัก แต่อย่างไรก็ตามในช่วงที่ผ่านมาไม่นาน ได้มีการพัฒนาของสถานที่พักในรูปแบบอื่นๆ เพื่อตอบสนองต่อความต้องการของนักท่องเที่ยวที่เพิ่มจำนวนขึ้นอย่างรวดเร็ว ซึ่งถือว่ามีความสำคัญต่อการท่องเที่ยว เช่น โฮมสเตย์ ซึ่งเป็นที่พักประเภทหนึ่งที่นักท่องเที่ยวพักร่วมกับเจ้าของบ้าน ใช้บ้านเป็นศูนย์กลาง โดยเชื่อมโยงกับแหล่งท่องเที่ยว วัฒนธรรม ขนบธรรมเนียมประเพณี วิถีชีวิตของชุมชนเข้าด้วยกัน ทั้งนักท่องเที่ยวและเจ้าของบ้านมีวัตถุประสงค์ร่วมกันที่จะแลกเปลี่ยนเรียนรู้วัฒนธรรมและวิถีชีวิตด้วยความเต็มใจ พร้อมทั้งจัดที่พักและอาหาร นำเที่ยวในแหล่งท่องเที่ยวใกล้เคียง โดยได้รับคำตอบแทนตามความเหมาะสม ซึ่งถ้อยคำดังกล่าวใช้ผสมผสานกับคำอื่นๆ รวมทั้งที่พักและอาหารเช้า (bed and breakfast) เกสต์เฮ้าส์ (guesthouse) และฟาร์มสเตย์ (farmstay) โฮมสเตย์ไม่ได้เป็นเพียงที่พักเท่านั้นแต่ยังเป็นการท่องเที่ยวทางเลือก (alternative tourism) ที่นำเสนอเพื่อดึงดูดนักท่องเที่ยว ในปัจจุบัน มีการก่อตั้งโฮมสเตย์ขึ้นเพื่อให้บริการที่พักแก่นักท่องเที่ยวอย่างมากมาย ซึ่งโฮมสเตย์ในแต่ละท้องถิ่นก็จะมีรูปแบบแตกต่างกันไป ทั้งในเรื่องโครงสร้างของสถานที่พัก สิ่งอำนวยความสะดวก และการบริการอื่นๆ

เนื่องจากโฮมสเตย์ได้รับการส่งเสริมในฐานะเป็นการท่องเที่ยวทางเลือก (alternative tourism) ซึ่งสามารถดึงดูดนักท่องเที่ยวได้เป็นจำนวนมากมาสู่ชุมชนท้องถิ่น และเมื่อนักท่องเที่ยวเพิ่มจำนวนมากขึ้น ผลกระทบต่อสิ่งแวดล้อมและทรัพยากรธรรมชาติย่อมเพิ่มมากขึ้นไปด้วย การพัฒนาการท่องเที่ยวที่ไม่มีการวางแผนและการบริหารจัดการที่ดีพอก็อาจจะก่อให้เกิดผลเสียต่อ

ทรัพยากรธรรมชาติ สิ่งแวดล้อม และประชาชนในท้องถิ่นได้ การบัญญัติกฎหมายที่มีลักษณะของการจำกัดสิทธิเสรีภาพก็อาจมีความจำเป็นเพื่อบรรลุวัตถุประสงค์ของการพัฒนาการท่องเที่ยวที่ยั่งยืน (sustainable tourism) การท่องเที่ยวเชิงนิเวศน์ (ecotourism) หรือการท่องเที่ยวเชิงชุมชน (community based tourism) ซึ่งให้ความสำคัญต่อการป้องกันและอนุรักษ์ทรัพยากรธรรมชาติและสิ่งแวดล้อม รวมทั้งการคำนึงถึงความเป็นอยู่ที่ดีของประชาชน

ดังนั้น ในส่วนของการให้บริการที่พักแบบโฮมสเตย์ จะเห็นได้ว่าเป็นการให้บริการที่พักแก่นักท่องเที่ยวและประชาชนทั่วไป มาตรฐานคุณภาพของการบริการและความปลอดภัยสาธารณะจึงถือเป็นประเด็นสำคัญที่ต้องได้รับการพิจารณาเป็นลำดับแรก ดังนั้น การบัญญัติกฎหมายและระเบียบข้อบังคับที่ชัดเจนที่ใช้ในการควบคุมการประกอบธุรกิจโฮมสเตย์จึงมีความจำเป็นเพื่อก่อให้เกิดผลในเชิงบวกต่อการคุ้มครองทรัพยากรธรรมชาติและสิ่งแวดล้อม ประชาชนในท้องถิ่นและประชาชนทั่วไป รวมทั้งการพัฒนาการท่องเที่ยวของประเทศไทย

คำสำคัญ: โฮมสเตย์, ที่พัก, การท่องเที่ยว

1. Overview of homestay

Homestay was first appeared in Europe where students stayed with a host family to learn local culture and language. In tourism study, homestay is a part of community based tourism which has four significant elements: community product sales, cultural shows, village based activities, and camping or homestay¹.

Homestay is a specific term referring to types of accommodation where tourists or guests pay for the private homes, where interaction takes place with a host family usually agree to share public spaces. This definition can therefore be seen as incorporating a number of other terms, including bed and breakfast, guesthouse, and farmstay².

Definitions of homestay that were given in many resources represent the same essence concept referring to types of accommodation³ and an alternative tourism⁴ that tourist will stay in the same home with a local family to experience the diverse regional daily life and utilize the natural resources in the local community. Therefore, homestay does not only provide accommodation and food but also a chance to exchange and share experiences between hosts and guests.

¹ คณาธิป ทองรวีวงศ์, กฎหมายเกี่ยวกับการท่องเที่ยว, 299 (กรุงเทพ: นิติธรรม, 2558)

(Kanathip Thongraweewong, **Tourism Law**, 299 (Bangkok: Nititham, 2558))

² Gianna Moscardo, “*Bed and Breakfast, Homestay and Farmstay Accommodation: Forms and Experience.*” in **Commercial Homes in Tourism: An International Perspective**, edited by Paul A.Lynch, Alison J McIntosh and Hazel Tucker, 25-26 (Routledge, 2009)

³ *Id.* at 26.

⁴ Final ASEAN Homestay Standard provides meaning of Homestay in section 4.18 that “*Homestay – an alternative tourism where tourists will stay with the host’s family in the same house and will experience the everyday way of life of the family and the local community.*”

2. Legal problem relating to homestay accommodation business

In Thailand, homestay provides tourist accommodation services, like a hotel, but on a smaller scale. Hotel business operations have to operate under strict laws. For example, the hotel operators have to comply with the laws requiring them to obtain licenses in order to obey the laws regulating the hotel business operations, crime control, and the collection of revenue. However, there are no laws to regulate homestay businesses directly. They operate without a license or permission. Although the Department of Tourism has established the Thai Homestay Standards⁵ certification which homestay establishments should conform, however, there is no compulsory registration for certification and complying with the standards is voluntary. Homestay operators can freely register and assess the standard. If a homestay operator opts-out, it is not illegal⁶.

As the purpose of homestay establishment is to provide temporary accommodation to tourists and to gain income from service charge, thus, homestay defined as a hotel under section 4 of the Hotel Act B.E. 2547⁷. However, considering the other elements, such as the physical structure of residential buildings, location, security system, and sanitary system, homestay do not comply with this criteria and standard according to the related laws and regulations such as hotel law, building law, and public health laws. Due to the physical structure of homestay does not meet the requirements according to the hotel act. Although homestay can be considered as a tourist accommodation under hotel definition, homestay is different from hotel because it is actually a residential home⁸. Then, the homestay operator cannot apply for license or permission before operating a homestay business as provided in the hotel act because it cannot meet the legal standard which is not designed for homestay. So, a large number of homestay operate practically without entering into the legal system. As a result, homestay business is not in control of state. The operation of such business is not in order and tourists may get bad service or poor quality as there is no compulsory standard regulation on homestay business.

Since homestay is defined as an alternative tourism where tourists will stay with the host's family in the same house and will experience the everyday way of life of the family and the local community. Homestay, then, differs significantly from hotel. However, the operators may not understand how to carry out appropriate homestay operation. There is only a guideline from the Announcement of the Department of Tourism on the Thai Homestay Standard B.E. 2554 that specifies standards for homestay establishments to comply with the concept of alternative tourism in

⁵ ประกาศกรมการท่องเที่ยว เรื่อง กำหนดมาตรฐานบริการท่องเที่ยวมาตรฐานโฮมสเตย์ไทย พ.ศ. 2554 ประกาศในราชกิจจานุเบกษา เล่ม 129 ตอนพิเศษ 26 ง หน้า 59 ลงวันที่ 31 มกราคม 2555

(The Announcement of Department of Tourism on Thai Homestay Standard B.E. 2554, published in royal gazette volume 129, special issue 26 ง, page 59, January 31, 2555)

⁶ คณาธิป ทองรวีวงศ์, *อ่วงแล้ว* เจียงอรรถที่ 1 หน้า 301.

(Kanathip Thongraweewong, *supra* note 1 at 301.)

⁷ พระราชบัญญัติโรงแรม พ.ศ. 2547 มาตรา 4 ในพระราชบัญญัตินี้

“โรงแรม” หมายความว่า สถานที่ที่จัดตั้งขึ้นโดยมีวัตถุประสงค์ในทางธุรกิจเพื่อให้บริการที่พักชั่วคราวสำหรับคนเดินทางหรือบุคคลอื่นใดโดยมีค่าตอบแทน....

(Hotel Act B.E. 2547 Section 4 Under this Act “hotel” means accommodation established with business purpose to provide temporary accommodation service for traveler or any other person for consideration....)

⁸ คณาธิป ทองรวีวงศ์, *อ่วงแล้ว* เจียงอรรถที่ 1 หน้า 301.

(Kanathip Thongraweewong, *supra* note 1 at 301.)

conserving nature and providing benefits to the local community. But, it does not have a compulsory condition. It depends on operators to voluntarily participate in the official assessment and certification system. So, it does not meet the real purpose of homestay as an alternative tourism.

The popularity of homestay in Thailand tourism industry has increased constantly. The characteristic and nature of homestay are different from hotel under the Hotel Act. However, there is no specific law regulating homestay. So, the standards of service, safety, and quality have been neglected. In addition, the avoidance of the application of Hotel Act by using 'homestay' banner has increased. These cause a negative effect on tourism industry, taxation and the country. Furthermore, homestay is not only accommodation service but also the alternative tourism that has been proposed to attract tourists with the concepts of sustainability, ecotourism and community based tourism. The lack of definite regulations controlling and encouraging may affect the adverse results on nature, environment and local people.

3. The laws governing homestay accommodation business in foreign countries and Thailand

1) United States (California): California Agricultural Homestay Bill (AB 1258)⁹

In United States (California), the law governs farmstay or homestay as a type of accommodation and provides the compulsory registration system and compulsory requirements or minimum quality standards for registration. And it recognizes homestay or farmstay as a type of agricultural enterprise in agricultural tourism. However, the homestay or farmstay operators have to comply with many laws and regulations such as Land Use and Land Development Regulations, Public Health and Safety Regulations, Environmental Health Regulations and Business Regulations.

2) Australia (Victoria): Public Health and Wellbeing Regulation 2009¹⁰

In Australia (Victoria), the law regulates farmstay or homestay as a type of accommodation¹¹ and provides the compulsory registration system and the compulsory quality standard. However, homestay or farmstay operators have to comply with complicated and overloaded laws and requirements, for example, Public Health and Wellbeing Act, Public Health and Wellbeing Regulations and Building Regulations. All of laws and requirements cause complexity in operating and establishing homestay or farmstay.

⁹ see California Agricultural Homestay Bill (AB 1258), *available at* <http://sfp.ucdavis.edu/agritourism/factsheets/ab1258/>

¹⁰ see Public Health and Wellbeing Regulations 2009, *available at* [http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/b05145073fa2a882ca256da4001bc4e7/a3b0a9845fd0980aca25768d002ab0b5/\\$file/09-178sr.pdf](http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/b05145073fa2a882ca256da4001bc4e7/a3b0a9845fd0980aca25768d002ab0b5/$file/09-178sr.pdf)

¹¹ Australian Business Licence and Information Service (ABLIS), *Registration of Prescribed Accommodation – Victoria*, *available at* <https://ablis.business.gov.au/VIC/pages/e44ed3d4-5a9b-44be-8887-45051c1419a9.aspx>

3) Republic of China (Taiwan): Regulations for the Management of Homestay Facilities¹²

In Republic of China (Taiwan), the law regulates homestay as a type of accommodation and provides the compulsory registration certification system and the compulsory requirements or minimum quality standards for registration. And it recognizes homestay as a type of alternative tourism by providing additional requirements and duties for homestay operator. For example, duty to pay attention to nature and environment, special requirement for homestay shall be operated by the actual user of the building and special objective of homestay to provide tourists with a rural living experience by incorporating local culture, nature landscape, ecological environment, environmental resources and agricultural, forestry, fishery, or livestock farming activities.

4) Thailand: the Hotel Act B.E. 2547, the Ministerial regulation prescribing criteria and standard of hotel business B.E 2551 and the Announcement of Department of Tourism on Thai Homestay Standard B.E. 2554

In Thailand, the law regulates homestay as a type of accommodation by providing the voluntary certification assessment system and providing the non-compulsory requirements or minimum quality standards for certification assessment. And the law recognizes homestay as a type of alternative tourism, sustainable tourism, ecotourism and community-based tourism. By providing guideline for homestay management such as tour program must be accepted by the community, maintenance tourist attractions and providing activities and plans to reduce the impact of tourism and global warming.

4. Comparison study of the laws governing homestay accommodation business in foreign countries and Thailand

The Announcement of the Department of Tourism on Thai Homestay Standards B.E.2554 is only a guideline for homestay operator in management of homestay by providing the standards and indicators for certification assessment. Because of the Announcement on Thai Homestay Standard B.E. 2554 has not provided the compulsory registration system, this caused many problems. In contrast, California Agricultural Homestay Bill (AB 1258), Public Health and Wellbeing Regulation 2009, and Regulations for the Management of Homestay Facilities, have recognized homestay operation as a type of accommodation business and provide the specific law governing such business operation strictly and provide the compulsory registration system for homestay accommodation business. The following analyses are focused on the comparison the appropriate provisions relating to homestay accommodation business in Thailand and foreign countries.

¹² see Regulations for the Management of Homestay Facilities, Promulgated as per a Ministry of Transportation and Communications ordinance, Reference (2001) MOTC Integrated No. 00094, dated December 12, 2001, in a complete issue covering a total of 38 articles., Tourism Bureau, M.O.T.C. Republic of China (Taiwan), available at http://admin.taiwan.net.tw/law/law_d_en.aspx?no=9&d=39

4.1 Definition of homestay

The study found that, there are many elements that should be taken into consideration for providing the definition of homestay. The critical elements are divided into two parts, as follows.

4.1.1 Physical elements

(1) The number of rooms (4-15 rooms) as provided in the law of United States (California)¹³, Republic of China (Taiwan)¹⁴ and Thailand¹⁵.

(2) The capacity number of guests (15-20 people) as provided in the law of United States (California)¹⁶, Australia (Victoria)¹⁷ and Thailand¹⁸.

(3) The size of the service area (150-200 square metres or 2 people per floor area of less than 10 square metres and 3 people per floor area of 10 square metres or more) as provided in the law of Republic of China (Taiwan)¹⁹ and Australia (Victoria)²⁰.

It can be noticed that the physical elements of homestay, the number of rooms, the capacity of guests and the size of service area, are often smaller or less than the number of rooms, the capacity of guests and the size of service area of other type of accommodation. The determination that homestay is a small sized accommodation is corresponding to the practice of other countries. However, the criterion of the size of the service area does not exist in the law of Thailand.

4.1.2 Activities elements

The interaction between hosts and guests distinguish homestay establishments from other forms of accommodation. Providing activities constitutes the interaction between hosts and guests. The activities that homestay operators provide to tourist may consist with the objective of educational exchange and learning culture and lifestyle as well as the objective of tourism. In Thailand, such activities are often a combination of many objectives such as learning culture and the way of life, ecotourism, agritourism, and community-based tourism objectives. Each local community will provide the different activities according to culture or lifestyle of their community and the activities will depend on the tourist attractions existing in each local community. Activities related to culture or lifestyle could include cooking, dining, cultural shows, cultural events, religious events and farming activities. The activities relating to tourist attraction include tours of cultural attractions, natural attractions, and recreation activities.

¹³ see California Agricultural Homestay Bill (AB 1258), Section 1

¹⁴ see Regulations for the Management of Homestay Facilities, Article 6

¹⁵ see Announcement of Department of Tourism on Thai Homestay Standard B.E. 2554, Article 4

¹⁶ see California Agricultural Homestay Bill (AB 1258), Section 1

¹⁷ see Public Health and Wellbeing Regulation 2009, Regulation 17

¹⁸ see Announcement of Department of Tourism on Thai Homestay Standard B.E. 2554, Article 4

¹⁹ see Regulations for the Management of Homestay Facilities, Article 6

²⁰ see Public Health and Wellbeing Regulation 2009, Regulation 17

For this issue, the law of Republic of China (Taiwan) defines a homestay as an accommodation which operates as a family's secondary occupation business, using the leftover rooms of a self-used home to furnish tourists with a countryside living experience. It usually includes local culture, natural scenery, ecological environment, and agricultural, forestry, fishing, or farming activities²¹. The definition is clearly that it is an accommodation established with a special purpose and appearance of activities. It can also demonstrate the ecotourism, agritourism, and community-based tourism concept. It also indicates the uniqueness of homestay as the different type of accommodation. However, as the area size elements, Thai laws do not include activities elements into the definition of homestay²².

4.2 Quality standard of service

4.2.1 The standard of homestay as tourist accommodation, including:

- (1) Accommodation condition
- (2) Food service and drinking water
- (3) Security and safety on duty
- (4) Credibility of homestay accommodation business
- (5) Prevention and mitigation of environmental pollution

The standard of homestay as a tourist accommodation in foreign countries, each country has the specific law provided with strict standards on public health, cleanliness, food safety, public safety or fire safety, prevention or mitigation of environmental pollution by making the laws the compulsory with penalties. The study found that the Announcement of Department of Tourism on Thai Homestay Standards B.E. 2554 does not provide any duty provisions on fire safety, public safety, and prevention or mitigation of environmental pollution. In particular, the Announcement of Department of Tourism on Thai Homestay Standards B.E. 2554 is not compulsory standard. The laws of foreign countries are enforceable as restrictive laws with the compulsory enforcement. The operator must comply with such laws from the startup of homestay accommodation. It is required to maintain such quality standards at all times the homestay accommodation business is in operation.

4.2.2 The standard of homestay as alternative tourism

Homestay has been promoted as the alternative tourism to attract more tourists. To become considered an alternative tourism accommodation, there are many quality standards concerned. In addition to the above considerations, the following considerations under this part are also equally important. The standard of homestay as alternative tourism including:

²¹ see Regulations for the Management of Homestay Facilities, Article 3

²² คณาธิป ทองรวีวงศ์. “ปัญหาของกฎหมายเกี่ยวกับการควบคุมสถานที่พักเพื่อการท่องเที่ยว”. วารสารกระบวนการยุติธรรม ปีที่ 4, ฉ. 3. (กรกฎาคม-กันยายน 2554): 83-104.

(Kanathip Thongraweewong, “Legal Problem in the controlling tourist accommodation”, *Journal of Thai Justice System*, Vol.4 July-September 2011: 83-104.)

- (1) The hospitality of host family
- (2) The tour program
- (3) Preservation of culture
- (4) The creation of value of community identity product
- (5) Conservation of nature and environment
- (6) The management of homestay group by local community

For the standard of homestay as alternative tourism, it is special aspect of homestay consisting of sustainable tourism, ecotourism, agritourism and community-based tourism objectives with concepts including culture and local tradition, so, homestays are different from other accommodations. In foreign countries, there are no laws to regulate homestay to accomplish such objectives. However, there is a law of Republic of China (Taiwan) that encourages the homestay operator to provide excellent hospitality services, good service practices and the promotion of culture, quality of life, and the tourism industry in the local community by awarding or acknowledging such homestay operator. In Thailand, the Announcement of Department of Tourism on Thai Homestay Standards B.E. 2554 has recognized the concepts of sustainable tourism, ecotourism, and community based tourism. However, the standards are only provided for operators who voluntarily participate in the certification assessment. To achieve the objectives of sustainable tourism, ecotourism, and community based tourism may be difficult because the operators do not fall under the single standard. Therefore, the restrictive law can contribute to the concepts of sustainable tourism, ecotourism, and community based tourism to be formed. For example, the law can restrict the qualification of homestay operator to be local people only, the tour program must be accepted by the community and homestay operator has a duty to preserve nature and environment.

4.3 The remedies to tourists for injury and damages

In foreign countries, the solution for the problem of improper remedies is to require the homestay operator to buy an insurance policy. For example, Australia (Victoria) and Republic of China (Taiwan), public liability requires the homestay operator to cover paying guests and visitors, product liability to cover prepared food or other products offered to guests, for human bodily injury or death and for the loss of or damage to property. In addition, the law of Republic of China (Taiwan) states that the homestay operator has a duty to help the guests who are sick or injured by taking the guest to get the appropriate medical treatment.

4.4 The control and supervision by state

The study of foreign laws suggests that the registration of homestay accommodation business is important. Because they considered homestays that offer residents to tourists as a type of business that provides accommodation to public general. It is necessary to have the quality and standard controls as well as monitoring such business to be operated orderly. The registration system is the basic tool for the state to control such business. Moreover, the registration of homestay can be the tool for state to provide support and promotion to homestay operators. Therefore, the law on homestay of Thailand should provide the control and supervision by state as the basic

principle by providing the compulsory registration and license system for homestay accommodation business in Thailand.

4.5 Taxation and fees

At present time, in Thailand, there are no compulsory rules stating that the state has authority to monitor or inspect the operation of the homestay and there is no compulsory registration system for homestay accommodation businesses. Monitoring or inspection of such businesses is difficult. The income from homestay business may be hidden from tax authorities. In addition, there is the problem of budget hotels using the homestay title in order to avoid the application of hotel law, taxation and regular fees.

The study has been divided into two parts, including the license and registration fees and the specific tax.

The license and registration fees, when the law provides the license registration system, it is normally to provide the license and registration fees. In Thailand, if the law enforces homestay to be registered with the government agency, it should carefully impose the appropriate amount of fees.

The specific tax, at present time, the imposing additional specific tax, as in the United States (California), in Thailand may not appropriate. In order to encourage the homestay business operation and support tourism development, it should avoid the prescribing the loaded tax burden on the operators and tourists.

4.6 Nature and environment

According to the Hotel Act B.E. 2547 it is required that hotel operators must maintain environmental quality in accordance with the law on the promotion and maintenance of environmental quality. But the homestay accommodation business is excluded from such requirement by the provision of the Ministerial Regulation prescribing criteria and standard of hotel business B.E. 2551.

Although the Announcement on Thai Homestay Standard B.E. 2554 provides the standards and indicators for certification assessment on natural resources and environment standards, there is no compulsory certification assessment. This may cause homestay operators to neglect to maintain the environment and natural resources. As a result, environmental degradation, lower quality of life in communities and the negative impact of tourism on the community in the long term.

It is necessary to adopt the principles for the protection and prevention of natural resources and environment by providing a duty for the homestay operator to pay attention to protection and prevention of the natural and environment including preparation the conservation plans or measures and provide activities to conserve natural resources, to reduce the impact of tourism and global warming.

Conclusion

The significance of the problem relating to homestay accommodation business in Thailand is the characteristic and nature of homestays which are different from hotels under the Hotel Act B.E. 2547. While the popularity of homestays in Thailand tourism industry has been increasing, the standards of service, safety, and quality have been neglected. In addition, the avoidance of the application of Hotel Act B.E. 2547 by using

‘homestay’ banner has increased. These cause a negative effect on tourism industry and the country. The accommodation that provides to the general public should have quality standards.

Furthermore, homestays are not only accommodation service but also an alternative tourism that has been proposed to attract tourists with the concepts of sustainability, ecotourism and community based tourism. Tourism development that has no proper plan and management may have adverse affects on nature, environment and local people. However, the trend of law in form of anti-market or the restrictions of rights are necessary to accomplish the purpose of sustainable tourism, ecotourism, and community-based tourism that pays attention to nature and environment protection as well as well-being of local people.

Suggestion

The standard of homestays as tourist accommodations should emphasize the standards on public health, cleanliness, food safety, public safety, fire safety, prevention or mitigation of environmental pollution by providing compulsory standards with the penalties. The study found that the Announcement of Department of Tourism on Thai Homestay Standard B.E. 2554 does not provide any standard on fire safety, public safety, and prevention or mitigation of environmental pollution.

For the standards on homestay as alternative tourism, it is special aspect of homestays that consist of sustainable tourism, ecotourism, and community-based tourism concepts including culture and local tradition. Homestays are different from other accommodations because it consists of the special objectives. For this issue the trend of law is to encourage the homestay operator to provide for excellent hospitality services or good service practices and the promotion of culture, quality of life, and the tourism industry in the local community by awarding or acknowledging such homestay operator.

In addition, the compulsory licensing registration of homestay accommodation businesses is important because homestay is a type of accommodation business that provides temporary resident to public general. So, it is necessary to have the quality and standard controls as well as monitoring of such business. Homestay business should be operated orderly, in order to prevent the misuse the homestay title to avoid the application of hotel law, taxation and regular fees. Moreover, the state will be able to observe the operation of homestay business to prevent the criminal offenses hidden behind the homestay business such as drugs, prostitution, gambling, and money laundering and so on. The registration system is the basic tool for the state to control such business. Besides, the registration of homestay can be the tool for state to provide support and promotion to homestay operators. Therefore, the law on homestay should provide the compulsory registration and license system for homestay accommodation business in Thailand. In conclusion, the definite law controlling and encouraging homestay accommodation business can have a positive result on nature, the environment and the local people as well as tourism development in Thailand.

REFERENCES

1. Books

1.1 English Books

- A.K. Bhatia, **Tourism Development: Principles and Practice**, Sterling Publishers Private Limited, 1982.
- Alan Pannett, **Principles of Hotel and Catering Law**, Great Britain: Mackays of Chatham Ltd., 1992.
- Alan Pannett, **Principles of Hotel and Catering Law**, third edition, Cassell, 1992.
- Alastair M. Morrison, **Marketing and Managing Tourism Destinations**, Routledge Taylor & Francis Group London and New York, 2012.
- Brent Lovelock and Kirsten M. Lovelock, **The Ethics of Tourism Critical and Applied Perspectives**, Routledge Taylor & Francis Group, London and New York, 2013.
- Charles R. Goeldner J.R. Brent Ritchie, **Tourism: Principles, Practices, Philosophies**, WILEY John Wiley & Sons, Inc., 2009.
- C. Michael Hall and Stephen Page, **Tourism in South and Southeast Asia: Issues and Cases**, Butterworth-Heinemann, 2000.
- Conrad Lashley and Alison Morrison, **In Search of Hospitality, Theoretical perspectives and debates**, Butterworth Heinemann, 2000.
- David B. Weaver. **The Encyclopedia of Ecotourism**, CABI is a trading name of CAB International, 2011
- David Weaver, **Sustainable Tourism: Theory and practice**, Elsevier Butterworth-Heinemann, 2006.
- Dimitrios Diamantis, **Ecotourism Management and Assessment**, Thomson, 2004.
- Donald Getz, Jack Carlsen and Alison Morrison, **The Family Business in Tourism and Hospitality**, CABI Publishing, UK, 2003.
- Eric Laws, Harold Richins, Jerome Agrusa, Noel Scott., **Tourist Destination Governance: Practice, Theory and Issues**, CABI is a trading name of CAB International, 2011.
- E. Wanda George, Heather Mair and Donald G. Reid, **Rural Tourism Development Localism and Cultural Change**, Typeset by Data page International Ltd., 2009.
- Frank M. Go and Carson L. Jenkins, **Tourism and Economic Development in Asia and Australasia**, CASSELL London and Washington, 1997.
- Hendrik Zwarensteijn, **Fundamentals of Hotel Law: The Legal Aspects of the Innkeeper-Guest Relationship**, The Ronald Press Company, New York, 1963.

- John H. Sherry, **The Law of Innkeepers - For Hotel, Motels, Restaurants, and Clubs**, Cornell University Press, Ithaca and London, 1972.
- James R. Keiser, **Principles and Practice of Management in the Hospitality Industry**, A CBI BOOK (Published by Van Nostrand Reinhold Company), 1979.
- Lesley Roberts and Derek Hall, **Rural Tourism and Recreation Principles to Practice**, CABI Publishing, UK, 2001.
- Mark Poustie, Jenifer Ross, Norman Geddes and William Stewart, **Hospitality and Tourism Law**, International Thomson Business Press, 1999.
- Micheal Boella, and Alan Pannett, **Principles of Hospitality Law**, London: Thomson Learning, 1999.
- Michael Boella and Alan Pannett, **Principles of Hospitality Law**, second edition, CASSELL, 2000.
- Michael J. Hatton, **Community-Based Tourism in the Asia-Pacific**, APEC Publication, 1999.
- Michal Sznajder, Lucyna Przezborska and Frank Scrimgeour, **Agritourism**, CAB International, 2009.
- Norman G. Cournoyer, Anthony G. Marshall, **Hotel, Restaurant, and Travel Law**, Third Edition, Delmar Publishers Inc., 1988.
- Norman G. Cournoyer, Anthony G. Marshall Karen L. Morris, **Hotel, Restaurant, and Travel Law: A preventive Approach**, Thomson Delmar Learning, 2004.
- Paul A. Lynch, Alison J. McIntosh and Hazel Tucker, **Commercial Homes in Tourism An international perspective**, Routledge Taylor&Francis Group, London and New York, 2009.
- Peter Burns and Andrew Holden, **Tourism: a new perspective**, Prentice Hall, 1995.
- Peter M. Burns and Marina Novelli, **Tourism Development: Growth, Myths and Inequalities**, CABI is a trading name of CAB International, 2008.
- Robert W. McIntosh, **Tourism: Principles, Practices, and Philosophies**, Sixth Printing, 1972.
- Stephen Barth, J. D., **Hospitality Law Managing Legal Issues in the Hospitality Industry**, WILEY John Wiley & Sons, Inc., 2011.
- Stephen Wearing & John Neil, **Ecotourism: Impacts, Potentials and Possibilities**, Second Edition, ELSEVIER, 2009
- Tom Powers and Clayton W. Barrows, **Introduction to the Hospitality Industry**, Wiley John, Wiley & Sons, Inc., 2006.

1.2 Thai Books

คณาธิป ทองรวีวงศ์, **กฎหมายเกี่ยวกับการท่องเที่ยว**, กรุงเทพฯ: นิติธรรม, 2558

(Kanathip Thongraweewong, **Tourism Law**, Bangkok: Nititham, 2558)

2. Articles

คณาธิป ทองรวีวงศ์. “ปัญหาของกฎหมายเกี่ยวกับการควบคุมสถานที่พักเพื่อการท่องเที่ยว”. วารสารกระบวนการยุติธรรม ปีที่ 4, ฉ. 3. (กรกฎาคม-กันยายน 2554): 83-104.

(Kanathip Thongraweewong, “*Legal Problem in the controlling tourist accommodation*”, **Journal of Thai Justice System**, Vol.4 July-September 2011: 83-104.)

3. Electronic Media

<<https://sustainabledevelopment.un.org/content/documents/Agenda21>>

<http://www.nesdb.go.th/Portals/0/news/plan/p11/Plan11_eng.pdf>

<<http://media.unwto.org/en/content/understanding-tourism-basic-glossary>>

<http://www.researchgate.net/profile/Carlos_Carpio2/publication/23515719_The_Demand_for_Agritourism_in_the_United_States/links/09e415138da359c4ec000000.pdf>

<<http://anrcatalog.ucdavis.edu/pdf/8333.pdf>>

<<http://sfp.ucdavis.edu/agritourism/factsheets/ab1258/>>

<http://www.researchgate.net/profile/Jeffrey_Kidd/publication/37376256_A_Profile_of_Far_mstay_Visitors_in_Victoria_Australia_and_Preliminary_Activity-Based_Segmentation/links/546d16d10cf26e95bc3cacd6.pdf>

<<https://www.tourism.vic.gov.au/component/edocman/?task=document.viewdoc&id=255&Itemid=0>>

<http://admin.taiwan.net.tw/law/law_d_en.aspx?no=9&d=39>

<[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/8B1B293B576FE6B1CA2574B8001FDEB7/\\$FILE/08-46a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/8B1B293B576FE6B1CA2574B8001FDEB7/$FILE/08-46a.pdf)>

<[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/b05145073fa2a882ca256da4001bc4e7/A3B0A9845FD0980ACA25768D002AB0B5/\\$FILE/09-178sr.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/b05145073fa2a882ca256da4001bc4e7/A3B0A9845FD0980ACA25768D002AB0B5/$FILE/09-178sr.pdf)>

<[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt7.nsf/DDE300B846EED9C7CA257616000A3571/DE3E7B8DD3E5864FCA257B2E00047D70/\\$FILE/84-10082aa101%20authorised.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt7.nsf/DDE300B846EED9C7CA257616000A3571/DE3E7B8DD3E5864FCA257B2E00047D70/$FILE/84-10082aa101%20authorised.pdf)>

<<https://ablis.business.gov.au/VIC/pages/e44ed3d4-5a9b-44be-8887-45051c1419a9.aspx>>

LEGAL ISSUES ON HOME BUILDER: FOCUSING ON HOME IMPROVEMENT IN CONSUMER ASPECT*

*Duangkamol Kotaraphong***

ABSTRACT

The rising of accommodation nowadays leads to the increasing of homebuilder contractor. Some of them can be called as professional but some cannot. The latter could cost damages to consumers due to the problem of non-quality homebuilder which can be seen in many consumers' claims. This is because in Thailand, the Construction Profession Act B.E.2522 (1979) is not effective in terms of implementation to practical situations. This law was enacted to control, regulate and support the contractor profession to be under the same standard. However, there is no Council of Contractor under this Act to be the profession organization setting up regulations to regulate the contractor under the licensing system. Thus, the non-standard of homebuilders has caused many problems to consumers. They are the one suffering from the damages due to the non-quality or non-standard construction work. It is a waste of everything; time, feeling, money including a waste of reputation of the contractors themselves. This problem should urgently be healed by any proper and applicable solutions in order to protect consumers and to regulate the contractor profession with the intention to develop the construction industry to meet with international standard.

This thesis will study on the problem arising from the applicable law in construction business. Furthermore, it will propose an appropriate measurement regarding control of the homebuilder contractors to produce more quality work.

Keywords: Homebuilder, Contractor, Construction, Contractor license

บทคัดย่อ

ปัจจุบันอัตราการเติบโตของสิ่งปลูกสร้างประเภทที่อยู่อาศัยทั้งในรูปแบบของการก่อสร้างใหม่และปรับปรุงใหญ่ (Renovate) นั้นยังคงมีอยู่อย่างต่อเนื่อง เนื่องจากเป็น 1 ในปัจจัย 4 ของมนุษย์ที่จะต้องมี ซึ่งเป็นนำไปสู่การเพิ่มขึ้นของผู้ที่ประกอบอาชีพรับเหมา ซึ่งถือเป็นบุคคลที่สำคัญ ที่สุดคนหนึ่งในการก่อสร้างที่อยู่อาศัย ผู้ประกอบอาชีพนี้ทั้งที่ทำงานมีคุณภาพ มีประสบการณ์ ทำงาน เป็นมืออาชีพและไม่หนีงาน แต่ก็มีหลายรายบางรายที่ไม่มีคุณสมบัติดังกล่าว ซึ่งเป็นสิ่งนำไปสู่ ความเสียหายต่อผู้บริโภค หรือเจ้าของที่อยู่อาศัยดังกล่าว ไม่มีความรับผิดชอบ จากการเลือกใช้ ผู้รับเหมาที่งานที่เกิดขึ้นไม่ได้คุณภาพ หรือเลวร้ายที่สุดคืองานไม่เสร็จ เกิดความเสียหายและ ทำให้เกิดการร้องเรียนของผู้บริโภคเป็นจำนวนมาก ซึ่งในอดีตก็ได้มีการตราพระราชบัญญัติ การประกอบอาชีพ งานก่อสร้าง พ.ศ. 2522 ซึ่งเป็นกฎหมายเกี่ยวเนื่อง

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โดยตรงในการควบคุม จัดระเบียบวิชาชีพก่อสร้าง เพื่อขจัดปัญหาข้างต้น แต่ก็ยังไม่สามารถบังคับใช้ได้จริงในแง่ของ การปฏิบัติ กฎหมายฉบับนี้ถูกตราขึ้นเพื่อควบคุม จัดระเบียบและดูแลผู้ประกอบการวิชาชีพงานก่อสร้าง โดยตรงให้มีคุณภาพอยู่ในระดับที่ได้มาตรฐานของวิชาชีพ แต่ในปัจจุบันยังไม่มีการจัดตั้งองค์กรที่จะ มาทำหน้าที่ดังกล่าวตามพระราชบัญญัติฉบับนี้ขึ้นมาตามเจตนารมณ์ ของกฎหมาย เพื่อที่จะกำกับ ดูแล และจัดระเบียบโดยการขึ้นทะเบียนผู้ประกอบการวิชาชีพนี้ ตามที่ควรจะเป็น ซึ่งเท่ากับว่า เมื่อยังไม่มียุทธศาสตร์มากำกับดูแลและจัดระเบียบ เป็นผลทำให้ปัญหา ระหว่างผู้ประกอบการอาชีพ ผู้รับเหมารายใหญ่ หรือรายย่อยที่รับจ้างทำงานก่อสร้าง ซ่อมแซม ปรับปรุงที่อยู่อาศัยกับผู้บริโภค ยังเกิดขึ้นอยู่ต่อไป ซึ่งปัญหาที่พบเจอส่วนใหญ่ เป็นการทำงานที่ไม่ได้คุณภาพ การทิ้งงานของผู้รับเหมา การเลือกใช้วัสดุที่ไม่ตรงกับที่ตกลงในสัญญา ข้อตกลงในสัญญาไม่เป็นธรรม เป็นต้น มักก่อให้เกิดความเสียหายต่อผู้บริโภคอยู่บ่อยครั้ง ไม่ว่าจะเป็นความเสียหายในทรัพย์สิน เวลา และ ความรู้สึก แม้กระทั่งความเสียหายต่อชื่อเสียงของผู้รับเหมารายนั้นเอง จากที่ได้กล่าวมาทั้งสิ้นนี้ ทำให้ปัญหาในเรื่องนี้ควรได้รับการแก้ไขเยียวยาอย่างจริงจัง โดยแก้ไขในทางที่เหมาะสมกับวิชาชีพ เพื่อจะได้มีมาตรการคุ้มครองและช่วยผู้บริโภคจากปัญหาต่างๆให้หมดสิ้นไป และยังเป็นภาระระดับและพัฒนาวิชาชีพนี้ให้เป็นอยู่ในระดับสากล

วิทยานิพนธ์ฉบับนี้ จะศึกษาเกี่ยวกับปัญหาที่เกิดขึ้นกับผู้บริโภคในมุมมองของการปัญหา ที่เกิดจากการว่าจ้างผู้รับเหมาในปัจจุบัน และกฎหมายที่มีอยู่เพื่อบังคับใช้สำหรับวิชาชีพ ผู้รับเหมาก่อสร้าง โดยพร้อมชี้แนะแนวทางและมาตรการที่เหมาะสมในการควบคุม จัดระเบียบ ดูแลวิชาชีพผู้รับเหมาก่อสร้างไทย เพื่อประโยชน์ในอนาคต

คำสำคัญ: ช่างซ่อมบ้าน ,ผู้รับเหมาก่อสร้าง ,การก่อสร้าง, ใบอนุญาตวิชาชีพผู้รับเหมาก่อสร้าง

Introduction

Nowadays, there is a high development of real estate businesses which have increased the number of home constructions and promotes the relationship between consumers and local contractors or homebuilders. Due to the varied choices in choosing a contractor, consumers may face the problem of irresponsible contractors.

Most of the consumers are willing to hire a good local contractor or home builder with a reasonable price. However, there is no way of proving the ability and reliability of the contractors they have chosen. Disputes between the owner of the house and the contractor happen very often which results in the replacement of the contractor. The reasons behind these conflicts may come from unspecialized contractors or from the consumers themselves due to the lack of insight or helping guidance for the contractor. The construction of a house in the home improvement industry is usually done by the owners of the house themselves, which can lead to many difficulties. This may be inferred from the increasing number of complaints through the Office of Consumer Protection on the construction or home improvement services, which include complaints of poor quality of work, risks from unfinished work, soft contract which cannot be enforced in practice, etc.¹ Although the Office of Consumer Protection

¹ สำนักงานคณะกรรมการคุ้มครองผู้บริโภค, สถิติรับเรื่องร้องเรียนจากผู้บริโภคในระบบคุ้มครอง ผู้บริโภคแบบเบ็ดเสร็จ ปีงบประมาณ พ.ศ. 2558 (1 พ.ย.-30 พย. 2557).

The Office of Consumer Protection board, *Statistics complaints from consumers in the form of comprehensive consumer protection* (1 Nov 2014-30 Nov 2014), http://www.ocpb.go.th/more_news.php?cid=19 (last visited Jun. 4, 2015).

imposes a fine penalty to entrepreneurs through civil claims in many cases in the past few years, these problems still persist.²

In fact, in Thailand there is the enactment of the Construction Profession Act, B.E. 2522 (1979) (hereinafter referred to as the “Act”). The Act mentions the requirement to set up the Council of Contractors similar to the Council of Engineers and the Council of Architects which have been set up following the Engineer Act B.E. 2542 (1999). The main objective of setting up the Council of Contractors is to supervise and control juristic persons such as construction companies and construction limited partners. However, the Act provides no protection to individual persons such as small/minor or local contractors, or small groups of consumers which are provided for under the engineer or architect profession. In any case, some provisions in relation to the Council of Contractors are similar to those of the engineer or architect profession, namely, the provisions to control the standard of construction services by considering the standard of work, the quality of work, the safety of work and also the ethics of contractors. A licensing system is also provided under this Act. If the contractors conduct anything wrong or improper in bad faith, their licenses will be revoked by the Council. The purpose here is to develop this profession to have more quality in terms of construction work, to boost the standard of the profession to reach the international standard, and also to protect the consumers.

Regarding the construction contract, normally in Thailand, the said contract is recognized as the Hire of work Contract under the Civil and Commercial Code B.E. 2535 (1992) under Section 587 to Section 607. However, these provisions are not strict and there is no official format for the contract. Thus, even an oral agreement is enough to be considered as a hire of work contract. In some cases when there are any accidents, damages or actions, the oral agreement is not enough to be evidence to prove the facts of the case.

Nonetheless, despite all of the above facts, the number of homebuilders or home improvement works in the construction industry is increasing. The subsequent problems then also increase for the consumer. The contractors or homebuilders should meet the standard of work and be controlled by a specific organization. The improvement of this profession should be made and everyone who receives the effect from non-quality work should have more protection. Consumers should receive the quality of work which is worth the money they have paid for. Should these problems continue without any measurement to encounter the problem, it can cause much harm to the consumers. Therefore, such problems should be seriously addressed. It is highly recommended to have something to ensure the consumer by ways of helping them choose contractors to take care of their accommodation such as licensing standard or any certificated of standard work.

2.Problems on Home Builder in Consumer Aspect

Once a house has been inhabited for some time, residents may need to renovate to improve the quality of the accommodation as sufficient accommodation is one of basic needs in life. Renovation may be needed when the family expands, which may lead to more members of the family and more residents, or a family member living in the home could want a higher quality residence. In some cases, buyers may have plans for home renovation in mind when purchasing a residence. In other cases, residents may want to renovate after having bought a new house from a housing

² *Id*

developer which does not meet their demands in terms of decoration or certain structures, and want to make home improvements to meet their demands immediately. Home owners then decide to make home improvements by hiring a homebuilder or contractor to do it for them. However, when considering home renovations or improvements, the home owner usually does not know much about construction. The Thai law does not particularly focus or help to realize that home improvement is significant and has a great effect on the quality of life. There is rarely sufficient available information to educate about home improvement and the home builder, which may lead to many severe problems for consumers nowadays.

In general, we do not have an exact explanation on the types of home improvement in the Construction Profession Act B.E. 2522 (1979). However, we can conclude that home improvement is the construction on housing developments which are directly related to home owners, such as repairing, remodeling, altering, converting, or the modernizing of, or adding to residential properties and includes, but is not limited to, the construction. Home improvement is also the installation of home improvement goods or the furnishing of home improvement services.³

Problems occurring from the homebuilder in home improvement can be seen in the present every day. The increasing amount of homebuilders, home development, population and economic growth are all factors of increased home improvement.⁴ However, the main reason for consumer problems is the lack of control of homebuilders' actions.

The contractor problems in home improvement should be more carefully addressed. This has a great and direct effect on the consumer's life. For example, it can cause damage to property, loss of money spent on an unsatisfying contractor's work, loss of time in waiting for the correcting of the work, and even bodily harm or loss of life in the case that the contractor did not exercise precautionary care. This is the reason why we need to control the construction occupation business by granting licenses. This measure would act as a precaution to prevent any damage from the occurring.

3. Legal Control on Home Builder in California Law

The contractor problems in home improvement should be more carefully addressed. This has a great and direct effect on the consumer's life. For example, it can cause damage to property, loss of money spent on an unsatisfying contractor's work, loss of time in waiting for the correcting of the work, and even bodily harm or loss of life in the case that the contractor did not exercise precautionary care. This is the reason why we need to control the construction occupation business by granting licenses. This measure would act as a precaution to prevent any damage from the occurring.

In California, for most professions such as accountants, contractors, professional engineers or attorneys and many others, there are legal provisions

³Edmund G. Brown, Jr., *California Contractors License Law & Reference Book with CD-ROM* (2013, last accessed Jun. 14, 2015).

⁴ สมาคมรับสร้างบ้านฯเตือนผู้บริโภค อย่าเห็นแก่ของถูก! ชี้ต้องระวังปัญหาผู้รับเหมาทิ้งงาน-ก่อสร้างล่าช้า (2558) ThaiContractor.com, *Homebuilders Association warns consumers not to hire cheap; to beware of contractors abandoning work and delays on construction*, available at <http://www.thaicontractor.com> (last visited June 12, 2015).

concerning each profession under the California Business and Profession Code or BPC⁵. The Code consists of a general California focuses on public protection. They are concerned with the consequence of this profession and have issued the guidelines for the regulation of the contractor and enforcing licensing of the contractor under their law. Moreover, they have set up the Contractors State License Board under the Department of Consumer Affairs to continue the intention of Contractor law part and 9 divisions. Under Division 3 concerning **Professions and Vocations Generally**, each chapter from chapters 1 to 21.5 provides regulations and describes penalties of each profession.

The contractor profession is described in Chapter 9, thoroughly providing regulations and a code of practice for construction in the article 1 to article 12.⁶ Article 1, section 7000 stipulates that, *“This chapter constitutes, and may be cited as, the Contractors’ State License Law.”*⁷

California focuses on public protection. They are concerned with the consequence of this profession and have issued the guidelines for the regulation of the contractor and enforcing licensing of the contractor under their law. Moreover, they have set up the Contractors State License Board under the Department of Consumer Affairs to continue the intention of Contractor law. CSLB has the responsibility to enforce California’s Contractors State License Law including investigating complaints against licensed and unlicensed contractors; issuing citations and suspending or revoking licenses; seeking administrative, criminal, and civil sanctions against violators; and informing consumers, contractors, and the industry about CSLB actions

Contractor licenses are divided into the following three basic branches of construction business, under the provision under section 7055⁸

(1) Class “A” General Engineering Contracting concerns fixed works requiring specialized engineering knowledge and skill. Infrastructure and similar projects also require specialized engineering knowledge and skill.

(2) Class “B” General Building Contracting concerns any structure built, being built, or to be built, requiring in its construction the use of at least two unrelated building trades or crafts.

(3) Class “C” Special Contractor for the contractor whose construction work requires special skills

The application of a contractor license requires that the contractor who is applying to be a licensed contractor must be 18 years of age or older and have the experience and skills necessary to manage the daily activities of a construction business, including field supervision, or be represented by a qualifying individual with the necessary experience and skills.⁹

⁵ Contractors State License Board, California Business and Professions Code, available at <http://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=BPC&tocTitle=+Business+and+Professions+Code+-+BPC> (last visited Jun. 1, 2015).

⁶ *Id*

⁷ California Business and Profession Code, Chapter 9, Article 1 sec. 7000

⁸ California Business and Profession code, Chapter 9, Article 4 sec.7055

⁹ Contractor State License Board, *Building your career as Contractor*, available at <http://www.cslb.ca.gov/> (last visited June 12, 2015).

The contractor must have had, within the ten years immediately before the filing of the application, at least four full years of experience at a journey level, or as a foreman, supervisor, or contractor in the classification for which he or she is applying. The experience claimed on the application must be verifiable and individuals who have knowledge of the experience must certify the accuracy of the experience information provided by the applicant.¹⁰ The contractor must have had, within the ten years immediately before the filing of the application, at least four full years of experience at a journey level, or as a foreman, supervisor, or contractor in the classification for which he or she is applying. All businesses or individuals who construct or alter any building, highway, road, parking facility, railroad, excavation, or other structure in California must be licensed by the California Contractors State License Board if the total cost (labor and materials) of one or more contracts on the project is US\$500 or more. Contractors must be licensed before submitting bids.¹¹

All California contractors who are occupied in the home improvement business or who provided goods and services for home improvement are required to have Home Improvement licenses and must provide a home improvement contract to the parties.

CSLB recommends that, “A contract is one of the most significant instruments you have to help you avoiding the problem with unclear agreement. A well-written contract can help its communication between the homebuilder and the home owner. An unclear written contract can quickly lead to miscommunication and misunderstandings; problems that could lead to have a prosecution in court or under investigation by the Contractors State License Board (CSLB).”¹²

We can conclude that CSLB protects the homeowner by being a representative mediation offering a complaint system process for the consumer. If you hire unlicensed contractors, the CSLB Board may not be able to help you with a resolution to a complaint. Thus, compensations and remedies against unlicensed contractors may exist only in civil procedures in court. This is the reason that licensing is significant to California’s construction industry and is beneficial to consumer protection from undesirable occurrences in home improvement or other construction works. It is illegal for one contractor to use another contractor’s license, just as it is illegal for someone to use another person’s driver’s license.¹³

This contract is the most important communication tool between the homebuilder or the employer and the contractor; it should identify all project expectations to help avoid any confusion. A comprehensive contract details who will do the work, what materials will be used, where the work will be done, when it will be done, and how much it will cost.

A home improvement contract should be in writing, legible, easy to understand, and inform the right to cancel or rescind the contract. If you are promised

¹⁰ *Id*

¹¹ *Supra* note 9

¹² Contractor State License Board, *Contracting for Success: A contractor’s guide to home improvement contract*, <http://www.cslb.ca.gov/Resources/GuidesAndPublications/ContractingForSuccess.pdf> (last visited Jun. 15, 2015).

¹³ *Supra* note 9

something orally, it should be included and informed in writing. Any changes to the contract must also be in writing and included in the paperwork.¹⁴

With respect, based on California law and the construction industry in California, it seems that CSLB play an important role for this career by enforcing a licensing system to the contractor which impacts regulations in the construction industry from small business to large company, as we see from the condition of contractors working for the amount of US\$ 500 or higher must have a license. If they work under unlicensed conditions or underground work, it would be illegal in California.

4. Legal Control on Home Builder in Thailand

According to The Royal Decree on reserved professions for Thai people B.E. 2522,¹⁵ craftsman or masonry is one of 39 professions reserved solely for Thai people. Although there such laws that set a reservation for careers in which only those with Thai nationality can work, foreign companies can carry a permit to use foreigners in some projects.

In this respect, there are many laws which concern the construction industry, such as Architect Act B.E. 2543, Engineer Act B.E. 2542, Building Act B.E. 2522 and specifically the Construction Profession Act B.E. 2522 which should be similar and effective for use in the contractor profession; however, most contractors are opposed to them, as in the past, the older contractors feel that this act does not support them, but only limits them to work under the regulation.

This law is issued to set up a government organization in order to organize and control the contractor profession including construction work which should be controlled construction work. This is one of the significant alternative policies from the government to control this profession and may prevent subsequent construction-related problems which occur in the period of legislating.

In conclusion, since B.E. 2522, this law has not been enforced in practice because there is no organization established to enforce the law under this act. Thus, contractors have not been regulated as per the objective of this act.

There are, however, many private organizations set up by grouping the members from this career and related businesses to form associations, such as Thai Home Builders Association (THBA), Thai Contractors Association Under H.M.The King's Patronage (TCA) and Construction Institute of Thailand (CIT).

For the construction work which requires the Engineer profession, there is particular law to control and regulate them; Engineers, Act B.E.2542, established in order to regulate the profession of engineer. The law states that the engineer needs to be control and have a licensed to work on the regulated work. The license is considered and issued by Council of Engineers.¹⁶ The council of Engineer is important

¹⁴ *Supra* note 12

¹⁵ พระราชกฤษฎีกากำหนดงานในอาชีพและวิชาชีพที่ห้ามคนต่างด้าวทำ พ.ศ. 2522 (Royal Decree prohibiting aliens from working in professions and vocations B.E. 2522) *available at* <http://www.lawreform.go.th> (last visited Jun. 20, 2015).

¹⁶ *Id*

organization to push up the engineer profession The council mission is to safeguard life, property and welfare of the public by setting high standard for registering and regulating professional engineers.¹⁷ Although there is a license to regulate the engineer, the licensed engineer still has a duty to follow the 15 code of ethics of the engineering profession.¹⁸

In general homebuilder's problems about home improvement between the homebuilder and homeowner in Thailand are enforced by an agreement based on the hire of work contract under The Civil and Commercial code, Section 587.¹⁹ Hire of work contract is a contract that does not have a restricted form of contract by law. The contract can be made simply by inform the intention of the agreement. It can even be verbal, and it can be used in court without any evidence in writing.²⁰ However, in general usage of normal people or small private segments, there are some loops of law with no formal form. The contract would generally be an informal contract or verbal contract, providing few details in the contractor's obligations. This leads to the consumer problems between the contractor and project owner (homeowner).

Regarding to the details of Construction Profession Act B.E.2522 (1979), it does not provide the necessary information on the construction work and contractors in a proper matter and has less information about the kind of construction work, the code of practice, or even the ethics in this profession. On the other hand, it only focuses on providing the steps to establish an organization and the committee including the authority and duty to control the licensed contractors conducting regulated construction work which would be set from the Ministerial Regulations. At present, no Ministerial Regulation has been issued under this act, nor has there been information on which construction work is to be considered as regulated construction work. In other words, without the establishment of regulated construction work, there will also not be any licensed contractors to register to conduct said regulated construction work. The problem persists, leading to damage for the consumer.

This is a severe problem that the legislation and relevant departments, including the Department of Public Works and Town & Country Planning should seriously address. If the Department of Public Works and Town & Country Planning chooses to issue a policy to fast track this law to be enforced, there would then be a mechanism to support the contractor and regulate them in the proper manner

Regarding to the law, provide the provision to control the contractor under the regulated work which focusing only to large scale construction work as set by the Ministerial regulation. This shows that this law is not up to date in the different types of construction work. Nowadays there are various kinds of construction; the types of construction can start from small project like home improvement to a big project like

¹⁷ Council of Engineers, *Mission of Council of Engineers*, available at <http://www.coe.or.th/coe-2/eng/main/appMain.php?aMain=2&aMenu=1020> (last visited Jun. 15, 2015).

¹⁸ Council of Engineers, *Ethics*, available at http://www.coe.or.th/e_engineers/ethics.php (last visited Jun. 19, 2015).

¹⁹ นฤนาท เกศสระ, บทวิเคราะห์: การบอกเลิกสัญญาจ้างก่อสร้าง

Narunat Ketissara, Analysis: Cancellation of construction contract, available at <http://tsumis.tsu.ac.th/tsukm/UploadFolder%5CCancle%20Contact.pdf> (last visited Jun. 15, 2015).

²⁰ Council of Engineers, *Persons practicing the Regulated Engineering*, available at <http://www.coe.or.th/coe-2/eng/main/appMain.php?aMain=2&aMenu=1040> (last visited Jun. 19, 2015).

a construction for a government project. Problems may occur in every step of the construction work, thus, the law should be able to cover every type of construction work and not only be limited to large scale contractors; small contractors should also be included.

At present, the Thai law still does not have a potential solution to resolve the consumer's distress. The Construction Profession Act B.E. 2522 (1979), was established specifically to control and regulate the profession of contractors; however, this law has not been practically enforced. Since the establishment of this act, there have been no ministry regulations for regulated construction work as the law states under Section 26. Moreover, the Council of Contractors still has not been set up until now for the same reasons suggested above.

Nonetheless, the standard of the profession is not obviously regulated. Regarding contractors in the construction industry, some small contractors may be able to learn from experience, becoming a business owner with their own workers in their command. Some big companies have many employees who have knowledge and educated skills. This is the gap in the construction profession, and the reason to create a standard of profession which is acknowledges throughout the construction industry along with examinations to test their knowledge, similar to that in California.

Conclusion and Recommendations

Thailand is close to having a particular law which would like to control and regulate the contractor at the present; however, loopholes in the law and in practice still exist, as the writer has analyzed and recommended to amend. The law will be drive the construction industry to achieve a higher potential, and will generate more income to our country. It would be necessary for those relevant persons in construction profession to realize seriously to amend it for the public interest as consumer protection and contractor benefit and the country's construction development would be higher.

For abovementioned, in conclusion, first of all, it is essential to set up the Council of Contractors (the "Council") in Thailand as is the case for other professions for the implementation of the legal provisions under the Construction Profession Act B.E. 2522 (1979). The Council will have the authority to regulate the construction business in general, and both minor and major contractors, regardless of whether they are individual or juristic persons. It is important to have a government organization as a working body to implement and set the rules and regulations for this career. This working entity will educate the contractors or relevant people in the construction business to be more aware of illegal or improper working manners. The Council will also improve the quality of construction works, alleviating the current problem. Furthermore, this working entity will also be responsible for the enforcement of the relevant laws and regulations.

Secondly, in general, small constructions such as home improvement should be more focused and protected. The Construction Profession Act B.E. 2522 (1979) should introduce measures to control the contractors.

Thirdly, In order to prevent the damages at this time and also in the near future, the Thai law should adapt and implement the licensing system as used in foreign countries. The initial objective of enacting the Construction Profession Act B.E. 2522 (1979) was to license construction works and the contractors themselves.

Moreover, The license is not a limitation of occupation. On the contrary, it generates added value to the construction career. Consumers will give more attention to small construction businesses. This may generate more income for small and minor contractors than being an underground contractor, although the contractors may have to incur more costs in order to obtain the license. It is a way of guaranteeing that these licensed contractors or homebuilders have a kind of official recognition from a government authority as they would be required to pass many exams and training as stipulated by the relevant rules and regulations in order to obtain a license. This will reduce problems which consumers are facing nowadays. The advantages outweigh the disadvantages in this regard. The development of construction business will grow further after applying this system. They have to acquire sufficient knowledge and experiences to work and to demonstrate to the consumer that they are qualified to do the work properly, and may call for higher wages.

Therefore, the Thai construction business should have a standard of construction work and the contractors themselves should pass these standards before delivery of any work to the project owner.

REFERENCES

Book

Brown, Edmund G. Jr. 2013. *California Contractors License Law and Reference Book with CD-ROM*. N.p: Matthew Bender & Company, Inc. CD-ROM.

Articles

Council of Engineers, *Persons practicing the Regulated Engineering*, available at <http://www.coe.or.th/coe-2/eng/main/appMain.php?aMain=2&aMenu=1040> (last visited Jun. 19, 2015).

นฤนาท เกศสระ, บทวิเคราะห์: การบอกเลิกสัญญาจ้างก่อสร้าง

Narunat Ketissara, Analysis: Cancellation of construction contract, available at <http://tsumis.tsu.ac.th/tsukm/UploadFolder%5CCancle%20Contract.pdf> (last visited Jun. 15, 2015).

Electronic Media

Council of Engineers, *Mission of Council of Engineers*, available at <http://www.coe.or.th/coe-2/eng/main/appMain.php?aMain=2&aMenu=1020> (last visited Jun. 15, 2015).

Council of Engineers, *Ethics*, available at http://www.coe.or.th/e_engineers/ethics.php (last visited Jun. 19, 2015) Contractor State License Board, *Contracting for Success: A contractor's guide to home improvement contract*, <http://www.cslb.ca.gov/Resources/GuidesAndPublications/ContractingForSuccess.pdf> (last visited Jun. 15, 2015).

Contractor State License Board, *Building your career as Contractor*, available at <http://www.cslb.ca.gov/> (last visited June 12, 2015).

พระราชกฤษฎีกากำหนดงานในอาชีพและวิชาชีพที่ห้ามคนต่างด้าวทำ พ.ศ. 2522 (Royal Decree prohibiting aliens from working in professions and vocations B.E. 2522) available at <http://www.lawreform.go.th> (last visited Jun. 20, 2015).

Law

Kingdom of Thailand. 1979. *Building Control Act B.E. 2522*.

Kingdom of Thailand. 1979. *Contractor Profession Act B.E. 2522*.

Kingdom of Thailand. 1979. *Consumer's Protection B.E. 2522*.

Kingdom of Thailand. 1992. *Engineers Act. B.E 2535*.

Kingdom of Thailand. 1992. *Civil and commercial Code B.E 2535*.

United States. *California Business and Professions Code*.

LEGAL PROBLEMS INVOLVING MIXED-USE CONDOMINIUM IN ONE BUILDING*

*Jinjutha Techakumphu***

ABSTRACT

Even though Thailand has promulgated the Condominium Act B.E. 2522 and had the latest amendment in B.E. 2551 with a view to manage the living of co-owners in the condominium, the aforementioned Act is somewhat outdated because it was promulgated mainly to serve single purpose condominium and further it creates a loophole in relation to the management of common property in the mixed-use condominium where there are different types of units located in the same building. As a result of the complicated structure of mixed-use condominium which leads to the conflict use of common property among different types of unit in the building, this thesis will focus on the problem of the Condominium Act B.E. 2522 in relation to the management of common property in the mixed-use condominium. This is because a mixed-use condominium triggers a more complex structure for common property than that of the single purpose condominium since the management of common property in the building will not belong to one group of co-owners who has the same interest, but consists of co-owners with various interest who are in the same building.

This thesis finds that the management of common property in the mixed-use condominium according to the current Condominium Act poses many controversies among different types of units, such as; the lack of a clear definition of “condominium” and “common property”, the lack of limitation on the multipurpose area in the condominium, the conflict among the different types of co-owners with regard to the maintenance and management of common property, voting rights on the common property reserved only for the usage of certain types of condominium units and the conflict between the right of certain unit owners and the right of all unit owners in the same condominium.

In order to provide solutions to the management of common property in the mixed-use condominium, this thesis therefore studies the condominium law in two countries: the USA and Singapore, where their condominium laws’ structures contain the measures regarding the management of common property in the mixed-use condominium and also the management corporation and subsidiary management corporation in dealing with various types of units in the same building.

As a result of the study concerning the management of common property in the mixed-use condominium, this thesis proposes that the definitions of “condominium” and “common property” under the Condominium Act B.E. 2522 be amended to accommodate the mixed-use condominium. The limitation on multipurpose area should be established. Moreover, the voting rights in connection with the common property for certain co-owners having the same unit purpose should also be separated from the voting rights of the rest of the co-owners in the building so as to prevent the conflict use among different types of units in the mixed-use condominium.

Keywords: common property, mixed-use condominium

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บทคัดย่อ

แม้ว่าประเทศไทยจะมีการออกพระราชบัญญัติอาคารชุด พ.ศ. 2522 และมีการแก้ไขครั้งล่าสุดในปี พ.ศ. 2551 โดยมีวัตถุประสงค์เพื่อจะจัดการการอยู่ร่วมกันของเจ้าของร่วมในอาคารชุด อย่างไรก็ตามพระราชบัญญัตินี้มีความล้าหลังเนื่องจากวัตถุประสงค์ในการประกาศใช้นั้นมีเพียงเพื่อวัตถุประสงค์เดียว ดังนั้นพระราชบัญญัตินี้จึงก่อให้เกิดช่องโหว่ในการจัดการทรัพย์สินส่วนกลางของอาคารชุดแบบผสม เนื่องจากอาคารชุดแบบผสมนั้นมีห้องชุดที่มีวัตถุประสงค์แตกต่างกันอยู่ในอาคารชุดเดียวกัน สืบเนื่องจากโครงสร้างที่ซับซ้อนของอาคารชุดแบบผสมซึ่งก่อให้เกิดความขัดแย้งในการใช้ทรัพย์สินส่วนกลางท่ามกลางห้องชุดที่มีวัตถุประสงค์แตกต่างกัน ผู้เขียนวิทยานิพนธ์จึงต้องการจะเน้นเรื่องปัญหาของพระราชบัญญัติอาคารชุด พ.ศ. 2522 อันเกี่ยวเนื่องกับการจัดการทรัพย์สินส่วนกลางในอาคารชุดแบบผสม เนื่องจากอาคารชุดแบบผสมนั้นก่อให้เกิดโครงสร้างซับซ้อนสำหรับทรัพย์สินส่วนกลางมากกว่าอาคารชุดที่มีวัตถุประสงค์เดียว เพราะการจัดการทรัพย์สินส่วนกลางในอาคารชุดจะมีได้เป็นของกลุ่มเจ้าของร่วมเพียงกลุ่มเดียวที่จะมีผลประโยชน์เดียวกัน หากแต่เป็นเจ้าของร่วมที่มีผลประโยชน์ที่หลากหลายอาศัยอยู่ในอาคารเดียวกัน

ผู้เขียนพบว่า การจัดการทรัพย์สินส่วนกลางในอาคารชุดแบบผสมภายใต้พระราชบัญญัติอาคารชุดฉบับปัจจุบันนั้นก่อให้เกิดปัญหาหลายประการระหว่างห้องชุดที่มีวัตถุประสงค์แตกต่างกัน อาทิเช่น การไม่มีคำนิยามที่ชัดเจนของ “อาคารชุด” และ “ทรัพย์สินส่วนกลาง” การไม่กำหนดพื้นที่เฉพาะสำหรับพื้นที่สำหรับวัตถุประสงค์ต่างๆในอาคารชุด ความขัดแย้งของเจ้าของร่วมที่มีวัตถุประสงค์ต่างกันสำหรับการบำรุงรักษาและการจัดการทรัพย์สินส่วนกลาง สิทธิในการออกเสียงในทรัพย์สินส่วนกลางซึ่งกำหนดให้ใช้เฉพาะบางห้องชุด และความขัดแย้งระหว่างสิทธิของเจ้าของห้องชุดบางห้องกับเจ้าของห้องชุดทุกห้องในอาคารชุด

เพื่อหาทางแก้ไขการจัดการทรัพย์สินส่วนกลางในอาคารชุดแบบผสม ผู้เขียนจึงได้ศึกษากฎหมายอาคารชุดของสองประเทศ คือ สหรัฐอเมริกาและสิงคโปร์ ซึ่งโครงสร้างกฎหมายอาคารชุดของทั้งสองประเทศมีมาตรการในการจัดการทรัพย์สินส่วนกลางในอาคารชุด และยังมีหน่วยงานจัดการหลักและหน่วยงานจัดการย่อยในการจัดการห้องชุดที่มีวัตถุประสงค์ต่างกันอาคารเดียวกัน

ผลจากการศึกษาในวิทยานิพนธ์นี้ในเรื่องการจัดการทรัพย์สินส่วนกลางในอาคารชุดแบบผสม ผู้เขียนจึงได้เสนอแนวทางแก้ไขปัญหา โดยให้มีการแก้ไขคำนิยามของ “อาคารชุด” และ “ทรัพย์สินส่วนกลาง” ภายใต้พระราชบัญญัติอาคารชุด พ.ศ. 2522 เพื่อรองรับการจัดตั้งอาคารชุดแบบผสมอย่างชัดเจน ตลอดจนเสนอแนะให้มีการกำหนดพื้นที่สำหรับวัตถุประสงค์ต่างๆ ในอาคารชุดนอกจากนั้น สิทธิในการออกเสียงในเรื่องทรัพย์สินส่วนกลางสำหรับห้องชุดที่มีวัตถุประสงค์การใช้เหมือนกันควรจะถูกแยกออกจากสิทธิในการออกเสียงของทุกห้องชุดในอาคารชุดเพื่อจะป้องกันความขัดแย้งระหว่างห้องชุดที่มีวัตถุประสงค์ต่างกันที่อยู่ในอาคารชุดแบบผสม

คำสำคัญ: ทรัพย์สินส่วนกลาง อาคารชุดแบบผสม

Introduction

The statistics of the registration of condominium from the Real Estate Business Promotion Bureau in 2001 showed 21 registered condominium in Bangkok, while in 2013, the number rose significantly to 227.¹ Based on the aforementioned statistics, the writer is of the opinion that condominium plays an important role in our life since more and more people prefer to avoid tiresome traffic congestion and reside in the center of the city where they can do all activities in the same place.

¹ Statistics on Bangkok Metropolitan Real Estate Project, available at <http://homewithdream.com/2013/12/09/statistics-real-estate/> (Last visited Dec 6, 2014).

In order to serve people's need in relation to dwelling, Thailand launched the Condominium Act B.E. 2522 (the "CA"). The latter was also intended to solve the problem of ownership of real estate under the Civil and Commercial Code which does not accommodate separate ownership of condominium units. The CA also established a maintenance system for condominiums so as to assure the condominium unit purchasers.²

As time passed by, people not only use condominiums for residential purpose, but preferred to "live, work and play" in a single place; that was when the mixed-use condominium was introduced. A mixed-use condominium is a condominium that consists of an integration of different groups of units, for example; retail units, and residential units, etc., located in one building. The integration of home, office and recreation sections of a mixed-use condominium is the solution to modern living and also helps to optimize land usage.

Although Thailand has the CA to control people living together in a condominium, it does not serve the need of an increasing number of mixed-use condominiums. This is because the CA does not provide suitable provisions for the management of common property in a mixed-use condominium. Consequently, without clear provisions to govern the management of common property thereunder, it can lead to conflict among owners of different types of units. To make matters even more complicated, there are some areas in the building which are dedicated for use only by particular types of units; therefore, the management of common property, including the payment for maintenance fees, needs to be clearly defined so as to prevent conflict among owners of different types of units.

Definition of Mixed-Use Condominium

From the writer's research of mixed-use condominiums in Thailand, the Eight Thonglor Residences can be used as an example of a mixed-use condominium.

Based on clause 5 of the Eight Thonglor Residences' bylaws, the unit types are divided into 3 categories as follows:

1. Retail units which are intended for use as retail outlets, e.g. restaurants, offices, clinics, spas, financial institutions, entertainment spots, tutoring institutions, product showrooms and for other commercial purposes with parking spaces, etc.

2. Residential units which are divided into 2 types:

- 2.1 Residential units section 1 which stipulates that they shall be used solely for residential purposes only;

- 2.2 Residential unit section 2 which serves as a serviced apartment

3. Office units

Using the aforementioned characteristics of the Eight Thonglor Residences as a case study, and for the purpose of this thesis, the term "mixed-use condominium" can be defined as a condominium consisting of multi-purpose units in the same building, e.g. for use as residences, offices, and other commercial purposes, so long as such uses do not violate the laws.

²Remarks of the Condominium Act B.E. 2522.

Provisions in relation to the Management of Common Property in the Mixed-Use Condominium in Thailand

In the writer's opinion, there are only two main provisions under the CA that can be applied to the common property management in the mixed-use condominium, namely:

Section 17/1 of the Condominium Act: Limitation on Commercial Area

Section 17/1 of the CA stipulates that *“in the case where a space in the condominium is set aside as a place to carry on business, access to and from such area shall be specifically established in order to prevent disturbance or the peaceful enjoyment of the joint owners.”*

No person shall be permitted to engage in any trade activity in the condominium, except it is a trade activity conducted in the area of the condominium designated in accordance with paragraph one.”

Section 17/1 is added into the CA by the Condominium Act (No. 4) B.E. 2551 because the CA has been long enforced and it appears that the principles and many details thereof are not practical and also insufficient to protect buyers or the prospective buyers who purchase the condominium for residential purpose, therefore it is essential that the Condominium Act (No. 4) B.E. 2551 be introduced to solve the enforcement issue and to protect the buyers.³

In the writer's opinion, Section 17/1 is a good example to illustrate how the condominium structure has changed in Thailand and how the government responded to such change by enacting this Section. Moreover, this Section also proves that at the present time, the condominium trend is changing from single purpose to multipurpose condominium since there are also retail units for business in the condominium, therefore the condominium should have regulation to control the business being carried out in the condominium.

According to Section 32(6) of the CA, condominium regulation shall contain the substantive terms with regard to management of common property. Therefore, the condominium regulation must contain details in relation to the management of personal property and common property, for example, it must be stated whether condominium is for residence or for commercial purpose. This is because Section 17/1 limits the usage of unit as commercial area, unless there is a proper entrance and exit system.⁴

The purpose of Section 17/1 is to protect the owners residing in other units in the same building and it also prevents other owners from conducting business which can disturb the peacefulness of the joint owners. Section 65 also subjects those in violation of Section 17/1 to a fine not exceeding fifty thousand Baht and an additional fine not exceeding five thousand Baht per day throughout the period of such violation. However it should be noted that Sections 17/1 and 65 will not apply to condominiums registered as condominiums containing units used in carrying on trading business previously, or prior to 6 July 2008, according to Section 32 of the Condominium Act (No. 4) B.E. 2551.

³ Remark of the Condominium Act (No. 4) B.E. 2551

⁴ วิชัย ตันติกุลานันท์. คำอธิบายกฎหมายเกี่ยวกับอาคารชุดกฎหมายคอนโดมิเนียม 52, พิมพ์ครั้งที่ 8: ห้างหุ้นส่วนจำกัดพิมพ์อักษร, 2556, [Wichai Tuntikulanan, **Law in relation to Condominium**, 52, PimAksorn Limited Partnership, 8th ed., 2013]

Section 46 of the Condominium Act: the Right of Specific Unit Owners

Section 46 of the CA stipulates that *“Where the Bylaws require some co-owners to pay costs for a particular purpose, only those co-owners shall have the right to vote for the resolution pertaining to the costs for that particular purpose and each person has a number of votes pursuant to the ratio as stipulated in the provision of Section 18 Paragraph One.”*

Section 46 states of the right of specific unit owners regarding the matter involving only those unit owners which can be regarded as the exception under the CA. This is because normally the co-owner of each unit shall have equal voting right at the meeting, except in the case of Section 46. In other words, should the Bylaws state that certain co-owners are obliged to pay specific expense for a specific matter, for instance, the expense solely for the condominium swimming pool membership, then other co-owners who are not swimming pool members shall have no right to cast vote regarding the expenses for swimming pool maintenance. The law further provides that in casting such specific vote, the said owners shall have voting right equal to the ownership ratio as provided in Section 18.

In the writer’s opinion, the developer can apply Section 46 which is the closest Section regarding the solution to the mixed-use condominium management concerning the collection of the different expenses for various unit types; for example in case of a mixed-use condominium consisting of commercial, office and residential units, and the residential units possess specific common property reserved only for the residential units usage, then the developer can apply Section 46 to collect special expense in order to maintain the said specific common property from only the residential unit owners and the residential unit owners have the right to bar other units i.e. the commercial and office units from exercising their votes on this specific common property. Nonetheless, Section 46 is not the specific provision to regulate the mixed-use condominium since it does not set the standard for the management of limited common property; Section 46 rather applies on a case-by-case basis in dealing with the right of specific unit owners in specific matters. Therefore, there is uncertainty in applying Section 46 to deal with common property reserved only for certain units.

Problems regarding the Management of Common Property in Mixed-Use Condominium under the Condominium Act B.E. 2522

The Unclear Definition of “Condominium” under the Condominium Act

Section 4 of the CA provides the definition of condominium as *“the building that can be separated into units for individual ownership which includes personal and common properties.”*

Based on the aforementioned definition, it can be concluded that the CA allows the separation of ownership in the building which is the basic concept of “condominium”. The important factor is that the CA stipulates that the ownership in the condominium consists of 2 parts: personal property and common property. Furthermore, to be listed as condominium in Thailand, such building must be registered with relevant authority under the CA.

It can be seen that the CA does not mention the type of condominium to be registered. As a result, when the developer would like to establish a mixed-use structure for the condominium, there is uncertainty as to whether or not the developer can register such mixed-use building as the condominium under the CA. Moreover, the footnote to the enactment of the CA 1979 states: *“the CA was enacted due to the rising problems and conflict of residing in urban areas and the ownership right in the immovable property regime under the Civil and Commercial Code does not accommodate the need of the residents in the same building having separate titles to the units. This*

Condominium Act sets up the ownership system in the condominium to govern all common residents in the same condominium while allowing individual ownership of the units. At the same time, it enables fair sharing of expenses. In addition, the establishment of many condominiums now can be organized and administered under the rules developed to ensure confidence of the buyers of condominium units.” From such note, it can be implied that the CA was established solely for the residential purpose of the condominium purchaser. As a result, when the developer conducting the mixed-use condominium, there are loopholes regarding the registration of condominium, the management of common property since not all unit owners have the same objective in purchasing the mixed-use condominium.

The Unclear Definition of “Common Property” under the Condominium Act

Since the CA divides the definition of the property into only 2 categories: personal property and common property. Section 4 of the CA defines “*common property*” as “*part of the building that is not the unit such as land on which the building is constructed or other property provided for common use*”.

In respect of the common property, there is the controversy as to whether or not the common property needs to be used for all co-owners in the condominium or only certain co-owners are allowed to use certain common property. In this regards, a scholar views that the common property under the CA needs not be reserved for the benefit of all co-owners, he rather opines that some common property can be reserved only for the benefit of certain group of co-owners, in other words it depends on the purpose of the establishing of condominium or the agreement of the co-owners in such condominium.⁵ Another scholar⁶ further supports the aforementioned idea by stating that the purpose of French Condominium law, the root of the Thai CA, stipulates that the common property means part of building and land (including other property determined by the law) for the usage or for the benefit of all co-owners or certain co-owners among all co-owners. He further states that French law applies broader definition of common property than that of the CA. Moreover, if people interpret that there is no limited common property when there exists certain property that is only for the benefit of certain group of co-owners then it shall be unfair to the rest of the co-owners who do not utilize such property but have to pay for the maintenance fee thereof.

According to the writer’s perspective, strictly speaking, the common property under the definition provided in the current CA should mean the property for the common use of all co-owners in the condominium, based on the following grounds:

Firstly, the definition of “common property” under the CA does not stipulate that it is provided for common use of certain units in the condominium, on the other hand it simply states that it is for the common use of the co-owners in the building.

Secondly, without a clear definition of “common property”, there will be a loophole when it comes to the separation of properties which are commonly used only among certain groups of owners and are not for the benefit of all unit owners in the building. This is because the developer and the unit owners will face the problem

⁵ วิกรณ์ รักษ์ปวงชน, กรรมสิทธิ์ในอาคารชุด151, วิทยานิพนธ์นิติศาสตรมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ (2528) อ้างอิงงานของ วิวัฒน์ รุจทิฆัมพร, อาคารชุด7, วารสารฉบับพิเศษ 10 ปี แห่งการสถาปนาการเคหะแห่งชาติ[Vikorn Rakpuangchon, Condominium Ownership 151(1985) citing Viwat Rujtikangporn, Condominium 7, special journal 10 years of the establishing of National Housing Authority (unpublished Master of Laws thesis, Thammasat University)(on file with the Thammasat University Library)]

⁶ *Id.* at 151-152.

concerning the management of such common property, that is to say, initially, the developer or the condominium juristic person (“CJP”) may draft the condominium bylaws to prohibit certain units from using such common property since only specific unit owners are required to pay for the maintenance of such common property. Nonetheless, due to the unclear definition of common property, the voting on the management of such property falls under Section 48 of the CA which requires not less than half of the total votes of the joint owners in the condominium to be effective. As a result, other co-owners who have not paid for the maintenance of that common property, will have the right to vote in matters involving that common property. This is because such common property is regarded as common property which is for the benefit of all co-owners in the condominium under Section 4 of the CA.

The Limitation of the Multipurpose Area only Limits to the Commercial Area

The fourth amendment which is the latest amendment to the CA on 27 February 2008 added one new Section regarding the limitation on commercial area in the condominium as follows:

“In the case where a space in the condominium is set aside as a place to carry on business, access to and from such area shall be specifically established in order to prevent disturbance or the peaceful enjoyment of the joint owners.

No person shall be permitted to engage in any trade activity in the condominium, except it is a trade activity conducted in the area of the condominium designated in accordance with paragraph one.”

It can be seen that the new Section 17/1 only states that the co-owners wishing to conduct business in the condominium must provide a separate entrance and exit to such area so as not to disturb other co-owners in the building. Nonetheless, it should be noted that under the mixed-use condominium structure, the purpose of the units may not be limited to retail shops only, but may include other purposes not prohibited by law. Therefore, should the new Section 17/1 deal only with retail shops, there could be a problem when the need to use an area for other purposes arises, for example, for use as office units. In this connection, stipulating only limitation on retail shops could result in creating loophole for other unit’s purposes in the mixed-use condominium seeing that the CA does not state that for other purposes except for retail shops, those co-owners are required to provide the system on entering and exiting such area in order to prevent the disturbance on the peaceful enjoyment of the joint owners.

Voting Right on the Common Property Reserved only for Usage of Certain Types of Condominium Units

In a mixed-use condominium the number of each unit type is unequal, in other words, there will be one section that possess more bargaining power as they control the main voting rights; for instance, Condominium A consists of 3 sections: the first consists of 55 commercial units; the second comprises 80 office units and the last section consisting of 200 residential units. As a result, the residential units will have control over the management of common property because they have more voting power. **Section 48** of the CA provides that *“the resolution on the following matters must have the votes of not less than a half of total votes of the joint owners in the condominium.*

- (1) *A purchase of a real estate or acceptance as a gift of a real estate with the encumbered charge being the common property,*
- (2) *A disposition of common property being the real estate,*
- (3) *A permission to a joint owner to build, decorate, make a change in, alteration on or addition to his own unit at his own expenses which adversely affect the common property or the external features of the condominium,*
- (4) *An alteration on or a change in bylaws relating to the use or management of the common property,*
- (5) *An alteration on or a change in the ratio of common expenses in the bylaws defined under Section 32(8),*
- (6) *A construction deemed to be a change in, addition to or modification on the common property,*
- (7) *An arrangement for the exploitation from the common property.*

In case where the joint owners attending a meeting does not constitute the number set forth under paragraph one, a new meeting shall be summoned within fifteen days from the date of summoning the preceded meeting and that a resolution relating to the matter provided under paragraph one in this new meeting must receive the votes of not less than one third of the joint owners' total votes."

Consequently, if the residential units consisting of 200 units exercise their rights to make the minority units (the commercial and office units) to pay for more maintenance fee and at the same time prohibiting those minority units from the enjoyment of certain common facilities, they can do so by mobilizing half of the total voting right by virtue of Section 48. It can be said that Section 48 creates a loophole which leaves the minority units vulnerable to unfair treatment from the majority units in the mixed-use condominium.

The Conflict between Sections 46 and 48 of the Condominium Act B.E. 2522

Section 46 of the CA stipulates that *"When there is Bylaws requiring that only some co-owners have to pay for costs for a particular purpose, only those co-owners shall have the right to vote for the resolution pertaining to the costs for that purpose and each person has a number of votes pursuant to the ratio as stipulated in the provision of Section 18 Paragraph One."*

Section 48 of the CA provides that *"the resolution on the following matters must have the votes of not less than a half of total votes of the joint owners in the condominium:*

- (4) An alteration on or a change in Bylaws relating to the use or management of the common property,*
- (6) A construction deemed to be a change in, addition to or modification on the common property,*
- (7) An arrangement for the exploitation from the common property.*

In case where the joint owners attending a meeting does not constitute the number set forth under paragraph one, a new meeting shall be summoned within fifteen days from the date of summoning the preceded meeting and that a resolution relating to the matter provided under paragraph one in this new meeting must receive the votes of not less than one third of the joint owners' total votes."

Section 46 of the CA stipulates that certain co-owners have the right to vote for the resolution pertaining to the cost of a particular purpose and that only they pay for

the costs thereof and each person has a number of votes pursuant to the ratio stipulated under Section 18. In my point of view, Section 46 only provides that the aforementioned co-owners have the right to vote solely on the cost of a particular purpose, Section 46 however is silent on whether or not the management of such particular purpose is the absolute right of those co-owners. Consequently, there is an uncertainty when it comes to the management of the specific common property for some unit owners. This is because under Section 48 (4), the amendment to the bylaws in relation to the use or management of common property and (6) a construction deemed to alter or modify the common property requires the resolution of not less than half of the total voting rights of all co-owners in the condominium.

The conflict between these 2 Sections will take place when the co-owners under Section 46 would like to exercise their voting rights in other aspects besides the cost of such particular purpose. For example, the residential units would like to redesign the swimming pool for which only they have paid the maintenance fee and the bylaws provides that the swimming pool is for the exclusive use of this group. Based on Sections 46 and 48(6), the residential units cannot modify the swimming pool if their total voting rights do not amount to the equivalent of half of the total voting rights of the entire co-owners which shall include other types of unit owners residing in the same building. This is owing to the fact that Section 48(6) requires that the modification of the common property can only be made when receiving the resolution of half of the total voting rights of all unit owners.

In my opinion, the CA does not provide the concrete solution to the management of common property that is only for the common use of certain units as the CA only mentions about the voting on the expense thereof. The concept of common property only for the common use of certain units should be that those who pay for the property should not have the sole right to vote on the expense thereof, but they should also have the absolute right in managing such property without the interference from other types of units that do not pay for the maintenance of such property.

Moreover, in case the developer or the CJP stipulates the management of common property in the bylaws to be inconsistent with the provision provided in the CA, such bylaws shall be invalid.⁷

Problems in relation to the Application of Bylaws in Mixed-Use Condominium and the Condominium Act B.E. 2522

Under Clause 25.4 of the bylaws of Eight Thonglor Residences divides the common property into 5 categories: (1) the common property for retail units, (2) the common property for residential units lot 1, (3) the common property for residential units lot 2, (4) the common property for retail units and residential units lot 1 and (5) the common property for all types of units. Clause 30 of such bylaws also stipulates that each type of units entitled to the usage of each type of common property. Furthermore, the maintenance and operational fee in each type of units is also varied.

It can be seen that mixed-use condominiums' bylaws provide for the management of limited common property which is not dealt with in the CA. From its bylaws, the unit owners shall pay different rate for the maintenance of common property, that is to say, besides the maintenance fee of the common property which the bylaws states that all unit owners have the right to use such common property, each type of unit is required to pay a different rate for the common property reserved for the exclusive use of a particular group of units.

⁷ Supreme Court Decisions nos. 7874/2549 and 13225/2553

It should be noted that Eight Thonglor Residences' bylaws adapt Section 46 to its bylaws' provision, this means that those certain types of unit that have paid for the maintenance and the management fee of specific common property is entitled to vote only on the resolution regarding the expense of those specific common property. The bylaws do not state that those specific co-owners have the right to vote on the management of the said common property. Moreover, Clause 51 of its bylaws applies the same wording as Section 48 of the CA, therefore, the resolution for the management or amendment of common property requires the vote at least half of the total votes of the co-owners in the condominium.

As a result, the problem will occur when the retail units would like to amend their specific common property because even though the residential units do not pay for the maintenance and management fee thereof, but according to Clause 51 of the bylaws and Section 48 of the CA, those specific common property is considered as the common property which is for the benefit of all co-owners in the building, therefore it requires half of the total votes from all unit owners not only half of the total vote from the co-owners whom the bylaws provides that only themselves are entitled to use such specific common property.

Foreign measures in relation to the management of common property in the mixed-use condominium

The foreign countries chosen for the study on the management of common property in the mixed-use condominium are USA and Singapore. In USA, the relevant law is the Uniform Condominium Act ("UCA") while in Singapore, it is the Building Maintenance and Strata Management Act ("BMSMA")

The provisions under the UCA and BMSMA contain similar measures concerning the management of common property in the mixed-use condominium as follows:

UCA of USA	BMSMA of Singapore
1.Limited Common Elements("LCE") means a portion of the common elements allocated by the declaration or by the operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of units.	1. Limited Common Property ("LCP") means such part of the common property for the exclusive benefit of the subsidiary proprietors of 2 or more (but not all) lots in that strata title plan, but does not include — (i) the foundations, columns, beams, supports, walls, roofs of, and any window installed in any external wall of, any building within that parcel; and (ii) any chute, pipe, wire, cable, duct and other facility for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, not comprised in any lot or proposed lot and necessary for the common use of the occupiers of all lots or proposed lots in that parcel

UCA of USA	BMSMA of Singapore
2. Class voting The declaration may provide: (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class.	2. Subsidiary Management Corporation (“Sub-MC”) for LCP The Sub-MC is introduced to govern LCP. The Sub-MC shall have the same power and duties as the management corporation but its power is limited to only matters relating to LCP
3. Assessment for common expense The UCA clearly separates the assessment of common expense, that is to say the assessment for the maintenance, repair, replace of the LCE shall be assessed only against the units which LCE is assigned to.	3. Separation of the expenses of subsidiary management corporation The maintenance fee and the expense in managing LCP is separated from the main corporation and shall be collected only from subsidiary proprietors who are entitled to the exclusive use of LCP.

Various structures for mixed-use condominium

According to John B. Lundquist, the president of the real property section in the Hennepin County Bar, mixed-use condominium can be divided into 3 main categories as follows;⁸

1. Single Condominium- Single Association

This approach can be seen as the traditional one in which the condominium is created and is operated by one association. The single condominium approach is suitable for projects containing various groups of units with roughly equal voting strength in the association.⁹In this approach, the power of all groups is normally equal. There are many advantages in establishing mixed-use under single condominium. Firstly, it provides the unity for the management of the project since all units shall be under one association. Secondly, it is economical because the procedure for contract can be done in one time. However, it should be noted that single condominium and single association might not be appropriate for a condominium containing substantial variation other than building type, for example in a mixed-use condominium consisting of both residential and retail units, single association will cause trouble in managing the common expense, for there are many differences of allocation of expenses between two types of units.

2. Two-Tier Condominium

Under the two-tier condominium structure, even though the condominium consists of various types of units, it still retains a continuity of management through the use of master condominium association. Besides the master association, there exists separate association to deal with specific type of the units within the master condominium. It can be said that the two-tier condominium is suitable for projects with different types of units, in other words, a mixed of residential, hotel and commercial project.

A two-tier condominium consists of a master condominium that is a single condominium covering the entire project area. In the master condominium, areas are

⁸ John B. Lundquist, “Mixed Use Condominiums under the Minnesota Uniform Condominium Act”, 10 Wm. Mitchell L. Rev. 97, 101 (1984).

⁹*Id.*

designated for particular uses which consist of the real estate of the second-tier condominiums.

3. Related But Separate Condominiums

The related but separate condominium might be suitable for large projects containing distinctly different types of units where coordinated management and maintenance are not essential on an ongoing basis.¹⁰ The pro for this structure is convenience since each association is responsible only for the operation of its condominium however there exists the con thereof because of the independence of each association; there is a lack for communication as to which direction all groups' owners should focus on.

Conclusion and Recommendations

In light of the establishing of mixed-use condominium in Thailand, the developer would likely face a large numbers of obstacles in structuring the condominium. Due to the outdated condominium law under which its structure is not suitable for multi-purpose building, that is to say many provisions under the CA cannot solve the problem of the management of specific common property.

In the writer's opinion, the CA needs a revision to provide specific provisions in relation to the management of the common property which in mixed-use condominium shall be for the common use of all co-owners in the building or for the common use solely for certain co-owners.

In this regard, Thailand should consider adopting the condominium law of both USA and Singapore that have the specific provision in managing the common property which are only for the benefit of some unit group and the common property for the common use of all co-owners in mixed-use condominium, for example the definition of condominium and common property in the CA should be amended so as to separate the management thereof from the management of common property which belong to all co-owners in the condominium. Moreover, the voting right should be separated for each type of unit owners so that other types of unit owners shall not be involved in the management of certain common property in the type of units that they do not have interest in.

From the uncertainty of the common property management in mixed-use condominium in Thailand, I suggest that the CA should be amended as follows:

Definition of "condominium" in Section 4 of the Condominium Act should be amended

Owing to the fact that at the present time, the definition of condominium under that CA is silent on whether or not the developer can establish the multipurpose condominium, therefore the developer wishing to establish mixed-use condominium is likely to encounter the uncertainty in developing his project which shall include the management of common property that is provided only for the benefit of certain unit owners in the building. In order for the clarification that the CA supports the establishment of mixed-use condominium, I would recommend that the definition of condominium be revised as follows:

"Section 4 of this Act

Condominium means the building in which a person can divide ownership into several portions for the residential purpose, commercial purpose and/or any other

¹⁰ *Id.* at 106.

purposes and each portion consists of ownership in personal property and co-ownership in common property”.

Definition of “common property” in Section 4 of the Condominium Act should be amended

In this regard, the CA should consider applying the concept from the UCA of USA and BMSMA of Singapore that allow the common property to be use for all co-owners and only for certain co-owners in the building.

Based on the aforementioned concept of common property in USA and LCP in Singapore, the common property stipulated in Section 4 of the CA therefore should be revised to the following term so that it will support the common property in two types. The first type is the common property for the common use of all co-owners in the condominium and the other type is the common property for the common use of only certain units in the condominium.

“Section 4 of this Act

“Common Property” means part of a condominium that are not the condominium units, the land on which the condominium is situated, and the land or other properties available for use or for common interest of all co-owners in the condominium or for use or for common interest of the co-owners having the same unit purpose in such common property.”

Limitation on multipurpose area should be amended in Section 17/1 of the Condominium Act

Even though Section 17/1 has been added to the CA so that the commercial area be specifically separated the entrance and exit thereof with a view not to disturb other types of co-owners in the same building, such amendment only mentions of the separation of commercial area which might not sufficient for the mixed-use condominium structure considering that there will be other purpose besides commercial purpose in the condominium.

For the clarification and suitable of mixed-use condominium structure, it is therefore recommended that Section 17/1 be amended as follows:

“In the case where a space in the condominium is set aside as a place to carry out the business or for any other purposes, the system on entering and exiting such area shall be specifically set up in order to prevent the disturbance on the peaceful enjoyment of the joint owners.

No person shall be permitted to engage in any trade transactions or in any other purposes in the condominium except it is a trade transaction or any other purposes in the area of the condominium designated in accordance with paragraph one.”

Separation of voting right on common property

Since Section 48 of the CA provides the right to resolution regarding the common property of the unit that have half of the total vote of the joint owners can regulate the common property of the building which can result in the unfairness for the minority unit types in the same building because their voices cannot be heard and their hands are tied to whatever the majority units cast their votes.

Besides revision of the term “condominium” and “common property” in the CA, there should be the separation of voting right in relation to the common property in order to set the clear boundary for the management of common property which is for the use of all co-owners and that of certain co-owners having the same unit purpose in the

condominium. I therefore recommend that Section 48/1 of the CA shall be inserted as follows;

“Section 48/1 Resolutions on the matters under Section 48 (1)-(7) for common property which are for use or for common interest of the co-owners having the same unit purpose in such common property must be passed by not less than half of the total number of votes from such the co-owners.

In case that the co-owners attending a meeting has insufficient votes as provided under paragraph one, a new meeting shall be convened within fifteen days from the date of convening of the previous meeting. At this new meeting, the resolutions concerning the matters as provided under paragraph one shall be passed by not less than one-third of the total number of votes from such co-owners.”

REFERENCES

Books and Book Articles

วิชัย ตันติกุลานันท์. *คำอธิบายกฎหมายเกี่ยวกับอาคารชุดกฎหมายคอนโดมิเนียม*. พิมพ์ครั้งที่ 8: ห้างหุ้นส่วนจำกัดพิมพ์อักษร, 2556 [Wichai Tuntikulanan, *Law in relation to Condominium*, 8th ed.: Pim Aksorn Limited Partnership, 2013].

Articles

John B. Lundquist, “Mixed Use Condominiums under the Minnesota Uniform Condominium Act”, 10 Wm. Mitchell L. Rev. 157, 101 (1984).

Electronic Media

Eight Thonglor Residences, *available at* http://www.pacificstargrp.com/docs/Thonglor_Factsheet.pdf (accessed July 18, 2015).

Statistic on Bangkok Metropolitan Real Estate Project, *available at* <http://homewithdream.com/2013/12/09/statistics-real-estate/> (accessed Dec 6, 2014).

Other Materials

ไกรฤกษ์ ตันติเวสส. *อาคารเนกหน้าที่ใช้สอย*. วิทยานิพนธ์สถาปัตยกรรมศาสตรมหาบัณฑิต. คณะสถาปัตยกรรมศาสตร์. จุฬาลงกรณ์มหาวิทยาลัย, 2523. [Krairiksh Tuntivet, *Multi-function Building Complex*, thesis of Master of Architecture, Faculty of Architecture, Chulalongkorn University (1980)]

วิกอร์ณ รักษ์ปวงชน. *กรรมสิทธิ์ในอาคารชุด*. วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2528. [Vikorn Rakpuangchon, *Condominium Ownership*, Thesis of Master of Laws, Thammasat University, Bangkok, 1985]

LEGAL MEASURES TO PREVENT HUMAN RIGHTS INFRINGEMENT IN THE PRODUCT SUPPLY CHAIN: A FOCUS ON THAI FISHERY INDUSTRY*

Kiranee Tammapiiban-udom**

ABSTRACT

The risks of trafficking and slavery in production supply chain are significant and widespread. Particularly in the fishing sector as an industry which involves multiple parties from many different sources in its production line, it is highly possible to have labor issues at all levels of the supply chain. The Thai fisheries industry, both fishing and processing sector, is significant to Thailand's economy; however, the human rights infringement is currently being emphasized as a condition of fishery products trading in the international markets, which is an important problem that Thailand is questioned on human rights infringement in the country's business operations.

According to the existing legal measures in Thailand, the preventive measures concerning human right infringement in business, particularly in fishery industry are upon the State. The existing Thai laws and regulations, merely criminal sanctions, are applicable as a legal mechanism to punish who violates law. However, it is clear that the capacities of the State to protect human rights have not kept pace with the expansion of global economic activity¹.

Thus, Thailand should improve the legal mechanisms to monitor and observe the business operation e.g. disclosing the measures companies taken for human rights due diligence, increasing corporate transparency, empowering and educating consumers.

KEYWORDS: human trafficking, forced labor, human rights, human rights infringement, human rights abuse, fishery industry, Thai fishery industry, business transparency, corporate transparency, transparency in supply chain

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¹ Olivier De Schutter & Anita Ramasastry et al, Human Rights Due Diligence: The Role of States (ICAR, ECCJ & CNCA, 2012).

บทคัดย่อ

ปัจจุบันการค้ามนุษย์ การใช้แรงงานทาส หรือการบังคับใช้แรงงานจัดเป็นปัจจัยเสี่ยงที่มีความสำคัญและส่งผลกระทบในวงกว้าง โดยเฉพาะในธุรกิจประมงและอุตสาหกรรมต่อเนื่อง ทั้งนี้เนื่องจากห่วงโซ่การผลิตในธุรกิจประมงมีความเกี่ยวข้องและต่อเนื่องกัน โดยมีผู้ผลิต ผู้จัดจำหน่าย และแรงงานในหลายภาคส่วนเป็นฟันเฟืองที่สำคัญของธุรกิจ และโดยที่ธุรกิจประมงและอุตสาหกรรมต่อเนื่องเป็นธุรกิจที่มีความสำคัญต่อระบบเศรษฐกิจของประเทศไทย ดังนั้น การที่ประเทศไทยถูกกล่าวอ้างว่ามีการละเมิดสิทธิมนุษยชนด้านการบังคับใช้แรงงาน ย่อมส่งผลกระทบต่อประเทศไทยเป็นอย่างมาก ผลกระทบประมงซึ่งผลิตในประเทศไทยย่อมถูกตั้งคำถามจากประเทศคู่ค้า เป็นต้นว่า ผลกระทบเหล่านั้นผลิตจากแรงงานบังคับ หรือแรงงานที่มาจากการค้ามนุษย์ในห่วงโซ่การผลิตหรือไม่

ประเทศไทยได้ให้ความสำคัญในการแก้ปัญหาการค้ามนุษย์และการใช้แรงงานบังคับในภาคธุรกิจประมงและอุตสาหกรรมต่อเนื่อง อย่างไรก็ตาม มาตรการและกฎหมายที่เกี่ยวข้องในการแก้ปัญหาดังกล่าวเป็นมาตรการการกำกับดูแลจากทางภาครัฐ ซึ่งมักปรากฏในรูปแบบของมาตรการและกฎหมายทางอาญาโดยมุ่งลงโทษแก่ผู้กระทำความผิดตามที่กฎหมายได้บัญญัติไว้ แต่เนื่องด้วยข้อจำกัดของทางภาครัฐ ทำให้การป้องกันการละเมิดสิทธิมนุษยชนด้านการบังคับใช้แรงงานบังคับ และการแก้ปัญหาดังกล่าวในภาคธุรกิจนี้ไม่มีประสิทธิภาพเท่าที่ควร

ดังนั้น เพื่อให้การบังคับใช้กฎหมายที่มีอยู่ในปัจจุบันให้เกิดประสิทธิภาพมากยิ่งขึ้น ประเทศไทยจึงควรพัฒนาเครื่องมือทางกฎหมายเพื่อช่วยสนับสนุนและส่งเสริมการกำกับดูแลภาคธุรกิจไม่เฉพาะแต่ธุรกิจประมงและอุตสาหกรรมต่อเนื่องซึ่งถูกจับตามองจากประเทศคู่ค้า แต่ควรรวมถึงภาคธุรกิจอื่นๆ เพื่อส่งเสริมให้ภาคธุรกิจต่างๆ ที่เกี่ยวข้องนำหลักความรับผิดชอบต่อสังคมและหลักธรรมาภิบาลมา

ปรับใช้ในการดำเนินกิจการ เพื่อให้บริษัทเหล่านั้นมีความโปร่งใสและสามารถตรวจสอบได้ เช่น การเปิดเผยข้อมูลมาตรการและนโยบายซึ่งใช้ในการตรวจสอบการละเมิดสิทธิมนุษยชนในห่วงโซ่การผลิตเข้ามาเป็นส่วนหนึ่งของข้อมูลที่ต้องเปิดเผยต่อสาธารณะ นอกจากจะทำให้ผู้มีส่วนได้เสียในกิจการของตนได้รับรู้ถึงข้อมูลดังกล่าว ยังเป็นการให้ข้อมูลแก่ผู้บริโภคอีกทางหนึ่งด้วย

คำสำคัญ : ค้ามนุษย์, แรงงานบังคับ, บังคับใช้แรงงาน, สิทธิมนุษยชน, ละเมิดสิทธิมนุษยชน, ประมง, ธุรกิจประมงในประเทศไทย, ความโปร่งใส, ห่วงโซ่การผลิต, การเปิดเผยข้อมูล

Introduction

As the concept of business Supply Chain is popularly becoming a major strategy in the world of international production, trade and investments, Multinational Corporations (MNCs) tend to seek competitive advantage based on cheaper labor, and search for access to consumers in emerging markets by outsourcing, offshoring, and other forms of production². However, such practices can possibly be a danger to the first tier of global supply chain in tracking where and how labor abuse occurs in their supply chain.

One of the industries most decayed by this issue is the fishing industry. There are over 58 million people engaged in the fishing and aquaculture sector, which involves multiple parties from many different sources in its production line. As such, it is possible to find labor issues at all levels of the supply chain. As one of the world's leading seafood exporters, in recent years, Thailand has been criticized for its failure to combat labor and human rights abuse in the Thai seafood industry, with many

²Jimmy Donaghey et al., From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains, 53 Human Resource Management 229-252 (2013).

international media publications and partner countries concerned about this issue.

Although Thailand has several laws and regulations controlling the human trafficking and the protection of labor, there are still no specific provisions or legal measures to eliminate trafficking of forced labor. According to the global trends, Thailand should consider whether it should regulate or strengthen human trafficking laws and regulations by requiring the companies to report on actions to eradicate forced labor in their operations or else face difficulties selling their products in certain regions.

This study has the hypothesis that there are no adequate legal measures for solving the problem of human rights infringement in the existing Thai laws, where merely criminal sanction are applicable as a legal mechanism to punish who violates law, particularly in one of the biggest industries, the fishery business. Raising awareness of entrepreneurs and improving the legal mechanisms to monitor and observe the business operation would be the best way to solve the problem. Therefore, there should be the specific legal mechanisms e.g. disclosing the measures companies taken for human rights due diligence, increasing corporate transparency, empowering and educating consumers.

The purpose of this thesis is to study on the legal concepts and recognized principles concerning human rights infringement-related labor issues in global supply chain, especially labor abuse in Thai fishery supply chain. The methods used in this thesis are based on documentary research, mainly the study and analysis searching, and analyzing Thai and foreign academic texts and relevant documents. In the end, the study is expected to help the reader thoroughly understand the background and problems of human rights infringement related labor issues in Thailand and global economy and to generate the ability to propose appropriate legal measures as a solution and guidance in order to address and prevent human rights infringement related labors issues the in Thai legal system.

1) Infringement of human rights related labor issues in global and Thailand's economy

Before tackling the issues, a general understanding of the corporation issues concerning human rights abuse-related labor issues should be acquired. This includes the understanding of legal concepts of such violations, corporate social responsibility and the severe situation of such abuse in global and national economy.

In estimation of the global human trafficking related economy, it can be stated that the majority of countries around the world today are affected by human trafficking as source, transit and/or destination countries for trafficking victims. The argument may be raised that human trafficking is the third most profitable global business for organized crime. As human trafficking can be present in diverse circumstances and at many levels of supply chain production, it is important for businesses to understand the different risk factors that can contribute to these severe forms of abuse³.

Corporate social responsibilities (CSR), at the most general level, include economic duties, legal and regulatory compliance, responsiveness to ethical norms, and discretionary social welfare contributions⁴. The concept of CSR refers to the general belief held by many that modern businesses have a responsibility to society which

³ VERITÉ, *Compliance is Not Enough: Best Practices in Responding to The California Transparency in Supply Chains Act*, 8 (2011), http://www.verite.org/sites/default/files/VTE_WhitePaper_California_Bill657FINAL5.pdf (last visited May 29, 2015).

⁴ SAGE Publications, *SAGE Brief Guide to Corporate Social Responsibility* (2012).

extends beyond the stockholders or investors in the firm⁵ such as consumers, employees, the community at large, government, and the natural environment.

Additional concepts to be studied are consumer and corporate relations, and supplier and worker relations. Consumer-corporate relations are complicated as they influence the behaviors of consumers and corporates. The consumer, corporations, suppliers and workers are associated with each other as a complex network of power relations.

The modern supply chain is very complex, with many parallel physical and information flows occurring in order to ensure that products are delivered in the right quantities, to the right place in a cost effective manner⁶. The emerging global labor market can advance both objectives with a large supply of overseas workers willing to produce goods more cheaply than the domestic labor market⁷. However, global labor and product supply chains, particularly throughout the developing world, where labor laws are non-existent or not enforced, also provide fertile ground for forced labor conditions to arise⁸. Corporations are often immuned from domestic legal accountability given the extraterritorial nature of their supplier relationships and the arm's length nature of supplier contracts and subcontracts⁹. Without transparency and accurate information, it is, at best, challenging to track what occurs in the production of goods¹⁰ and to discover and track instances of forced labor in supply chains¹¹.

Typically, fishery supply chains begin at oceans and end up with consumer markets worldwide. By the nature of the industry, it can be indicated as a risk sector for abusive forced labor and labor rights. Within this flourishing global trade, Thailand is positioned as suppliers to global markets and one of the world's largest exporters of shrimp, canned tuna, and other seafood products. The fisheries sector contributes about 9.9 per cent to the total agricultural GDP of the country¹² with the employment of millions of workers. However, the sector has been in downward trend in terms of returns on investment, and due to economic pressures, employment of migrant workers has been introduced to the industry to cut labor costs. In some cases the demand of forced labor arises. However, not only vulnerable migrant workers, but also Thai workers are forced into labor in both fishing and processing sector¹³.

Nowadays, trafficking for forced labor in the commercial fishing industry is an urgent national issue and broadly recognized as human rights abuse within

⁵ Holly J. Gregory, *Corporate Social Responsibility* (2014), <http://us.practicallaw.com/0-562-1565>.

⁶ Department for Transport, Local Government and the Regions, *SUPPLY CHAIN VULNERABILITY* 8 (2002), http://www.som.cranfield.ac.uk/som/dinamic-content/research/lscm/downloads/Vulnerability_report.pdf/ (last visited May 29, 2015).

⁷ Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 *Lewis & Clark L. Rev.* 397(2010).

⁸ Kevin Coon & Cynthia Jackson et al., *Managing Corporate Supply Chains: Challenges & Successes in the Fight to Combat Forced Labour and Human Trafficking*, 19 (2014), http://www.bakermckenzie.com/files/Publication/d35732d3-3396-4b6d-90aa-000ad3eda2c1/Presentation/PublicationAttachment/f13489e1-8a1d-4814-a21a-25b556ece060/Brochure_CSB37264_AMiller_GSC_11-18_v2.pdf (last visited Apr 29, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² ILO, *Employment Practices and Working Conditions in Thailand's Fishing Sector* (2014).

¹³ *Id.*

Thailand. The rates of abuse are high on fishing vessels¹⁴. Labor rights abuse can also take place at the level of fishing, processing or canning¹⁵. Burmese and Cambodian workers are also trafficked into working in fish boat and processing plants in Thailand, through the same mechanisms that boat workers are recruited¹⁶.

Currently, with regards to Thailand's Trafficking in Persons 2014 Country Report, there are 595 victims of human trafficking including 46 percent of Thai and 54 percent of foreigners. The majority of sexually exploited victims were Thai; forced labor victims were mostly from Myanmar, whereas most of the forced beggars were from Cambodia¹⁷. Prevention and suppression of human trafficking has been established as a top national priority and emphasized the importance of integrated and concerted efforts among key partners; government, private sectors and civil society. This is a great step forward in tackling labor issues and human trafficking in Thailand.

2) Legal measures concerning the prevention of human rights infringement related labor issues in Thailand

Thailand has several legal measures in place to handle human rights infringement in the fisheries sector. There have been various legal measures concerning fisheries management legislation including the Fisheries Act, B.E. 2558 (2015) and Order of the Head of the National Council for Peace and Order (NCPO) No. 10/2558: Actions against Illegal, Unreported and Unregulated Fishing. There are also extensive legal measures concerning labor protection such as the Labor Protection Act, B.E. 2541 (1998), the Ministerial Regulation concerning Labor Protection in Sea Fishery Work B.E.2557 under The Labor Protection Act, B.E. 2541 (Ministerial Regulation), the Anti-Trafficking in Persons Act, B.E. 2551 (2008) (ATPA), Thai Labor Standard Corporate Social Responsibility of Thai Business 8001-2010 (TLS 8001-2010), and Good Labor Practice (GLP) for Thai fisheries and seafood industry. Finally, regarding legal measures concerning corporate disclosure and transparency, there are several regulations concerning the disclosure of corporate's financial statement in Thailand including Thai Civil and Commercial Code (CCC), and Securities and Exchange Act B.E. 2535 (SEA).

3) International legal and institutional frameworks and national laws of foreign countries regarding the prevention of human rights infringement in businesses

There are several international entities concerned with the prevention of human rights infringement, each one with its own legal and institutional frameworks as follows; International Labor Organization (ILO) and its Protocol of 1944 to the Forced Labor Convention, 1930; United Nations Human Rights Council (UNHRC) and its International Guidelines on Business and Human Rights; Organization for Economic Cooperation and Development (OECD) and the OECD Guidelines for Multinational Enterprises (MNEs); The Food and Agriculture Organization of the United Nations (FAO) and its Code of Conduct for Responsible Fisheries; and FAO-OECD and the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Foreign Office, The Government Public Relations Department, Office of the Prime Minister, *Anti-Human Trafficking as Part of Thailand's Reform Agenda* (2015), http://thailand.prd.go.th/ewt_news.php?nid=977&filename=index (last visited Apr 29, 2015).

Draft FAO-OECD Guidance for Responsible Agricultural Supply Chains.

National laws of various foreign countries also tackle the issue such as the California Transparency in Supply Chains Act of 2010 (CTA) and Draft of Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 (BTA) as of the United States; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (EU Directive) as of the European; and Modern Slavery Act 2015 (MSA) as of the United Kingdom.

4) Analysis on Thai, international legal and institutional framework and national laws of foreign countries concerning the prevention of human rights infringement in product supply chain

An analysis on the Thai legal frameworks and laws concerning the prevention of human rights infringement in the Thai fishery industry can be categorized as follows;

- Fisheries management legislation: In order to effectively address the issues and enforce the law, currently the highest levels of government are empowered to command and lay down strategy and measures; however, currently preventive measures and solutions are not clearly stated. Considering that Thailand is one of the biggest fishing and fish processing nations, it is important to implement not only the principles to ensure sustainable marine yield but also the principles to eliminate the human rights violation occurred in the industry.

- Labor Protection Frameworks: While human rights have been recognized by the Thai Constitution and ATP, corporations should be an important player to prevent and strengthen the protection of human rights and elimination of human rights-related labor issues. The State should also regulate the preventive measures concerning corporate accountability and responsibly to respect human rights and to prevent trafficking for labor exploitation.

- Corporate legislation concerning Business Transparency of Human rights-Related Labor Issues: The idea of supply chain transparency is to require companies to disclose information regarding their supply chain, which is essential, but more importantly companies need to establish internal and external social responsibility programs, codes of conduct, and corporate governance.

Institutional frameworks and national laws of foreign countries concerning the prevention of human rights infringement in business entities may also be analyzed. States should make expanded use of well-established legal tools to require business due diligence for human rights, and to encourage due diligence through transparency and disclosure mechanisms¹⁸ while also implementing rules that require business enterprises to disclose due diligence, attempt to constrain any identified harm, and ensure that businesses respect human rights in the most effective way¹⁹. Methods which could be suggested as solutions for such issues include: establishing a human rights policy; assessing actual and potential human rights impacts; integration of

¹⁸ *Id.*

¹⁹ *Id.*

human rights assessment findings; tracking or auditing how impacts are addressed; and communicating regarding how the impacts are addressed.

Conclusions and recommendations

Based on the finding of the study, there are several legal and intuitional frameworks requiring the supply chain, and companies need to be ready to disclose information about their sources and supply chain practices. The recommendations to improve the preventive measures of human rights infringement in the supply chain would be as follows:

- Requirement on listed company under the Securities and Exchange Act B.E.2535 Section 56 should be extended to cover the policy statement regarding the human rights due diligence and the prevention of human rights infringement in supply chain.
- The information necessary for regulators, investors and consumers and other stakeholders to assess business respect for human rights should be required to be disclosed in order to stimulate the effectiveness and legitimacy of the overall due diligence regime.
- The rules, conditions and procedures on prevention of human rights infringement in supply chain should be specified in the notification of the Capital Market Supervisory Board later on. Related companies shall be required to disclose the policies to identify and eliminate risks of all forms of human rights infringement.
- With the purpose of tracking the issues occurred in the deep down supply chain, the company should require suppliers to prove that the manufacture of products and the recruitment of labor is carried out in compliance with applicable laws regarding avoidance of all forms of human rights infringement. The company should ensure that audits of suppliers are strictly conducted, and disclosures should be regularly submitted.
- The State should consider an appropriate mix of incentives and penalties in light of the human rights violation at issue and the national regulatory framework applicable to a particular business sector for preventive measures to be more effective.

REFERENCES

Books and Book Articles

- Anton, Don. "Introductory Note: 2014 Protocol to the Forced Labour Convention, 1930." *ANU College of Law Research Paper No. 14-36*, August 2014.
- Basu, Ron. *Managing Project Supply Chains*. Gower, 2011.
- Brown, Michael J Maloni & Michael E. "Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry." *Journal of Business Ethics*, 2006: 35-52.
- David Crowther, Güler Aras. *Corporate Social Responsibility*. 2008.
- De Silva, D.A.M.. *Value chain of fish and fishery products: origin, functions and application in developed and developing country markets*. Rome: Food and Agriculture Organization, 2011.
- Eckert, Sophia. "The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains." *Journal of International Business and Law*, 2013.
- Harland, C.M. "Supply Chain Management, Purchasing and Supply Management, Logistics, Vertical Integration, Materials Management and Supply Chain Dynamics." In *The Blackwell Encyclopedic Dictionary of Operations Management*, by N. Slack (ed.). Blackwell, 1996.
- Jimmy Donaghey, Juiliane Reinecke, Christina Niforou, Benn Lawson. "From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains." *Human Resource Management*, 2014: 229-252.
- Jordan, Ann. *Slavery, Forced Labor, Debt Bondage, and Human Trafficking: From Conceptual Confusion to Targeted Solutions*. American University Washington College of Law, 2011.
- Kevin Coon, Cynthia Jackson, et al. "Managing Corporate Supply Chains: Challenges & Successes in the Fight to Combat Forced Labour and Human Trafficking." *Baker & McKenzie* (Baker & McKenzie), 2014: 19.
- Lieberman, Michael M. "The Ruggie Principles on Business and Human Rights: How Companies Can Prepare." *Rocky Mountain Mineral Foundation Journal*, 2011: 271.
- Mares, Radu. "The limits of supply chain responsibility – A critical analysis of CSR instruments." *Nordic Journal of International Law*, 2010: 193-244.
- Maryanov, Debra Cohen. "Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain." *Lewis & Clark Law Review*, 2010: 397.
- Onoora, Pounthong. *National Coordination and Implementation of Port State Measures in Selected States in the Southeast Asian Region*. 2014.
- Sonja Vartiala, Henri Purje, et al. *Cheap Has a High Price*. Finnwatch, 2013.

Articles and Reports

- Caught at sea : forced labour and trafficking in fisheries*. Geneva: International Labour Organization, 2013.
- Compliance is Not Enough: Best Practices in Responding to The California Transparency in Supply Chains Act*. Verité, 2011.
- Convention concerning the Abolition of Forced Labor*. International Labour Organization, 2015.
- Chris Kelly, Felicity Lawrence, Kate Hodal. "Revealed: Asian slave labour producing prawns for supermarkets in US, UK." *The Guardian*, June 10, 2014.

- Developing a Regulatory Regime for Aquaculture Product*. Atlantic Canada Fish Farmers Association, 2012.
- Department for Transport, Home Office, Department of Trade and Industry. *Supply Chain Vulnerability*. Cranfield University School of Management, 2002.
- Estimating Labor Trafficking: A Study of Burmese Migrant Workers in Samut Sakhon, Thailand*. UNIAP, 2011.
- Foreign Office, The Government Public Relations Department, Office of the Prime Minister, *Anti-Human Trafficking as Part of Thailand's Reform Agenda* (2015), http://thailand.prd.go.th/ewt_news.php?nid=977&filename=index (last visited Apr 29, 2015).
- Fisheries of the United States 2010*. National Marine Fisheries Service, 2010.
- Fishing and Aquaculture*. Amherst, MA: Verité Headquarters, 2015.
- Global Report on Forced Labour In Asia: debt bondage, trafficking and state-imposed forced labour*. International Labour Organization, 2015.
- Information on the Tackling of Human Trafficking Issue in the Thai Tuna Industry*. Thai Tuna Industry Association, 2015.
- International Labour Organization. *Employment Practices and Working Conditions in Thailand's Fishing Sector*. 2014.
- Labour Conditions in Thai Fisheries and Food Processing Industry: Challenges and Solutions*. Seafish, 2014.
- Laurence Loubieres, Larysa Metanchuk. *Forced Labour and Slavery in the Thai Shrimp Industry*. 2015. <http://www.sustainalytics.com/forced-labour-and-slavery-thai-shrimp-industry> (accessed April 29, 2015).
- Olivier De Schutter, Anita Ramasastry, Mark B. Taylor, Robert C. Thompson. "Human Rights Due Diligence: The Role of States." 2012.
- Profits and Poverty: The Economics of Forced Labour*. Geneva: International Labour Organization, 2014.
- Royal Thai Embassy. "2014 Snapshot of Thailand's Key Efforts to Combat Human Trafficking and Forced Labor." *Royal Thai Embassy*. 2014. <http://www.thaianti-humantraffickingaction.org/> (accessed April 29, 2015).
- Reuland, Thomas. "A Revised Approach to Reducing Labor Abuses and Human Trafficking." *Second Annual Interdisciplinary Conference on Human Trafficking*. 2010.
- SAGE Brief Guide to Corporate Social Responsibility*. SAGE Publications, 2012.
- SLAVERY AT SEA: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry*. Environmental Justice Foundation, 2014.
- Stopping forced labour: global report under the follow-up to the ILO Declaration on fundamental principles and rights at work*. International Labour Organization, 2001.
- The State of World Fisheries and Aquaculture 2012*. Food and Agriculture Organization of the United Nations, 2012.
- Trafficked: Human rights Abuse in the Seafood Industry*. FishWise, 2013.
- Trafficking and Forced Labour of Thai Males in Deep-sea Fishing*. Bangkok: Mirror Foundation, 2011.
- Viederman, Dan. "Supply chains and forced labour after Rana Plaza." *The Guardian*, April 24, 2014.
- U.N. Office of the High Commissioner of Human Rights [OHCHR],
Guiding Principles on Business and Human Rights, U.N. Document HR/PUB/11/04 (2011)
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed October 14, 2015)

Academic References

- Affolder, Natasha. *The Legal Concept of Sustainability*. Faculty of Law, University of Calgary, 2012.
- Doubossarskaia, Elizaveta. *CA Transparency in Supply Chains Act: Can It Stop Worker Abuses Among Suppliers in the Developing World?* MA Thesis, University of San Francisco, 2012.
- Dubay K., Tokuoka S., and Gereffi G. *A Value Chain Analysis of the Sinaloa, Mexico Shrimp Fishery*. Duke University, 2010.

Electronic Media

- Europa.eu. *Combating illegal, unreported and unregulated fishing*. 2015. http://europa.eu/legislation_summaries/maritime_affairs_and_fisheries/fisheries_resources_and_environment/pe0005_en.htm (accessed June 30, 2015).
- European Commission. "EC Regulation 1005/2008 to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing." 2015. http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/information_note01_en.pdf.
- Gregory, Holly J. "Corporate Social Responsibility." n.d. <http://us.practicallaw.com/0-562-1565>.
- International Labour Organization. "Overview: International Labour Standards ." *Slide Share*. December 2, 2014. <http://www.slideshare.net/iamerika/overview-international-labour-standards-ils>.—. "THE PROTOCOL to the Forced Labour Convention." 2015. http://www.wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/_321414.pdf.
- UNODC. *Human trafficking: people for sale*. 2015. <http://www.unodc.org/toc/en/crimes/human-trafficking.html>.
- Verité. *Fish*. n.d. <http://www.verite.org/Commodities/Fish> (accessed April 29, 2015).

Other Materials

- Anti-Trafficking in Persons Act, B.E. 2551
- California Transparency in Supply Chains Act of 2010
- Code of Conduct for Responsible Fisheries
- Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (EU Directive)
- Draft of Business Supply Chain Transparency on Trafficking and Slavery Act of 2014
- FAO-OECD Guidance for Responsible Agricultural Supply Chains 2015
- Fisheries Act, B.E. 2558
- Good Labor Practice (GLP) for Thai fisheries and seafood industry
- International Guidelines on Business and Human rights
- Labor Protection Act, B.E. 2541
- Modern Slavery Act 2015 (MSA)
- OECD Guidelines for Multinational Enterprises
- Order of the Head of the National Council for Peace and Order (NCPO) No. 10/2558: Actions against Illegal, Unreported and Unregulated Fishing
- Ministerial Regulation concerning Labor Protection in Sea Fishery

Work B.E. 2557

Protocol of 2014 to the Forced Labor Convention, 1930
Thai Labor Standard Corporate Social Responsibility of Thai Business 8001-2010
(TLS 8001-2010)
Securities and Exchange Act B.E. 2535

DOUBLE INCOME TAXATION ON THAI REIT*

*Malyn Saengchote***

ABSTRACT

Real Estate Investment Trust or REIT was introduced to the Thai capital market since 2009 by the SEC, with its aims to replace to property fund. The new REIT structure lifted up some limitations on foreign investment which was previously restricted under the Property Fund structure.

REIT in Thailand is established in form trust which is not taxable entity under the Revenue Code. Hence, when Thai REIT invests in foreign country, there will be tax suffered in foreign country. Such tax suffered from foreign investment cannot be relieved under the Revenue Code as there is no provision of law allowing the REIT or the beneficiary of the REIT to access to double income tax relief. This leads to the discrimination between domestic and foreign investment. Such discrimination is contradicted to the intention of the Securities Exchange Commission to promote investment REIT.

This thesis, thus, aims to study on the problems of Thai tax law on the double income taxation relief provision and compare to the principles and practices of foreign legislation such as Australia, Singapore and Malaysia so as to analyze and propose amendment to the Revenue Code.

Keywords: REIT, Double income tax

บทคัดย่อ

ทรัสต์เพื่อการลงทุนในอสังหาริมทรัพย์ หรือ กองทรัสต์ นำมาใช้โดยสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ (ก.ล.ต.) ตั้งแต่ปี พ.ศ. 2552 เพื่อเป็นทางเลือกใหม่ในการลงทุนในตลาดทุนของประเทศไทย โดยกองทรัสต์จะถูกนำมาบังคับใช้แทนกองทุนรวมอสังหาริมทรัพย์ปัจจุบัน กองทรัสต์นั้นเมื่อนำมาบังคับใช้ได้เข้ามามีการจัดซื้อจำกัดต่างๆที่เดิมกองทุนรวมอสังหาริมทรัพย์ไม่อนุญาตให้กระทำ เช่น การลงทุนในต่างประเทศ

กองทรัสต์ จัดตั้งขึ้นรูปแบบทรัสต์ ซึ่งทรัสต์ไม่ถือเป็นบุคคลที่ต้องเสียภาษีตามประมวลรัษฎากร ดังนั้นเมื่อกองทรัสต์ไปลงทุนในต่างประเทศ กองทรัสต์ต้องเสียภาษีเงินได้ที่ได้รับจากการลงทุนในต่างประเทศ ภาษีที่เสียไปในต่างประเทศไม่สามารถขจัดหรือบรรเทาได้ เนื่องจากประมวลรัษฎากรไม่มีบทบัญญัติใดให้สิทธิแก่กอง

* The article is summarized and rearranged from the thesis “Double Income Taxation on Thai REIT” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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ริทส์หรือผู้รับประโยชน์สามารถใช้สิทธิบรรเทาภาระภาษีเข้าช้อนดังกล่าว ภาระภาษีเข้าช้อนก่อให้เกิดปัญหาความไม่เป็นกลางทางภาระภาษีระหว่างลงทุนในประเทศและการลงทุนในต่างประเทศของกองริทส์ เนื่องจากการลงทุนต่างประเทศจะเกิดภาระภาษีที่สูงกว่าการลงทุนภายในประเทศ อีกทั้งภาระภาษีเข้าช้อนขัดต่อวัตถุประสงค์ของสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ในการสนับสนุนการลงทุนผ่านกองริทส์

ดังนั้น วิทยานิพนธ์ฉบับนี้ จึงมุ่งศึกษาถึงปัญหาของกฎหมายภาษีของไทยในการบรรเทาภาระภาษีเข้าช้อนที่เกิดขึ้นจากการลงทุนผ่านกองริทส์ และศึกษาเปรียบเทียบกับหลักกฎหมายต่างประเทศ อาทิ ออสเตรเลีย สิงคโปร์ และมาเลเซีย เพื่อนำมาวิเคราะห์และเสนอแนวทางแก้ไขประมวลรัษฎากรต่อไป

Introduction

“Trust” was first introduced by the Securities Exchange Commission (SEC) through the Trust for Transactions in Capital Market Act, B.E. 2550 (2007). Later, the SEC adopted trust structure as alternative investment vehicle for immovable property investment in capital market¹, called Real Estate Investment Trust (REIT). After years of implementing Property Fund structure, the SEC found some limitations to development in immovable property through the Property Fund i.e. the limitation on foreign investment, capability to the leverage and most importantly to promote the immovable property investment in Thai capital market². According to research by the SEC, they found that trust structure is widely used by most countries.

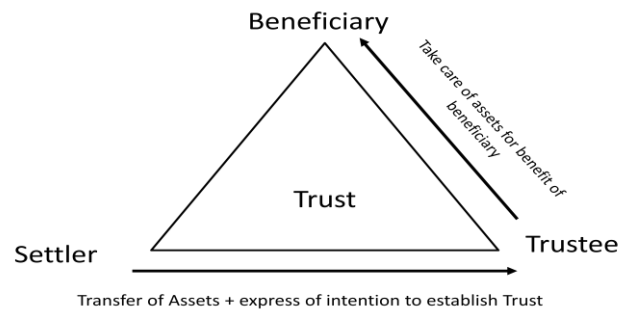
The REIT model which the SEC adopted and applied to Thai REIT is a trust structure. The trust are established from trust deed which identifies the relationship between trustee whose acts similar to agent of beneficiary appointed to manage and interest incurred in the REIT on beneficiary’s behalf and the custodian of the assets under REIT. REIT is subject to limitation on investment whereby it can only or majorly earn income from letting the immovable property³. Please see the illustration of trust structure below;

¹ The Securities and Exchange Commission, **SEC has approved to establish Real Estate Investment Trust**, available at

http://www.sec.or.th/th/Pages/News/Detail_News.aspx?tg=NEWS&lg=th&news_no=72&news_yy=2553 (last visited Aug 2, 2015)

² Telephone Interview with the officer rank at the Deputy Director, Securities-Capital market registration Department, *The Securities Exchanges of Thailand*. (Jun. 24, 2015)

³ William A. Kelly, **Real Estate Investment Trust Handbook**, 72, (2nd, ALI-ABA, 1998).



With regard to the tax implications on REIT structure, the ideal concept of REIT is to achieve neutrality between direct investment in immovable property and indirect investment through REIT, which leads to tax collecting concept known as “pass-through”. Most countries apply “pass-through” or “single-tier tax system” concept to its REIT structure. According to the pass-through regime, it normally levies tax at investors’ level only. To attain such goal, the REIT may provide the tax exemption at REIT’s level. In Thailand, it also adopts the “pass through” or “single-tier system”.

As previously discussed, Thai REIT was introduced to eliminate certain limitations on property fund structure including the limitation to foreign investment. Thereby, Thai REIT is permitted to hold foreign assets and derive foreign income. To achieve tax neutrality policy, the tax treatment of REIT should not discriminate between foreign investments and domestic investment (i.e. foreign income is treated at a par with domestic income). However, double taxation issues generally arise in connection with source country taxing right over the REIT income derived from direct or indirect investment in situs state immovable property. Thus, relief for source country taxation becomes crucial for avoiding (or alleviating) double taxation, provided that if the income is not taxed at REIT level, relief in the REIT residence country may not be enjoyed. Then, there should be provision of law to remedy and obviate the double income taxation for foreign tax paid. The methods provided to relieve the double taxation are⁴:

- (1) Creditable on foreign source income; and
- (2) Exempt income on foreign source income

In summary, the double income taxation from foreign investment by the REIT may occur from the treatment that foreign taxes are dealt with in the REIT residence country creates a disincentive to invest in a foreign jurisdiction. In that foreign investments may be subject to a higher overall tax burden.

⁴ Wolters Kluwer Law and Business edited by Stefano Simontacchi and Uwe Stoschek, **Guide to Global Real Estate Investment Trusts**, General Report 7- 20, (Kluwer Law International, 2012).

Problem

As discussed, the double income tax problem will be arisen where the REIT invest in foreign country. Under the Revenue Code, it does not provide a tax relief to juridical and economical double taxation to the investors of Thai REIT. Such tax discrimination results to higher and unfair tax cost compared to direct domestic investment is an obstacle to promote Thai REITs as per the SEC's intention.

Please see below the illustration of tax cost summary of the investors of Thai REIT compared between domestic investment and foreign investment.

	Domestic Investment	Foreign Investment
Rent	100	100
Tax on income in foreign country (WHT on rent is 25%)	-	25
Income received at REIT	100	100
Tax payable at REIT level	0	0
Tax on profit sharing	10	10
Net income received	90	65
Summary of tax cost	10	35

As illustrated above, when Thai REIT invests in assets located in foreign country and derives income from the investment in foreign country, such income will be taxed twice, firstly 25 percent tax in source country where the assets is located and tax in Thailand at the rate of 10 percent. The income which is so derived and repatriated to Thailand included the tax suffered in foreign country which will not able to relieve under the Revenue Code.

As a result, the tax cost from foreign investment through REIT received by the investors is higher compared to domestic investment. The investors in Thai REIT may discourage from an investment in Thai REIT if the REIT choose to invest in foreign immoveable property. Such discouragement contradicts to the intention of the SEC who aims to promote the investment in immoveable property in capital market through REIT.

Analysis of Legal Status of REIT

Thai REIT is established in form of Trust.⁵ In accordance with the Trust for Transactions in Capital Market Act, B.E. 2550 (2007), the trust shall be organized by trust deed. Trust deed refers to a contractual arrangement between settler and trustee where settler transfer assets or interest in assets to trust. Under the term of agreement, trustee shall have duty of care and fiduciary duty to manage benefits for the other person called beneficiary⁶.

⁵ The Securities and Exchange Commission no. Kor Khor. 8/2552, Article 1 (1) (b).

⁶ The Trust for Transactions in Capital Market Act, Section 3 and 11, (2007)

From the interpretation of the law, REIT or Trust is not juristic entity as it is established from contractual relationship between settler, trustee and beneficiary based on fiduciary duty for a purpose of assets management. Trust is not personally liable to the third or any party due to lack of juristic status. However, the trustee who is basically a juristic person (licensed company), holds legal interest in trust on behalf of beneficiary, is generally directly liable to the third party according to the contract law while trustee is liable to the beneficiary to the beneficiary according to the breach of trust.

Regarding to the Civil and Commercial Code, the relationship between settler, trustee and beneficiary are similar to the agency law provided that “the agency are established from the contract whereby a person, called the agent, has authority to act for another person, called the principal, and agrees so to act.”⁷. Such contractual relationship between trustee and settler and beneficiary are established under the scope of authorization given in trust deed. The trustee shall act on behalf of the settler or beneficiary based on fiduciary duty. Under the fiduciary duty, the agent shall take it necessary care within the authority given by the principal to act as the principal and protect interest of the principal. This leads to the liabilities from the agent to the principal. This similar concept applies to the trustee and beneficiaries where the trustee may be deemed as agent of the beneficiary to protect and management interest of the beneficiary, arising from assets in trust. Thereby, the trustee shall then be liable to the beneficiary if in any how the trustee breaches of trust. The liabilities from the agent to the principal are stipulated in section 812 of the Civil and Commercial Code states that “The agent is liable for any injury resulting from his negligence or non-execution of agency, or from an act done without or in excess of authority”.

Furthermore, the Civil and Commercial Code stipulates the principal is bound to the third persons by the acts which the agent or the subagent has done within the scope of his authority by virtue of his agency⁸. Thereby the agent shall be personally liable to the third party only when the agent act outside scope of authority given by the principal. Such liabilities to the third party shall occur from 2 main causes which are⁹ 1) wrongful act; and 2) breach of contract.

This thesis studies on the liabilities of trustee under the Trust for Transactions in Capital Transaction Act B.E. 2550, the Act specified that “in cases where a trustee fails to manage the trust in accordance with the trust instrument or this Act, the trustee shall be liable to indemnify the trust”¹⁰. According to the law, it can be inferred that trustee is appointed under the trust deed and the trust deed gives authority to trustee therefore the trustee shall only be act within the scope specified under the trust deed, otherwise the trustee shall liable to the beneficiaries for any damages incurred thereto.

Trust arrangement seems to adopt the agency concept, thereby; the trustee shall have liabilities similar to agent. Trust arrangement has adopted the agency concept provided that the beneficiary who is the principal gives authority to trustee under the trust instrument to manage and its assets for a benefit of the beneficiary.

⁷ The Civil and Commercial Code. Section 797, (2008).

⁸ The Civil and Commercial Code. Section 820. (2008).

⁹ ศาสตราจารย์ ดร.ไพฑูริย์ เอกจริยกรม, ตัวแทนนายหน้า, (Professor Phatai-chit **Akechariyakrom, Agency – Brokerage**, 185, (10th edition, 2010), Winyuchon Publication House Co., Ltd.

¹⁰ The Trust for Transactions in Capital Market Act. Section 43. (2007).

Moreover, the trust is not a partnership under the Civil and Commercial Code. Seeing that according to the Civil and Commercial Code, there are 2 main elements to constitute a “Partnership”, there are;

- 1) A contractual relationship between two or more persons;
- 2) The purpose is uniting for sharing the profits.

The same as joint venture, Thai Commercial law does not provide the definition of provided that the definition of “Joint Venture”. However, the term is usually refer to a contractual relationship between 2 or more persons whereby agree to invest and operate business together, for a purpose of sharing benefits from such business¹¹.

Trust, though is constituted from a contractual arrangement but the purpose of trust is different from the purpose of partnership as the trust is a contractual arrangement between 3 parties whereby one party (Settler) transfer its assets to another person (Trustee) to hold for another person (Beneficiary)’s behalf. The purpose of the trust is a contract for the benefit of the third party.

In summary, trust is not a juristic person under Thai commercial law, thereby, trust, itself, shall not be personal liable. Furthermore, this thesis found that the juristic rationale of trust is similar to the law of Agency under the Thai Civil and Commercial Code as both agency law and trust is constituted form contractual arrangement between the parties whereby one party authorize the other party to act on its behalf. Any act performed under the scope of authorization shall be bound to such party; however, the agent or trustee shall have duty of care and fiduciary duty to the principal.

As per above legal analysis, trust which is not a juristic entity, shall not be a taxable entity under the Revenue Code. Hence, the trust or REIT is not subject to income tax and trust will not be entitled to the double income tax relief given by the Revenue Code. The investor of the REIT or the beneficiary shall then be a person who is liable to tax on the income received from the investment as the beneficiary has economical interest in such incomes. If there is tax suffered from foreign investment, the beneficiary shall be entitled to relief; however, the Revenue Code currently does not give such entitlement to the beneficiary of the REIT.

Double Income Tax Relief in Foreign Countries

1) Credit Method

In some countries like Australia gives the foreign tax credit to the REIT’s investors. Australia REIT or A-REIT is established in form of trust and generally treated as tax transparent entity for Australian tax purposes¹². Australian tax law allows trust to apply for ‘flow-through’ status (subject to certain conditions i.e. annually distribute of its income and qualify as Managed Investment Schemes regulated under Corporation Law, Division 6 of the

¹¹ ศาสตราจารย์พิเศษ โสภณ รัตนากอร์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย หุ้นส่วนและบริษัท, (Professor Sophon Rattanakorn, **The Explanation of Civil and Commercial Code on Partnership and Company**, 47, (12th edition, 2010), Nitibannagarn Publication House Co., Ltd.

¹² Australian Government, Australian Taxation Office, **Trust**, available at <https://www.ato.gov.au/General/Trusts/>, (last visited Aug 2, 2015)

ITAA 1936). As a result of qualifying as flow-through regime, the beneficiary will be taxed on the REIT's taxable income according to the 'attribution system'*.

The trustee is not liable to tax on the trust's taxable income. The unit holders are presently entitled to the REIT's income at the end of the year. In the case where REIT earned foreign source income from investment in foreign country, the foreign source income shall be included into REIT's income. If the income had been suffered from tax paid in foreign country in relation to income, the beneficiary shall be allowed to utilize the foreign income tax offset in respect of tax paid in foreign country¹³. To be eligible to the foreign income tax offset, the following conditions must be satisfied;

- (1) The tax must have actually paid, or deemed to have paid;
- (2) The foreign tax imposed under a foreign law, regardless of whether it is imposed at a supranational, national or supranational level;
- (3) The foreign tax imposed on the taxpayer's income, profits or gains or be covered by one of Australia's double tax agreements;
- (4) The income or gain on which you paid foreign income tax must be included in taxpayer's assessable income for Australian income tax purposes.

To claim for foreign income tax offset, the taxpayer must record the actual amount of foreign income tax paid; however, such Foreign Income Tax Offset shall be limited to the Australian tax payable on taxable income for the year. As a result of tax limit, the tax payable in Australia will be reduced to limit. Any foreign income tax paid excess of the limit is not available to be carried forward to a later income tax year and cannot be refunded.

By giving foreign tax credit, it will consequently reduce the tax cost from foreign investment to the domestic rate or in at least to foreign tax paid, if the tax in foreign country is higher than domestic rate.

2) Tax Exemption

Other than the tax credit method, some countries such as Malaysia and Singapore adopt the exemption method to relieve the double income tax from foreign investment of the resident REIT. Malaysia and Singapore both impose tax on territorial basis provided that only the income attributable to the Malaysia and Singapore source is subject to tax in that country. The income derived outside Malaysia and Singapore is exempted from tax.

With regard to REIT characteristic on tax perspective, Malaysia and Singapore are similar provided that both countries have flow-through or tax transparency status is subject to certain conditions. By applying flow-through regime, the tax will not be levied at REIT level instead it will be levied at beneficiary's level.

* 'Attribution' system is system where the taxable income of the trust will not be taxable in the hands of the trustee provided that the trustee has allocated all of the taxable income of the trust to the unit holders on a 'fair and reasonable basis'.

¹³ The Income Tax Assessment Act, Section 6B. (1936) and the Income Tax Assessment Act, Section 770-130. (1997).

Seeing that Malaysia and Singapore collect tax on territorial basis then income derived in or deemed in derived Malaysia and Singapore are subject to tax in such country. Foreign sourced income earned by a REIT is generally not taxable in Malaysia. Moreover, under Malaysian tax law, foreign source income earned by the REIT will retain its character when it is distributed to its unit holders and there is no withholding tax apply on such distributions whilst in Singapore, unit holders who receive distributions made by REIT from the exempted income (foreign source income) under Section 13(8) or one-tier tax exemption dividend under 13(12) of the Income Tax Act, the distributions shall also be exempt from tax at hand of the beneficiary.

Thanks to the generosity of both countries, they voluntary provide tax exemption to foreign source to relief double taxation incurred from investment abroad. Thereby, the tax cost occurred in foreign country will only be the tax cost arising in country where M-REIT or S-REIT invest. This provision should encourage the investors to invest abroad. Unlike the foreign tax credit method which is ultimately neutral the tax burden between domestic investment and cross border investment.

Please see below comparison of summary tax cost from different approaches

	No relief	Tax Exemption	Foreign Tax Credit
Foreign Income received from investing in foreign country	100	100	100
Tax on income in source country (25%)*	25	25	25
Income received at REIT	75	75	75
Tax payable in REIT level	0	0	0
Net income received at unit holder	100	75	100
Tax payable at unit holder level (10%)	10	Exempt	10
Foreign tax credit	0	0	(10-25)
Net tax payable	10	0	0
Net cash received	65	75	75
Summary of tax cost	35	25	25

* Assuming that the withholding tax in foreign country is 25 percent

** There is no tax at REIT level.

*** Withholding tax at 10 percent on profit sharing from REIT

Conclusion and Recommendations

Based on this thesis analysis, this thesis found that Thailand should amend Thai tax law to allow the beneficiaries of Thai REIT to be entitled to foreign tax credit which suffered

from foreign investment by adopting Australian tax regime as a model. This thesis choose Australia as it has similar legal framework and tax system to Thailand and effectively impose the foreign tax credit method to relief the double taxation. While Malaysia and Singapore both have different tax system to Thailand provided that and Thailand does not seek to collect tax territory basis. In addition, Malaysia and Singapore both have aggressive promotion on inbound and outbound investment by introducing a lot of tax incentives. However, if Thailand wishes to compete on promoting investment on REIT with Malaysia and Singapore, the tax exemption method will be more preferred.

This thesis proposed to amend the Revenue Code. The amendment will allow the investors to utilize the foreign tax credit against income received from REIT. The Revenue Department may consider proposing an amendment to the Royal Decree 533 by including the provision to relieve the tax suffered in foreign country to beneficiary of Thai REIT.

Currently, the Royal Decree No. 533 issued for purpose to eliminate the double taxation occurred from the transactions in trust structure as well as provide Value Added Tax, Specific Business Tax and Stamp Duty exemption to settler, trustee and beneficiary. However, the double income taxation exemptions provided in the provision does not cover to foreign source income received by the beneficiary of Thai REIT. The Revenue Department may consider extend the scope of foreign tax credit to the beneficiary of the trust.

REFERENCES

Books

- Kelly, William A. Real Estate Investment Trustrs Handbook: ALI-ABA, 1998.
 Wolters Kluwer Law and Business edited by Simontacchi, Stefano., and Stoschek, Uwe.
Guide to Global Real Estate Investment Trusts: Kluwer Law International, 2012.
 ศาสตราจารย์พิเศษ โสภณ รัตนากอร์. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย หุ้นส่วนและบริษัท.(Professor Sophon Rattanakorn, The Explanation of Civil and Commercial Code on Partnership and Company: Nitibannagarn Publication House Co., Ltd, 2010
 ศาสตราจารย์ ดร.ไพฑิต เอกจริยกรม. ตัวแทนนายหน้า.(Professor Phatai-chit Akechariyakrom. Agency – Brokerage). Winyuchon Publication House Co., Ltd., 2010

Electronics Media

- The Securities and Exchange Commission. “*SEC has approved to establish Real Estate Investment Trust*”,
 <http://www.sec.or.th/th/Pages/News/Detail_News.aspx?tg=NEWS&lg=th&news_no=72&news_yy=2553> (accessed August 2, 2015)
 Australian Taxation Office. “Trust,” <<https://www.ato.gov.au/General/Trusts/>> (accessed August 2, 2015)

Interviews

- The SEC officer rank at the Deputy Director, Securities-Capital market registration Department, the Securities Exchanges of Thailand. Interviewed by Malyn Saengchote, Bangkok, Thailand. Jun. 24, 2015

LEGAL MEASURES ON HOMEOPATHY IN THAILAND*

*Narichprapa Tinprapa***

ABSTRACT

Homeopathy treatment is a branch of alternative medicine that is the second most widely used system of medicine in the world and is the fastest growing. So many people now choose to use homeopathy as potential medicine. In Thailand, although this treatment is quite new, homeopathy is on a rapid rise and it is becoming a booming medical business.

However, many countries, including Thailand, still do not have the appropriate legal measures and standards for homeopathic treatment, which would enable this treatment to be adapted and applied for proper use. The result of the lack of a legal mechanism could lead to the following questions regarding the safety of homeopathic treatment or homeopathic products, the appropriate qualification of the product resulting from the effectiveness of the treatment and the health conditions for the treatment to be applied. Consequently, the consumers or patients are currently treated by unlicensed homeopaths and consume homeopathic products that are unregulated by law. The lack of such control systems leads to problems concerning the consumer protection and quality in healthcare for the patients, consumers and also public interests.

This thesis aims to study the problems of Thai law in controlling homeopath licensing and homeopathic products, and compares Thai law to the principles of foreign legislations such as United State of America and India for activities of all parties involved in Homeopathic treatment and products so as to analyze and propose a legislation solution to Thai law.

Keywords: Homeopathy, Alternative medicine

* The article is summarized and rearranged from the thesis “Legal Measures on Homeopathy in Thailand” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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บทคัดย่อ

โฮมิโอพาธี เป็นการแพทย์แขนงหนึ่งของการแพทย์ทางเลือก ซึ่งกล่าวได้ว่า เป็นการแพทย์ทางเลือกเพื่อการรักษาโรคที่เติบโตเร็วที่สุดและใช้กันอย่างแพร่หลายมากที่สุดเป็นอันดับที่สองในโลก นั้นหมายความว่า มีผู้คนจำนวนมากเลือกที่จะใช้โฮมิโอพาธีเพื่อการรักษาอาการเจ็บป่วยของตน เช่นเดียวกับประเทศไทย แม้การรักษาด้วยแพทย์ทางเลือกแขนงนี้ จะเป็นแนวทางการรักษาที่ค่อนข้างใหม่ แต่ โฮมิโอพาธี ก็ได้รับความสนใจอย่างมาก และกลายเป็น การรักษาที่เป็นที่นิยมมาก

ขึ้นในธุรกิจการแพทย์ อย่างไรก็ตาม ในหลายประเทศ รวมถึงประเทศไทยยังไม่ได้มีมาตรการทางกฎหมายที่และมาตรฐานที่เหมาะสม สำหรับโฮมิโอพาธี ซึ่งผลของการขาดกลไกทางกฎหมายจะนำไปสู่คำถามต่างๆ จากผู้เข้ารับการรักษา เช่น ความปลอดภัยของการรักษา หรือผลิตภัณฑ์โฮมิโอพาธีมีคุณสมบัติที่เหมาะสมและมีประสิทธิผลมากเพียงพอในการรักษาหรือไม่ ปัจจุบันมีผู้บริโภคหรือผู้ป่วยที่ได้รับการรักษาจากแพทย์แผนโฮมิโอพาธีซึ่งไม่มีใบอนุญาตในการรักษาตามกฎหมายสำหรับแพทย์แขนงนี้โดยเฉพาะ รวมไปถึงการบริโภคยาโฮมิโอพาธีซึ่งไม่ได้รับการควบคุมคุณภาพจากหน่วยงานที่เกี่ยวข้อง ซึ่งถือเป็นปัญหาสำคัญที่กระทบกับการคุ้มครองผู้บริโภคและการดูแลสุขภาพของผู้ป่วย รวมไปถึงประโยชน์ของประชาชน

ดังนั้น วิทยานิพนธ์ฉบับนี้ จึงมุ่งศึกษาถึงปัญหาของกฎหมายไทยในการควบคุมการออกใบอนุญาตให้กับผู้ที่ทำการรักษาโดยใช้การรักษาแบบโฮมิโอพาธี และ ยาโฮมิโอพาธี โดยศึกษาเปรียบเทียบกับหลักของกฎหมายต่างประเทศ อาทิ อเมริกาและอินเดีย ในกิจกรรมต่าง ๆ ของผู้ที่เกี่ยวข้องกับแพทย์แผนทางเลือกแขนงนี้ เพื่อทำการวิเคราะห์และเสนอแนวทางแก้ปัญหากฎหมายไทย

Introduction

Illness, disease or a medical condition is an unpleasant experience that occurs to the body and mind, as they are impossible to avoid. Although such health problems are more common issues for every person, society and age, no one wants to be unhealthy; however, illness has been a long-time significant problem to all human cultures. Nowadays, people have many self-healing treatments to choose from; nevertheless, it is obvious that most patients prefer to use western healthcare solutions, or it can even be called the mainstream or called conventional medicine or other names such as orthodox, or modern medicine (defined as “a general term for conventional healthcare based on the “Western model” of evidence-based practice for diagnosing and treating disease¹).

However, because of the increasing realization that conventional medicine is not the only answer for good health people around the world are now turning to other healthcare methods. For that reason, there are many patients choosing alternative medicine to cure their health problems instead of using conventional medicine.

Alternative medicine offers a variety of treatments, products, and ways to care for health. These treatments often vary from their origins and original methods. The treatment might be classified by origin of its culture or by its origin of belief. Each way of treatment might be combined with another by using the methods that have existed in a culture for a long time and may have been developed recently or possibly a thousand years ago.²

¹ Segen's Medical Dictionary, **Modern Medicine**, available at <http://medicaldictionary.thefreedictionary.com/modern+medicine> (last visited June 2, 2015).

² ThaiCAM, **Definition of Alternative Medicine**, available at <http://www.thaicam.go.th/>

General Information on Homeopathy and Related Problems

In this regard, there is one type of alternative medicine, called homeopathy. Homeopathy is the most popular choice of alternative medicine. Homeopathy was first formulated and developed in Germany during the end of 18th Century or about 200 years ago.³ Currently, many Countries in Asia where Homeopathy is passionately embraced include India, Sri Lanka, Malaysia, and Japan. It is generally believed that homeopathy is one of the more compelling theories that has potential and promise to be used in various treatment stages.

Homeopathy or homeopathic medicine is a branch of the practice called complementary and alternative medicines, which is the practice of medicine that embraces a holistic and natural approach to the treatment of the sick based on the idea of a natural phenomenon of healing in that the body has the ability to heal itself.⁴

The basic principle of practically homeopathic healing is commonly referred to as the “Law of Similarity”,⁵ what means that any substance, which can produce symptoms in a healthy person, can cure similar symptoms in a person who is sick. This idea refers to a theory known as the “like cure like” of Hippocrates (460-377 B.C.), the Greek physician who known as the father of Medicine.⁶

As mentioned above, like cures like is the basis principle of homeopathy, a treatment system intended to cure an illness rather than simply hiding its symptoms. Instead of using an opposing force to suppress a symptom,⁷ homeopathy is founded on the idea that puts the same material that causes the sickness to the body, the body will receive more amount of the material and reach to the point called “The Trigger Point”. The Trigger Point is the stage at which the body has reached the point of transformation, reacting to the abnormality. This way of thinking has become using of vaccine in the world today.⁸

As stated in the beginning of this article, people are now interested in alternative medicine, and homeopathy in particular. According to the World Health Organization (WHO), homeopathic medicine is the second most widely used system of

[index.php?option=com_content&view=article&id=110&Itemid=109](http://www.wordsaremedicine.com/the-power-of-homeopathy/) (last visited on 29 March 2015).

³ National Center for Complementary and Integrative Health, **Homeopathy: An Introduction**, available at <https://nccih.nih.gov/health/homeopathy> (last visited March 29, 2015).

⁴ WebMD, **What is homeopathy**, available at <http://www.webmd.com/balance/guide/homeopathy-topic-overview>, (last visited June 25, 2015).

⁵ Homeopathy Plus, **Law of Similarity**, available at <http://homeopathyplus.com.au/tutorial-1-the-law-of-similars/> (last visited March 2, 2015).

⁶ Greek Medicine, **Hippocrates**, available at http://www.greekmedicine.net/whos_who/Hippocrates.html (last visited February 2, 2015).

⁷ Words are Medicine, **The Power of Homeopathy**, available at <http://www.wordsaremedicine.com/the-power-of-homeopathy/> (last visited June 23, 2015).

⁸ *Supra* note 5.

medicine in the world and is fastest growing.⁹ A high number of people now choose to use Homeopathy as potential medicine. Although a considered a new treatment in Thailand, homeopathy is on a rapid rise and it is becoming a booming medical business.

In addition, as Thailand is set to be the medical hub of Asia, in order to ensure Thailand develops to that stage, the implementation of the Medical Hub Policy, is executing its second strategic five-year plan (2012-2016).¹⁰ The Ministry of Public Health of Thailand has formally supported the sector in an effort to promote Thai traditional and alternative medicines in hospitals nationwide.¹¹ An important strategy of Thailand is trying to attract thousands of international patients with its Thai traditional medicine and alternative medicines like homeopathy.¹²

Many countries, including Thailand, still do not have the appropriate legal measures, nor have set forth the standard for homeopathic treatment in order to adapt it for proper usage. The result of the lack of such legal mechanism will lead to the questions regarding the safety of homeopathic treatment or homeopathic products, the appropriate qualification of the product resulting from the effectiveness of the treatment and the health conditions for the treatment to be applied. All parties involved in the homeopathic activities, especially government or relevant agencies in Thailand and many countries where the homeopathic treatment is promoted into their national health systems, ignore stipulating legal measures on homeopathic services; unfortunately, this leads to more issues and problems in homeopathic treatment.

Presently, Thailand has a number of study programs related to the practice of using homeopathic treatment, despite the fact that they have no standardized teaching, lack ethics in using homeopathic treatment and applying non-standardized homeopathic products and services, many of which are shown on online advertisements.¹³ All of these concerns could lead to misunderstanding and could cause harm to the patients.

It is therefore very important and necessary to research and analyze the legal issues and problems pertaining to homeopathic treatment in order to draft the appropriate laws and regulations directly related to homeopathy. In order to provide useful information and regulate all parties involved in the homeopathic business in Thailand.

Regulation on Homeopathy in Foreign Countries

Homeopathic treatment was accepted by many countries and those countries are stated the specified regulations for controlling the homeopath and homeopathic products in various ways. According to the research of the international homeopathic medical

⁹ Laura Josephson, **A Homeopathic Handbook of Natural Remedies: Safe and Effective Treatment of Common Ailments and Injuries**, E-Book, Kindle Edition., August 13, 2002.

¹⁰ Fireworks Media (Thailand) Co., Ltd, **Thai Medical Expo 2014**, available at <http://www.thaimedicaexpo.com/?ref=infact> (last visited June 2, 2015).

¹¹ The Board of Investment of Thailand, **Thailand's Medical Industry**, available at http://www.boi.go.th/tir/issue_content.php?issueid=108;page=42 (last visited on 2 June 2015).

¹² *Id.*

¹³ Astro-Vision-Avenir, **Losing weight with Homeopathy**, available at http://www.astro-vision-avenir.com/Homeopathie_mairir.149.Thai.html (last visited March 31, 2015).

society known as Liga Medicorum Homeopathica Internatioalis (“LMHI”)¹⁴, in many countries homeopathy has gained official status in medical systems. In some countries, homeopathy has been officially recognized by the government as a system of medicine or medical specialty or alternative medicine,¹⁵

According to worldwide studies, the legal measures on homeopathy are divided into two circumstances as follows:

1. Controlling the Practice of Homeopathy

Control of the practice of homeopathy as a homeopath would be considered by related agencies that observe and control homeopathy. In each country, the control on the practice of homeopathy depends on the level of stringency. The lowest level of stringency of control will exist in the form of registration, to collect the homeopath’s information for records. If there is a stronger need for control, the form required will be certification proving the knowledge of the homeopathy that the homeopath has.

Homeopaths may obtain the certificate as homeopathic practitioners after successful completion of the homeopathy course and being observed after receiving the certification. The most stringent of control is to use the method of licensing. The homeopath must receive the license before practicing homeopathy to their patients. The license will be the proper tool to approve and ensure that this homeopath has a guarantee of a high level of knowledge of homeopathic treatment, and will be able to assume responsibility by using the law to enforce it if the homeopath does not follow the laws and regulations concerning the homeopathic treatment; as a result, the license of such of homeopath can be rejected and such homeopath will punished by the relevant regulations.

For example, in the United States of America the practice of homeopathy in is diverse. There is no national certification for homeopathic treatment in the U.S., but certification has been granted by each state. It is only in Arizona, Connecticut and Nevada where there are licensing boards for doctors of Medicine (holders of M.D. degrees) and doctors of osteopathic medicine (holders of D.O. degrees). Assistants in Arizona and Nevada also receive the License of the Homeopathy Treatment for assisting and performing medical services observed by a homeopathic physician.¹⁶ Meanwhile, The Central Government of The Republic of India passed the Homeopathy Central Council Act, 1973 (“HCC Act”)¹⁷, which authorizes the Central Council of Homoeopathy (“CCH”) to promulgate the rules, to control Homeopathy education in India. If any institution or University desires to offer either a degree or a diploma to grant a qualification in homeopathy, it is required to apply to the Council, which

¹⁴ Liga Medicorum Homeopathica Internatioalis, **Welcome to Our Website**, available at <http://www.lmhi.org/>, (last visited March 2, 2015).

¹⁵ Asociación Nacional de la Industria Farmacéutica Homeopático, **Homeopathy in the world**, available at http://www.congresoanifhom.org/Memorias_files/Estado%20Actual%20de%20la%20Homeopatía%20en%20el%20Mundo.pdf (last visited March 2, 2015).

¹⁶ NCCIH, **Licensing**, available at <https://nccih.nih.gov/health/homeopathy> (last visited March 2, 2015).

¹⁷ Central Council of Homoeopathy, **The Homeopathy Central Council Act, 1973**, available at <http://www.cchindia.com/hcc-act.htm> (last visited 1 June 2015).

prescribes the course curriculum¹⁸ and maintenance of a central register of homoeopathy and for matters connected therewith in India.

2. Registration of Homeopathic Products

According to studies, homeopathic remedies can be distributed at pharmacies in many countries. Currently, Homeopathic Pharmacopoeia is issued by five countries¹⁹ as shown below:

1. German Homoeopathic Pharmacopoeia (GHP)
2. British Homeopathic Pharmacopoeia (BHP)
3. Homeopathic Pharmacopoeia of the United States of America (HPUS).
4. Homeopathic Pharmacopoeia of India (HPUI)
5. France Homeopathic Pharmacopoeia (FHP)

According to research, there are methods of registration of homeopathic remedies that are frequently used by countries around the world, which are:

1. One method is the registration of homeopathy in the area of medical law of each country, for homeopathic remedies to be registered. Normally, there would also be a law related to controlling the specific doctor who works in the field of homeopathy. For example, in India homeopathic remedies will be registered as a drug under the Law of the Drugs and Cosmetics ACT 1940 and the Drugs and Cosmetics Rules 1945,²⁰ and allows only a registered homeopathic medical practitioner²¹ to use homeopathy. In the United States, homeopathic remedies are regulated as drugs under the Federal Food, Drug and Cosmetic Act (FDCA) 51; however, there are homeopathic remedies that are allowed into market without approval from the FDA, which are homeopathic remedies that contain active ingredients listed in the Homeopathic Pharmacopoeia of the United States (HPUS). There must be a label on the product, outer container, and list of ingredients, specifying how much is the active ingredient diluted, and usage directions. Those homeopathic remedies that are for serious treatment such as cancer, must be sold by prescription. Only homeopathic remedies for minor health problems can be sold without prescription, such as a cold or headache remedies.²²

¹⁸ The Hindu, **Homoeopathy**, available at <http://www.thehindu.com/edu/2005/03/22/stories/2005032200250300.htm> (last visited 1 June 2015).

¹⁹ WHO, **Safety issues in the preparation of homeopathic medicines**, Publication date: 17 February 2010, available at <http://www.who.int/medicines/areas/traditional/prephomeopathic/en/> (last visited April 22, 2015).

²⁰ 4(dd), the drugs and Cosmetics Rules, 1945 (Added under Government of India Notification No. F. 1-59 / 68-D, dated 19th Nov. 1969.), available at <http://www.wipo.int/edocs/lexdocs/laws/en/in/in022en.pdf> (last visited March 2, 2015).

²¹ “Registered Homeopathic medical practitioner” means a person who is registered in the Central Register or State Register of Homeopathy (1Ins by G.O.I Notification No. G.S.R 680 (E) dated 5-12-1980)

²² National Pharmaceutical Control Bureau Ministry of Health Malaysia, **Guidance on Classification**, available at [file:///C:/Users/BIG/Downloads/Guidance_on_Classification_oct2011%20\(1\).pdf](file:///C:/Users/BIG/Downloads/Guidance_on_Classification_oct2011%20(1).pdf) (last visited May 22, 2015).

2. Another method is homeopathy registration in the form of natural products or dietary supplements. For example, Australia regulates homeopathy remedies as therapeutic goods.²³ Meanwhile, in Canada, homeopathy remedies are registered in as natural health products.²⁴

Conclusion and Recommendation

Although there has been so much research that indicates and explains the usefulness of homeopathy, the majority of people still do not fully understand how it works and there are also many misconceptions about this kind of treatment, which can lead a problem within the public society. Moreover, every kind of medical treatment, both conventional and alternative medicine (which also include Homeopathy), should be studied clearly and used by professionals based on standardization of knowledge, theory, and the right methods.

According to the standard of homeopathic treatment at the international level, homeopathy is accepted by many countries and those countries have stated specific legal regulations for controlling the homeopath and homeopathic products.

Beginning with the United States of America, the legal measures for homeopathic practice are at the state level. It is only Arizona, Connecticut and Nevada that have licensing for homeopathy for doctors of Medicine (holders of M.D. degrees) and doctors of osteopathic medicine (holders of D.O. degrees); however, homeopathic remedies are regulated as drugs under Section 201 (g) of the Food, Drug and Cosmetic Act (FDCA). In India, homeopathy is the part of mainstream medical system with a number of homeopathic practitioners. With the belief in this kind of patient treatment and also the benefits to the geography, specifically, the cultivation of plants that can be used as homeopathic medicine, the Indian government moved a resolution in the legislative assembly for the recognition of homeopathy.

For now, turning to Thailand, there are no laws related to homeopathy in Thailand regulating the homeopath who practices homeopathy to their patients and to control the quality and safety of homeopathy products. This could possibly affect the public interest, so it is very important for the Thai government to be involved in generating specific legal measures related to homeopathic treatment. There should be a registered organization within the government to certify and register both the homeopath who practices homeopathy and homeopathic products. There should be a specific organization to provide knowledge and advice to the public as there are many people who are not homeopathy professionals who will dishonestly use this opportunity to gain profit from the patients since there are no laws related to homeopathic treatment, and this will result in the harm to many patients and as well as the Thai public interest in the future.

²³ Department of Health, Australian Government, **Australian regulatory guidelines for complementary medicines (ARGCM), Homoeopathic preparations required to be listed on the ARTG**, 2015, available at <https://www.tga.gov.au/book/types-complementary-medicines> (last visited May 22, 2015).

²⁴ Health Canada, **Evidence for Homeopathic Medicines Guidance Document**, available at <http://www.hc-sc.gc.ca/dhp-mps/prodnatur/legislation/docs/ehmg-nprh-eng.php> (last visited May 22, 2015).

REFERENCES

Books

Laura Josephson, *A Homeopathic Handbook of Natural Remedies: Safe and Effective Treatment of Common Ailments and Injuries*, E-Book, Kindle Edition, August 13, 2002

Electronic Media

Asociación Nacional de la Industria Farmacéutica Homeopático. “*Homeopathy in the world*” <http://www.congresoanifhom.org/Memorias_files/Estado%20Actual%20de%20la%20Homeopatia%20en%20el%20Mundo.pdf> (accessed March 2, 2015)

Astro-Vision-Avenir. “*Losing weight with Homeopathy*” <http://www.astro-vision-avenir.com/Homeopathie_maigrir.149.Thai.html> (accessed March 31, 2015).

Board of Investment of Thailand. “*Thailand's Medical Industry*” <http://www.boi.go.th/tir/issue_content.php?issueid=108;page=42> (accessed on June 2, 2015)

Fireworks Media (Thailand) Co., Ltd. “*Thai Medical Expo 2014*” <<http://www.thaimedicalexpo.com/?ref=infact>> (accessed June 2, 2015).

Greek Medicine. “*Hippocrates*” <http://www.greekmedicine.net/whos_who/Hippocrates.html> (accessed February 2, 2015)

Health Canada. “*Evidence for Homeopathic Medicines Guidance Document*” <<http://www.hc-sc.gc.ca/dhp-mpps/prodnatur/legislation/docs/ehmg-nprh-eng.php>> (accessed May 22, 2015)

Homeopathy Plus. “*Law of Similarity*” <<http://homeopathyplus.com.au/tutorial-1-the-law-of-similars/>> (accessed March 2, 2015)

Liga Medicorum Homeopathica Internatioalis. “*Welcome to Our Website*” <<http://www.lmhi.org/>> (accessed March 2, 2015).

National Center for Complementary and Integrative Health. “*Licensing*” <<https://nccih.nih.gov/health/homeopathy>> (accessed March 2, 2015)

National Pharmaceutical Control Bureau, Ministry of Health Malaysia. “*Guidance on Classification*” <[file:///C:/Users/BIG/Downloads/Guidance_on_Classification_oct2011%20\(1\).pdf](file:///C:/Users/BIG/Downloads/Guidance_on_Classification_oct2011%20(1).pdf)> (accessed May 22, 2015)

ThaiCAM. “*Definition of Alternative Medicine*” <http://www.thaicam.go.th/index.php?option=com_content&view=article&id=110&Itemid=109> (accessed on 29 March 2015).

The Hindu. “*Homoeopathy*” <<http://www.thehindu.com/edu/2005/03/22/stories/2005032200250300.htm>> (accessed 1 June 2015)

U.S. National Center for Complementary and Integrative Health. “*Homeopathy: An Introduction*” <<https://nccih.nih.gov/health/homeopathy>> (accessed March 29, 2015).

WebMD. "*What is homeopathy?*"

<<http://www.webmd.com/balance/guide/homeopathy-topic-overview>> (accessed June 25, 2015).

WHO. "*Safety issues in the preparation of homeopathic medicines*"

<<http://www.who.int/medicines/areas/traditional/prephomeopathic/en/>>(accessed April 22, 2015)

Words are Medicine. "*The Power of*

Homeopathy"<<http://www.wordsaremedicine.com/the-power-of-homeopathy/>> (accessed June 23, 2015).

DAMAGES FOR TRADEMARK INFRINGEMENT IN THAILAND*

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ABSTRACT

Trademark protection has direct and indirect effects on economic development. At current situation of Thailand, many trademark infringements still increasingly arise.

In Thailand, the Trademark Act B.E. 2534 does not provide the provision determining the types of damages that the plaintiff may claim from the infringer. Within Thai jurisdiction, the court applies the concept of tort damages to the trademark cases under Section 438 of the Civil and Commercial Code, which in most cases it is improper to apply this Section to the trademark damages because the provision of this Section is too broad and that it is hard to give the clear rules and guidelines to the parties and the court. Thus, it may lead to the failure to achieve the compensation due to the fact that trademark law is more complicated and different than the general infringement of tort law.

This thesis aims to study the trademark infringement and damages under foreign laws, namely the United States law, Australian law, Singapore law, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Thai law in order to examine the problem and seek the appropriate resolutions to handle the problem of non-existing types of damages for trademark infringement under Thai trademark law.

Thus, to solve the mentioned problems, Thai trademark law should be amended. The resolutions to problem of non-existing types of trademark damages under Thai trademark law are separated into a short-term and a long-term.

To resolve this problem in short-term where the Trademark Act is not yet amended, the President of the Supreme Court should issue the recommendation in relate to types of claimable damages in trademark infringement case in order to give the clear rules and guidelines for the parties and the civil courts in the proceeding.

Moreover, the Department of Intellectual Property (DIP), as the principal agency in the development of intellectual property system in Thailand, should draft and

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publish the guideline and model framework for legislation on types of damages for trademark infringement in order to enhance the efficiency of intellectual property enforcement system.

In the long run, the Trademark Act B.E. 2534 should be amended by adding the provision to specify types of claimable damages that the court may grant and easily apply to trademark infringement case.

Keywords: Trademark. Trademark infringement, Damages, Tort, Agreement on Trade Related Aspects of Intellectual Property Rights, the United States, Australia, Singapore, Thailand.

บทคัดย่อ

ในประเทศไทย การคุ้มครองเครื่องหมายการค้ามีผลกระทบทั้งทางตรงและทางอ้อมต่อการพัฒนาเศรษฐกิจของประเทศ ซึ่งในปัจจุบันการละเมิดเครื่องหมายการค้านั้นยังคงเกิดขึ้นอย่างต่อเนื่อง และเมื่อเกิดการละเมิดเครื่องหมายการค้าขึ้น เจ้าของเครื่องหมายการค้ามักฟ้องคดีต่อศาลเพื่อขอให้ศาลมีคำสั่งห้ามการกระทำละเมิด รวมทั้งเรียกร้องค่าเสียหายอันเกิดจากการกระทำละเมิดนั้น อย่างไรก็ตาม ภายใต้อำนาจพระราชบัญญัติเครื่องหมายการค้า พ.ศ. 2534 ไม่มีบทบัญญัติที่กำหนดประเภทของค่าเสียหายที่โจทก์อาจจะสามารถเรียกจากผู้กระทำละเมิดได้ ซึ่งภายในเขตอำนาจศาลไทยนั้น ศาลนำหลักในมาตรา 438 แห่งประมวลกฎหมายแพ่งและพาณิชย์ ซึ่งเป็นหลักทั่วไปในการกำหนดค่าสินไหมทดแทนในคดีละเมิด มาปรับใช้กับคดีละเมิดเครื่องหมายการค้า ซึ่งในหลายกรณีหลักดังกล่าวไม่เหมาะสมที่จะปรับใช้กับคดีละเมิดเครื่องหมายการค้า เนื่องจากบทบัญญัติดังกล่าวไม่ได้กำหนดหลักและแนวทางในเรื่องค่าเสียหายให้แก่คู่กรณีและศาล ดังนั้น จึงอาจนำมาสู่ความล้มเหลวในการได้รับค่าสินไหมทดแทน เนื่องมาจากกฎหมายเครื่องหมายการค้ามีความซับซ้อนและแตกต่างจากกฎหมายละเมิดทั่วไป

ผู้เขียนวิทยานิพนธ์จึงมีจุดมุ่งหมายที่จะศึกษาถึงหลักของการละเมิดเครื่องหมายการค้าและค่าเสียหายจากการละเมิดเครื่องหมายการค้า ภายใต้อำนาจกฎหมายต่างประเทศ ซึ่งได้แก่ กฎหมายของประเทศสหรัฐอเมริกา ออสเตรเลีย สิงคโปร์ รวมทั้งข้อตกลงทางการค้าที่เกี่ยวข้องกับทรัพย์สินทางปัญญา หรือความตกลงทริปส์ (TRIPS) และกฎหมายไทย เพื่อที่จะศึกษาถึงปัญหาและหาแนวทางแก้ไขปัญหานั้นที่เหมาะสมเพื่อนำมาปรับใช้กับปัญหาการขาดบทบัญญัติที่กำหนดประเภทค่าเสียหายของการละเมิดเครื่องหมายการค้า ภายใต้อำนาจกฎหมายเครื่องหมายการค้าของไทย

ผลจากการศึกษาในวิทยานิพนธ์นี้ ผู้เขียนได้เสนอแนวทางในการแก้ไขปัญหาดังกล่าวเป็นสองระยะ คือ ระยะสั้นและระยะยาว สำหรับระยะสั้นนั้น ในขณะที่พระราชบัญญัติเครื่องหมายการค้าฉบับปัจจุบันยังไม่ได้มีการแก้ไข เห็นควรให้ประธานศาลฎีกาออกคำแนะนำในเรื่องประเภทและการกำหนดค่าเสียหายในการละเมิดเครื่องหมายการค้า เพื่อที่จะได้เป็นหลักและแนวทางให้แก่คู่กรณีและศาลในการพิจารณาคดี นอกจากนี้ กรมทรัพย์สินทางปัญญา ซึ่งเป็นหน่วยงานหลักในการพัฒนาระบบทรัพย์สินทางปัญญาของประเทศ ควรร่างแนวทางและแผนงานต้นแบบสำหรับการบัญญัติกฎหมายในเรื่องค่าเสียหายของการละเมิดเครื่องหมายการค้า ส่วนในระยะยาว พระราชบัญญัติเครื่องหมายการค้าควรได้รับการแก้ไข

ปรับปรุงโดยการเพิ่มบทบัญญัติที่กำหนดประเภทค่าเสียหายที่ศาลอาจจะให้ได้ในคดีการละเมิดเครื่องหมายการค้า

คำสำคัญ: เครื่องหมายการค้า, ละเมิดเครื่องหมายการค้า, ค่าเสียหาย, ละเมิดความตกลงทริปส์, สหรัฐอเมริกา, ออสเตรเลีย, สิงคโปร์, ไทย

1. Introduction

In today's competitive business world, a trademark is one of the most valuable intellectual properties and significant to each countries' national economy and commerce.¹

Trademark protection in Thailand is specified in the Trademark Act (No.2) B.E. 2543. A trademark law is aimed at protecting the benefits of traders and consumers. Traders benefit from law by receiving the right to use their own trademark exclusively. On the other hand, consumers are also protected by the law through the requirement to register, which prevents the likelihood of confusion and deception.²

In situation where trademark protection in Thailand has direct and indirect effects on economic development and the globalization of trade in products and services has changed, the problem of trademark infringement still has always been increasingly arisen and it has also been one of the more difficult issues to resolve. Once infringement has been occurred, the plaintiff in a trademark infringement lawsuit can seek an order from the court preventing the infringer from any further infringing activity. The court regularly grant injunctions against further trademark infringement.³ Apart from injunction relief, the court may also award monetary recovery which includes damages, the defendant's profits and costs of action.

However, in Thailand, the Trademark Act does not provide the provision determining the types of damages that the plaintiff can claim and the court normally award in infringement case.

2. Damages for Trademark Infringement

Relief in the form of damages is one of the remedies available in claims of tortious liability. Some jurisdictions allow for awards statutory damages, exemplary damages and other remedies. However, granted damages must be reasonably proven to the court by the plaintiff. There are many types of damages for trademark infringement recognized under the law that is;

¹ Worrawong Atcharawongchai, "Trademark damages: the comparative study on trademark damages in Thailand and US" 320 (2012).

² *Id.*

³ Richard Stim, Trademark Law 133 (2000).

2.1 Compensatory Damages also called “Actual Damages”

This damages are awarded with an intention of putting the party who has suffered injury in the same position as he would have been had the tortious act not been committed. The amount awarded is based on the proven damage, loss, or injury suffered by the plaintiff.

2.2 Nominal Damages

Nominal damages are awarded in certain cases where the plaintiff's right has been infringed, but no loss is sustained or the extent of the damage cannot be measured and proved.⁴ In other word, as a general rule, actual damages need not be shown to receive nominal damages.⁵ Nominal damages usually are awarded after the court declines the plea of the plaintiff that compensatory damages should be awarded. However, the plaintiff may not be awarded nominal damages in every case where he does not receive compensatory damages.⁶

2.3 Punitive Damages

Punitive damages are awarded to the prevailing party in addition to compensatory damages when the defendant's action is willful, malicious and oppressive. The award of punitive damages is at the discretion of the court. Anyhow, actual damages must exist before the court can award punitive damage. The court uses punitive damages to advance public policy goals to punish one guilty of willful wrong and to prevent the defendant and potential offenders from further misconduct.⁷

2.4 Statutory Damages

Statutory damages are awarded in situation where it is difficult to determine the exact value of harm or infringement to the injured person. The court may award the statutory damages even in the absence of proof about the plaintiff's losses or defendant's profits. Before the statutory damages were an alternative, the court awarded damages based on the plaintiff's damages or defendant's profits from the sales of counterfeit goods.

⁴ John A. Bauman & Kenneth H. York, **Remedies** 3 (1987).

⁵ John F. O'Connell, **Remedies in a nutshell** 64 (1985).

⁶ James Edelman, **Gain-Based Damages Contract, Tort, Equity and Intellectual Property** 243 (2002).

⁷ FREGRE & BENSON LLP, “*Availability of Punitive Damages for Trademark Infringement*”, available at http://www.faegrebd.com/files/3647_Punitive_Damages.pdf (last visited Jun. 15, 2015)

3. Damages for Trademark Infringement under International Convention, Laws of Foreign Countries and Thai Law

3.1 International Convention

3.1.1 *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994*

The TRIPS Agreement is an international agreement that sets down minimum standards for various form of intellectual property regulation.⁸

In regard to trademark damages, a trademark owner is entitled to recover damages or injunctions for trademark infringement, TRIPS provides that Member States must provide their judicial authorities with the respective power to order adequate damages to compensate the trademark owner for trademark infringement, or with reasonable grounds to know according to Article 45 (1).⁹

TRIPS Article 45 (1) – “The judicial authorities shall have the authority to order the infringer to pay the right holder adequate damages to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.”

3.2 Laws of Foreign Countries

3.2.1 *The United States*

The United States extended the Lanham Act 1946 to govern the protection of trademark including trademark infringement and especially set out Section 35¹⁰ to help the court and the parties to determine various types of claimable damages

⁸ World Trade Organization, “*Overview: The TRIPS Agreement*”, available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Apr. 1, 2015)

⁹ World Intellectual Property Organization, “*Which kind of damages are available in IP disputes?*”, available at <http://www.wipo.int/enforcement/en/faq/judiciary/faq08.html> (last visited Apr. 1, 2015)

¹⁰ Section 35 (a) of the Lanham Act – “When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under Section 1125 (a) or (d) of this title or the willful violation under Section 1125 (c) of this title, shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of Sections 1111 and 1114 and subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant’s sale only; defendant must prove all elements of costs or deduction claimed. In assessing damages the court may enter judgment, according to circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find the amount of recovery based on profits is either inadequate or excessive the court may in its discretion enter

and the amount of damages in infringement. Damages can include lost profits, business losses, punitive damages, costs and attorney's fees. The Act determines the types of claimable damages to profits; damages; and the costs of action and attorney fees and also giving the guideline to the court for granting such damages

3.2.2 Australia

At present, Australian trademark law has been codified in the Trade Marks Act 1995. The Trade Marks Act defines trademarks, what constitute trademark infringement and also what relief can be obtained from the court.

A monetary recovery for trademark infringement that can be obtained from the court is provided under Section 126 of the Trade Mark Act 1995.¹¹ The remedies for trade mark infringement available for the successful plaintiff also include injunction; damages or account of profits. Moreover, the court also has the power to grant the additional amount in assessment of damages if the court considers it appropriate to do.

3.2.3 Singapore

The protection for trademarks is available under the Trade Marks Act)Chapter 332 ,(which is revised in 2005. In accordance with Section 31 of the Act¹² that provides action and remedy for infringement of registered trademark. The Act provides the various types of relief that the court may grant to a plaintiff in infringement case which includes injunction, damages and account of profits. Furthermore, the Act clearly specifies that when the damages awarded to compensate the infringement, the

judgment for such sum as the court shall find to be just, according to circumstances of the case. Such sum in either of above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.”

¹¹ Section 126 of the Act – “(1) The relief that a court may grant in an action for an infringement of a registered trade mark includes: (a) an injunction, which may be granted subject to any condition that the court think fit; and (b) at the option of the plaintiff but subject to Section 127, damages or an account of profits.

(2) court may include an additional amount in assessment of damages for an infringement of a registered trade mark, if the court considers it appropriate to do so having regard to....”

¹²Section 31 of the Act – “(1) An infringement of a registered trade mark is actionable by the proprietor of the trade mark.

(2) Subject to the provisions of this Act, in action for an infringement, the types of relief that the Court may grant include the following:

- (a) an injunction;
- (b) damages;
- (c) an account of profits;
- (d) in any case to which subsection (5) applies, statutory damages under subsection (5)(c)....”

court is also permitted to award an account of any profits distributable to an infringement.

3.2.4 Thailand

In Thailand, the Trademark Act does not provide the provision determining the types of damages that the plaintiff can claim. Within the Thai jurisdiction, the court applies trademark law and civil tort law to the problems of trademark infringement. However, in case of compensation, the court applies Section 438 of the Civil and Commercial Code to determine the damages.

4. The problems of the current Thai trademark law on damages

The problems of the current Thai trademark law on damages is that the Trademark Act does not stipulate the types of damages that plaintiff may entitled in infringement case.

The court applies Section 438 of the Civil and Commercial Code to determine the damages caused by trademark infringement which is improper for the intellectual property regimes because trademark law aims to protect the human intellect and private economic right, while Section 438 aims to compensate the damages from tort that is mostly relevant to the injury to death, body, health and tangible property.

Moreover, Section 438 does not provide for any profits; the plaintiff has to prove the defendant's intention or negligence and the amount of actual damages can only be granted. Although, the court may grant damages in connection with intangible elements such as mental distress, pain, grief; but it depends on the court's discretion to grant any profits to the plaintiff through Section 438.

Moreover, the problem of the non-existence of the types of damages for trademark infringement seems to be unusual given that other IP laws like copyright under Section 64 of the Copy Right Act B.E.2557¹³ and patent law under Section 77ter¹⁴

¹³ Section 64 of the Copyright Act B.E. 2537 – “In the case of infringement of copyright or performer's rights, the Court has the authority to order the infringer to compensate the owner of copyright or performer's rights for damages the amount which the Court considers appropriate by taking into account the seriousness of injury including the loss of benefits and expenses necessary for the enforcement of the right of the owner of copyright or performer's right.”

¹⁴ Section 77ter of the Patent Act (No.3) B.E. 2542 (1999) – “In case of an infringement of the rights of the owner of a patent or petty patent under Section 36, 63 or Section 65decies and 36, the court shall have the power to order the infringer to pay owner of the patent or petty patent damages in an amount deemed appropriate by the court, taking in to consideration the gravity of the injury including the loss of benefits and expenses necessary to enforce the rights of the owner of the patent or petty patent.”

clearly specify the types of claimable damages.

In addition, Section 64 of The Copyright Act B.E. 2537 as amended by the Copyright Act (No.2) B.E. 2558 has now includes a second paragraph allowing the court to award punitive damage, not exceeding two times of the damages according to first paragraph. The purpose of the amendment is to protect the copyright owner or performer's right and to deter the infringer from willful and malicious conduct.

5. A comparative analysis of trademark damages

Comparing those foreign laws and Thai law, Thai Trademark Act does not have the provision stipulating the types of damages that plaintiff is entitled to claim in an infringement case. In the United States, damages awarded in an infringement case are prescribed in various types which includes defendant's profits, any damages sustained by the plaintiff, the costs of action and attorney fees. While, the Australian trademark law provides that at the option of the plaintiff, the court may grant damages or an account of profits. It is therefore different from the US law that the plaintiff may be entitled to obtain both damages and defendant's profits. However, in Australia, the court may also include an additional amount in assessment of damages for an infringement of a registered trademark. While Singapore law also gives the power to the court to award actual damages and account of profits, but does not provide the costs of action and attorney fees like US law.

As mentioned above, the Thai copyright and patent law clearly specifies the claimable damages that the court may grant in an action for an infringement. Under the Copyright Act, the court has power to award damages including the loss of benefits; expenses necessary for the enforcement of the right of the owner of copyright or performer's right and punitive damages. Hence, trademark law as one of intellectual property laws, does not provide the certain claimable damages like other Thai IP laws may cause the problems of inefficiency and inadequate compensation in trademark infringement case.

Conclusions

As mentioned earlier, the trademark law has no provision determining the types of damages that plaintiff is entitled. The court applies Section 438 of the Civil and Commercial Code to determine the damages caused by trademark infringement.

Moreover, this Section does not clearly stipulate that any profits such as defendant's profits, or loss of profits can be granted. The plaintiff has to prove the defendant's intention or negligence and the amount of actual damages can only be

granted. Even though the court may award any profits caused by infringement through Section 438, but in practice it relies on the court's discretion. Furthermore, most of court decisions do not differentiate the types of damages, but rather granted the award of total damages representing all types of damages claimed by the plaintiff.¹⁵ Thus, the amount of claimed damages may not be granted in adequate amount for the damages occurred in infringement case.

It is therefore improper to only apply Section 438 of the Civil and Commercial Code to the trademark infringement case due to the fact that trademark law is a specific law aiming to protect human intellect and prevent unfair competition. The inadequate and ineffective protection of trademark law is a condition for trade countermeasure from trading partner country, such as the US and the EU. Thailand has increased its enforcement of copyright and patent law and also has improved its protections, but trademark law, especially in respect of enforcement and remedies, still not improved. Thai trademark law should therefore be amended in order to resolve the problems of non-existence trademark damages and harmonizes with TRIPS Agreement that requires Member Countries to provide more extensive protection of intellectual property within each own legal system and practice.

Recommendations

The author would like to provide the following suggestions concerning trademark damages that should be specified under Thai Trademark Act. However, for the ease comprehensions, the author would like to combine the legal concept of trademark damages describing in the US, Australian law, Singapore law and Thai Copyright law. In this regard, the resolutions of problem of non-existence trademark damages under Thai trademark law are separated into a short-term and a long-term as follows;

Short-term resolutions

To resolve this problem in short-term where the Trademark Act is not yet amended, the President of the Supreme Court should issue the recommendation relating to types of claimable damages in trademark infringement case in order to give the clear rules and guidelines for the parties and the civil courts in the proceeding.

The other short-term resolution is that the Department of Intellectual Property (DIP), as the principal agency in the development of intellectual property system in Thailand, should draft and publish the guideline and model framework for legislation on types of damages for trademark infringement. The guideline and legal

¹⁵ Atcharawongchai, *supra* note 1, at 360.

framework should address the categories of damages that the trademark owner may claim in infringement.

Long-term resolution

In order to resolve the problem of trademark damages in long-term resolution, the Trademark Act B.E. 2534 should be amended by adding the provision regarding the types of claimable damages that the court may grant in trademark infringement case as follows;

Section XX of the Trademark Bill –

“In the case of infringement of registered trademark, the Court has the authority to order the infringer to compensate the owner of trademark for damages the amount which the Court considers appropriate by taking into account the seriousness of damage including (1) actual damages; (2) an account of profits; (3) the loss of benefits; and (4) expenses necessary for the enforcement of the right of the owner of trademark.

The court may include punitive damages for an infringement of registered trademark but not exceeding two times of the damages according to the first paragraph if the court considers it appropriate to do so.

The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant’s sale only; defendant must prove all elements of costs or deduction claimed.”

According to the first paragraph of proposed provision, the court has the power to award actual damages and an account of profits as appeared in the legal framework of the United States, Australian and Singapore trademark law. For loss of benefits and expenses necessary for the enforcement of right of the owner of trademark are the same types of damages as appeared in the Thai Copyright and Patent law.

Furthermore, the second paragraph offer the same identification of damages as appeared in the new legal framework of the Copyright Act (No.2) B.E. 2558. With regard to punitive damages, it has the limitation in awarding this type of damages not exceeding two times of the damages that the court may award in the first paragraph.

In addition, the third paragraph provides that the plaintiff may obtain both actual damages and defendant’s profits occurred from infringement.

REFERENCES

Books and Book Articles

- Bauman, John A, and Kenneth H York. **Remedies**. Chicago: Harcourt Brace Jovanovich Legal and Professional Publications, Inc., 1987.
- Edelman, James. **Gain-Based Damages: Contract, Tort, Equity and Intellectual Property**. Oxford: Hart Publishing, 2002.
- O’Connell, John F. **Remedies in a Nutshell**. United States: West Publishing, 1985.
- Stim, Richard. **Trademark Law**. New York: Thomson Learning, 2000.
- Atcharawongchai, Worrawong “Trademark damages: the comparative study on trademark damages in Thailand and US.”, In **The Intellectual Property and International Trade Law Forum**: 320-369. Bangkok: 2012.

Electronic Media

- FREGRE & BENSON LLP, “*Availability of Punitive Damages for Trademark Infringement.*” <http://www.faegrebd.com/files/3647_Punitive_Damages.pdf> (accessed June 15, 2015).
- World Intellectual Property Organization, “*Which kind of damages are available in IP disputes?*.” <<http://www.wipo.int/enforcement/en/faq/judiciary/faq08.html>> (accessed April 1, 2015).
- World Trade Organization, “*Overview: The TRIPS Agreement.*” <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> (accessed April 1, 2015).
- Commonwealth of Australia Consolidated Act, <http://www.austlii.edu.au/au/legis/cth/consol_act/tma1995121/s17.html> (accessed May 20, 2015).
- Hosseini Law Firm, “*Types of Damages in Civil Litigation.*” <<http://www.hosseinilaw.com/types-of-damages-in-civil-litigation/>> (accessed June 16, 2015).

IDENTIFICATION AND CONTROL OF FOOD-BORNE ILLNESSES UNDER THE FOOD ACT B.E. 2522*

*Nilubon Rakngam***

ABSTRACT

As commonly known that food is one of the basic bodily needs, consumers have the right to expect that food they purchase and consume will be safe and of high quality. The government agencies, in turn, should take measure to ensure that all food, whether locally produced or imported, freely sold on markets, is safe and consistent with national food safety standard.

For domestic consumption, Food and Drug Administration (FDA) has been authorized by the Food Act B.E. 2522 to protect and prevent consumers from food hazards. However, the Act has failed to serve the Thai FDA officers with appropriate tool to detect and control of the food hazards in every part of Thailand. Detecting and controlling food safety problems largely depend upon whether it can follow a food product's movement through the food supply chain. In this case, the Act should have adequate tool to access all relevant information about food production and distribution to support identification and control of food-borne illnesses. Notwithstanding, Section 43 of the Act does not allow the Thai FDA officers to acquire those information held by the food operators. At the same time, the Act lacks of record-keeping requirement to identify a food product's movement across the food supply chain.

After studying the principles of modern food control system and all relevant laws in both the UK and the US, the problems of identification and control of food hazards under the Food Act B.E. 2522 should be solved by expanding the competent officer's control powers covered most areas of the Thai FDA's operations. The inspectional authority under Section 43 of the Act, thus, must be expanded to include the ability to request the food-related information from food business operators. At the

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same time, by the virtue of Section 5 and Section 6(7) of the Act, the Act should set the provision to establish a new food business operators' responsibility for maintaining information that can identify food product's movement throughout the food supply chain. And hence, food-borne diseases will be fully detected and controlled.

Keywords: Food Safety, Food Law, the Food Act B.E. 2522, Identification and Control of Food Hazards, Modern Food Safety System

บทคัดย่อ

อาหารเป็นปัจจัยพื้นฐานอย่างหนึ่งที่ร่างกายต้องการ ผู้บริโภคมีสิทธิที่เลือกบริโภคอาหารที่คิดว่า จะปลอดภัยและมีคุณภาพสูง ซึ่งภาครัฐควรมีมาตรการที่จะทำให้อาหารที่ขายอยู่ในท้องตลาดไม่ว่าจะเป็น อาหารที่ผลิตภายในประเทศก็ดี หรือนำเข้าจากต่างประเทศก็มีความปลอดภัยและสอดคล้องกับมาตรฐาน ด้านอาหารภายในประเทศ

สำหรับการบริโภคภายในประเทศไทย คณะกรรมการอาหารและยาเป็นองค์กรที่มีอำนาจภายใต้ พระราชบัญญัติอาหาร พ.ศ. 2522 เพื่อป้องกันและคุ้มครองผู้บริโภคจากอันตรายที่เกิดขึ้นจากอาหาร อย่างไรก็ตามพระราชบัญญัติดังกล่าวกลับไม่สามารถจัดหากลไกที่เหมาะสมสำหรับพนักงานเจ้าหน้าที่ในการระบุและควบคุมอันตรายอันเกิดจากอาหารในทุกๆ ส่วนของประเทศได้ ซึ่งโดยหลักแล้ว การระบุและ ควบคุมอันตรายอันเกิดจากอาหารนั้นขึ้นอยู่กับว่าพนักงานเจ้าหน้าที่สามารถติดตามเส้นทางของอาหาร ภายในอุปทานห่วงโซ่อาหาร (Food Supply Chain) ได้หรือไม่ การเข้าถึงข้อมูลต่างๆ ที่สำคัญเกี่ยวกับอาหาร จึงเป็นหัวใจสำคัญที่จะสนับสนุนภารกิจของพนักงานเจ้าหน้าที่คณะกรรมการอาหารและยาในการระบุและ ควบคุมอันตรายอันเกิดจากอาหารดังกล่าวได้ ซึ่งตามมาตรา 43 แห่งพระราชบัญญัติฉบับนี้อำนาจในการ ปฏิบัติงานของพนักงานเจ้าหน้าที่มิได้ครอบคลุมถึงอำนาจในการเรียกข้อมูลที่เกี่ยวข้องกับอาหารซึ่งส่วนใหญ่ อยู่ในมือของผู้ประกอบการ ทั้งยังไม่มีข้อกำหนดเกี่ยวกับการจัดเก็บบันทึกข้อมูลที่จะทำให้พนักงานเจ้าหน้าที่ สามารถติดตามเส้นทางของอาหารภายในอุปทานห่วงโซ่อาหาร

หลังจากที่ผู้เขียนได้ศึกษาหลักการเกี่ยวกับระบบควบคุมอาหารในปัจจุบัน และกฎหมายที่เกี่ยวข้อง ทั้งในประเทศอังกฤษ และประเทศสหรัฐอเมริกา ปัญหาการระบุและควบคุมอันตรายอันเกิดจากอาหาร ภายใต้พระราชบัญญัติอาหาร พ.ศ. 2522 นั้นควรจะต้องแก้ไขด้วยการเพิ่มเติมอำนาจของพนักงานเจ้าหน้าที่ ให้ครอบคลุมถึงการปฏิบัติงานเกี่ยวกับการระบุและควบคุมอันตรายอันเกิดจากอาหาร กล่าวคือภายใต้มาตรา 43 ของพระราชบัญญัตินี้ ควรขยายอำนาจไปถึงการเรียกข้อมูลต่างๆ ที่เกี่ยวกับอาหารจากผู้ประกอบการ ด้านธุรกิจอาหารได้ ในขณะเดียวกัน ด้วยอำนาจตามมาตรา 5 และมาตรา 6 อนุ 7 ของพระราชบัญญัติฉบับ นี้ ควรกำหนดให้คณะกรรมการอาหารและยาออกประกาศเพื่อกำหนดหน้าที่ของผู้ประกอบการให้จัดเก็บ บันทึกข้อมูลเกี่ยวกับอาหารอันจะส่งผลให้พนักงานเจ้าหน้าที่สามารถติดตามเส้นทางของอาหารตลอด อุปทานห่วงโซ่ และควบคุมอันตรายจากอาหารได้อย่างเหมาะสม

คำสำคัญ: อาหารปลอดภัย, กฎหมายอาหาร, พระราชบัญญัติอาหาร พ.ศ. 2522, การระบุและควบคุม อันตรายอันเกิดจากอาหาร, ระบบความปลอดภัยของอาหารสมัยใหม่

Introduction

As a basic human right, food must be nutritious, safe, and culturally appropriate enough to provide health and longevity. However, due to several global changes in the 21st century including population growth, poverty, international trade in food etc., the food itself is likely to become the main route of transmission of microbial agents and chemical contaminants causing health problems. The consequences of food-borne diseases, due to microbial pathogens, biotoxins, and chemical contaminants in food, represent serious threats to the health of thousands of millions of people.¹ In Thailand, food is considered as a main route of transmission of microorganisms causing diarrheal diseases.² According to the report of Bureau of Epidemiology, there are approximately a million cases of acute diarrhea reported each year.³ Only in 2010, there were 65 deaths from the diseases thereof.⁴ In term of major food incidents, the ongoing outbreaks of highly pathogenic H5N1 avian influenza in poultry have also raised concerns about the source of infection and the risk to humans from various exposures throughout Thailand. As a result, these increased numbers of food-borne illnesses raise the question to our national food control system in detecting and controlling the contaminations and the diseases caused by food.

For domestic consumption, the Thai FDA has authorized by the Food Act B.E. 2522 to protect and prevent consumers from food hazards. Yet, only a small proportion of the control powers, upon the Food Act B.E. 2522, have been provided to support the purpose of identification and control of food-borne illnesses. Nowadays, the officers too often find difficulty tracing suspected food backwards through its distribution and product channels to its place of origin. One of the reasons is that many food products

¹ FAO, *Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems*, in FAO Food and Nutrition Paper 76 at 26 (Food and Agriculture Organization of the United Nation 1977).

² FAO&WHO Regional Conference on Food Safety for Asia and the Pacific, Malaysia, May 24-27, 2004, *Foodborne Diseases: Situation of Diarrheal Diseases in Thailand*, U.N. Doc. A/CONF.9/10, available at <http://www.fao.org/docrep/meeting/006/ad703e/ad703e00.htm> (last visited Mar. 21, 2013).

³ Id.

⁴ คณะกรรมการอาหารแห่งชาติ, กรอบยุทธศาสตร์ การจัดการด้านอาหารของประเทศไทย 43- 44 (สำนักงานกองทุนสนับสนุนการสร้างเสริมสุขภาพ, 2554). (The National Food Commission, *Strategies of Food Management program* 47-49 (Thai Health Promotion Foundation 2011).)

available on the market are unbranded. When food products from many suppliers are mixed in many stages of food supply chain, the competent officers are unable to know who supplies a particular food. This problem becomes even worse than ever in case where food incidents or outbreaks occurred. Because the rapid movement of food contamination can have widespread throughout the entire stages of food chain in short period of time, delayed identification of food hazards can cause a serious and uncontrolled food-borne risk to public health. As a consequence, this inability to detect and control food hazards can have important consequences for protecting public health.

1. Modern food safety principles in support of identification and control of food hazards

The national food control system can be achieved most effectively by several modern food safety principles. As part of food identification and control, the science-based approaches integrated in the principle of risk analysis can be used as reasonable option to minimize the occurrence of food-borne hazards.⁵ A risk analysis framework provides a process to systematically and transparently collect, analyze and evaluate relevant scientific and non-scientific information about a chemical, biological or physical hazard possibly associated with food in order to select the best option to manage that risk based on the various alternatives identified.⁶

Apart from the risk-based approaches, traceability concept plays the vital role to better detect and control food-borne disease or food hazards in the present day. One of the reasons is that food production and distribution systems are becoming more interdependent, integrated, and globalized. At the same time, escalating and heavily publicized outbreaks of food-borne diseases have raised awareness of the need to ensure food quality and safety. This need drives much of the system to trace food consistently and efficiently from the point of origin to the point of consumption. “Traceability” is a concept developed in industrial engineering and was originally seen as a tool to ensure the quality of production and products. Economic literature from supply-chain management defines traceability as the information system necessary to provide the history of a product or a process from origin to point of final sale. In context of food sector, traceability systems allow supply chain operators and regulatory authorities to

⁵ FAO & WHO, Food Safety Risk Analysis: PART I: An Overview and Framework Manual 3-7, (Provisional ed., FAO 2005).

⁶ Id. at 8-11

identify the source of a food safety or quality problem and initiate procedures to remedy it. Specific standards for food traceability have been mandated internationally; by law in the European Union (EU), Japan, and more recently the United States; and by private firms and associations.⁷

2. Legal Basis for Food Identification and Control in Foreign Countries

The profile of traceability has been raised widely at an EU level since food control system faced the difficulties in tracing where dioxin-contaminated animal feed had been used and the complex interactions and implications within the food chain of such contamination. The European Commission's White Paper on Food Safety recommended that a successful food policy demands the traceability of feed and food and their ingredients. Adequate procedures to facilitate such traceability must be introduced. As a result, the EU General Food Law Regulation (178/2002) contains clear requirements for traceability, stating at Article 18.⁸ Because this Article is the general principle directly applicable in all member states and all areas of food law, all food business operators in EU countries are subjected to this Article and have the responsibility for maintaining necessary information that can identify from whom and to whom a product has been supplied (one step back and one step forward). As a member state, the UK's General Food Regulations 2004 has been launched to create offences and provide enforcement powers in respect of obligations applying from 1 January 2005 under Regulation (EC) 178/2002.

In the United States (US), the Food Safety Modernization Act (FSMA) provides measure to improve traceability within food supply chain since outbreaks of food-borne illness prompted a number of high-profile food recalls during the past several years.

⁷ World Bank, *Module 12: Global Markets, Global Challenges; Improving Food Safety and Traceability While Empowering Smallholders through ICT, in Information and Communications for Development 2012: Maximizing Mobile* (2012), available at http://www.ictinagriculture.org/sites/ictinagriculture.org/files/final_Module12.pdf (last visited Jul. 9, 2013).

⁸ FSA, *Traceability in the Food Chain: A preliminary study 11-12* (Mar. 2002), available at <http://multimedia.food.gov.uk/multimedia/pdfs/traceabilityinthefoodchain.pdf> (last visited Jan. 14, 2013).

Section 204 of the FSMA requires the United States Food and Drug Administration (USFDA) to designate High-Risk Foods (HRFs) for which additional record-keeping requirements are appropriate and necessary and to establish record-keeping requirements for these foods. The additional requirement is designed to enable foods to be more rapidly and effectively tracked and traced during a food-borne illness outbreak or other event.⁹ Primarily, it means that if food operators process or use any of the foods on the high-risk list, they will have to adhere to increased record-keeping requirements (which are yet to be defined) for these foods. Moreover, in case where food operator processes or uses both high-risk and non-high-risk foods, the operator will need to either maintain two separate sets of records, or simply follow the high-risk recordkeeping rules for all food products in order to avoid confusion.

As mentioned earlier that information gathering and risk-based analysis are particular important for identification and control of potential food hazards, EU member states are required under the Regulation (EC) No 882/2004 to create a more comprehensive, integrated, risk-based, EU wide, farm to fork approach to official controls. The Regulation also requires that member states should have legal efforts in place for ensuring that the competent authorities have access to premises of and documentation kept by feed and food business operators so as to be able to accomplish their tasks properly.¹⁰ In the United Kingdom (UK), food laws and regulations about monitoring and enforcement arrangements were generally already consistent with most of the provisions of Regulation (EC) 882/2004. In support of information gathering and analysis, UK Food Standard Agency (FSA) has a self-sufficient of obtaining, compiling and keeping under review information about matters connected with food safety and other interests of consumers in relation to food.¹¹ Under the Food Standards Act 1999, the FSA and its staff have the power to carry out observations with a view to obtain information about any aspect of the production or supply of food or food sources.¹² The

⁹ USFDA, FDA's Draft Approach for Designating High-Risk Foods as Required by § 204 of FSMA Feb. 2014 at 1, *available at* <http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM380212.pdf> (last visited Mar. 14, 2014).

¹⁰ The Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on Official Controls Performed to Ensure the Verification of Compliance with Feed and Food Law, Animal Health and Animal Welfare Rule, Art. 8.

¹¹ The Food Standards Act 1999, § 8 (1999).

¹² The Food Standards Act 1999, § 10 (1999).

FSA may also require any person carrying on such a business to provide him with such facilities, such records or information and such other assistance, if it appears to him necessary to do so for the purpose of carrying out the observations.¹³

In the same way, the USFDA has issued a final rule expanding its record access authority. The amendments to the Federal Food, Drug, and Cosmetic Act (FD&C Act) made by FSMA allow USFDA access to records beyond those relating to specific suspect food articles, if the officer reasonably believes that other food articles are likely to be affected in a similar manner.¹⁴ In addition, the FSMA amendments permit USFDA to access records relating to articles of food for which there is a reasonable probability that the use of, or exposure to, the article of food will cause serious adverse health consequences or death to humans or animals. This expanded records access authority is designed to improve USFDA's ability to respond to and contain safety problems with the food supply for humans and animals in the US.¹⁵

3. Legal Basis for Food Identification and Control in Thailand

Unlike the UK and US, the Thai FDA's competent officers perform their duties to investigate food hazards in reliance on inspectional authority under Section 43 of the Food Act B.E. 2522. Based on traditional inspection approach, the officers must conduct an inspection for the purpose of ensuring regulatory compliance and gathering evidence necessary to sustain legal action against food operator. Thus, the authorities herewith are largely comprised of basic elements, namely the right to entry, the authority to inspect, and the authority to take sample. The Act pays less attention to the ability to access the records which become more important when the officer needs to trace back food distribution until the source of the food hazard is identified. Although the officer has the right to seize or attach any aspects of foods including documents connected with the food that is found during an inspection, however, the officer must conduct this power only for gathering all the evidences against violations of the

¹³ The Food Standards Act 1999, § 11 (1999).

¹⁴ Federal Food, Drug, and Cosmetic Act of 1938 § 414, 21 U.S.C. § 350(c) (2010).

¹⁵ USFDA, Guidance for Industry: FDA Records Access Authority under Sections 414 and 704 of the Federal Food, Drug, & Cosmetic Act, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm257978.htm#new> (last visited Mar. 14, 2014).

provisions of the Act. When compared to the purpose of identification and control, the need of information is to find the common source of the problem and control it properly. Under this circumstance, the food-related information, for examples manufacturing records, raw materials records, receipt records, product distribution records, or product inventory records, goes far beyond the intention of the inspectional authority under Section 43 of the Thai Food Act. This drawback food law, actually, provides inappropriate tool for identification and control of food-borne illnesses which are among the most widespread public health problems.

4. Legal problems and solutions relating to identification and control of food hazards in Thailand

The Food Act B.E. 2522 has been used as the primary tool in support of the Thai FDA's operations for almost 35 years. Without any improvement, the old concept of food inspection and control is far from enough to ensure food safety in Thailand.

4.1 Inappropriate control powers to access food-related information

Because detecting and controlling the source of the food safety problems largely depend upon whether they can follow a food product's movement through food supply chain, appropriate tool to access all relevant information in relation to food should be implemented for the Thai FDA's officers to identify and to reduce potentially serious consequences of food-borne illness in a timely manner. In this case, enough information should be available for the competent officer in order to trace back food distribution until the source of the food contamination is identified. The relevant information include, but not limited to, manufacturing records, raw materials (ingredients and packaging), receipt records, product distribution records, product inventory records, test records, or customer distribution lists. Unfortunately, the Food Act B.E. 2522 does not provide legal basis of how to acquire food-related information which mostly exists in the possession of food business operators. As mentioned previously, acquiring such information is relying on inspectional powers under Section 43. Instead of providing appropriate power to have access to the records or information kept by food operators, Section 43 contrarily does not allow the officer to request any information from food business operators when it is outside the time of inspection. If that so, once the food incident or outbreak occurred, the officer must enter and inspect food premise in every time when information is needed to magnitude the problems. With this inappropriate record access power, identification and control of food hazards

would be time and resource consuming, especially in food-borne outbreak that requires large number of competent authorities in order to carry out their incident investigation. As compared to rapidly increasing number of food operators, serious consequences of food-borne outbreaks cannot be identified and controlled in the timely manner.

Moreover, inspectional authority under Section 43 is also inadequate to serve the purpose of a new approach launched by the Thai FDA itself. Based on the principle of risk analysis, Food Alert System of Thailand (FAST) has been established to provide an effective information exchange among relevant agencies under the Ministry of Public Health. It also renders the best option to investigate and control food hazards in short period of time. In this case, inappropriate record access authority under Section 43 can obstruct a process of risk analysis that systematically collects, analyzes and evaluates information about a chemical, biological or physical hazard possibly associated with food.

Due to the influence of the EU General Food Law, the law in the UK is required to develop information gathering systems into a risk-based analysis. The developments include to having legal procedures in place to ensure that the competent authorities have access to premises of and documentation kept by feed and food business operators so as to be able to accomplish their tasks properly. To serve this goal, the Food Standards Act 1999 stipulates that the competent officers may carry out observations with a view to obtain information about any aspect of the production or supply of food or food sources. The competent officer also has the right to require any person carrying on such a business to provide him with such facilities, such records or information and such other assistance as he may reasonably request. Based on the same legal basic, the US's food officers can have access to the records kept by food operators through authority stipulated in Section 414(a) and (b) of the FD&C Act. Hence, to facilitate preventive approach based on risk analysis as well as to better detect and control the source of food hazards in Thailand, the Food Act B.E. 2522 should provide an appropriate tool for the Thai FDA's officers to have access to the information kept by food business operators properly. Other than traditional inspection approach under Section 43, the Food Act B.E. 2522 should be revised by expanding the inspectional powers to include the authority to request records or information from any person carrying on food business, like in the UK's Food Standard Act 1999 and the US's FD&C Act. However, all relevant matters concerning how to prevent the officers from abusing their authority, how to protect sensitive information, or how to deal with the non-compliance should also be considered as well.

4.2 Lack of mandatory requiring food business operators to keep record related to the movement of the food

The need to identify the origin of contamination brings another set of legal basis for food identification and control under the Food Act B.E. 2522. Apart from those inappropriate control powers mentioned above, lacking a mandatory of record-keeping can obstruct a complete and accurate identification of the food safety problem in a timely manner as well.

In case where necessary information to trace the food hazards has not even been kept by the food operators, the officers will face a great challenge to fulfill their duty in finding the source of the contamination and helping to remove unsafe food products from the food chain. Considering to the Food Act B.E. 2522, there is no a direct support for food tracing that involves documenting the production and distribution chain of products. Thus, it is hard to the Thai FDA and its officers to trace back to a common source or forward through distribution channels. As seen in the report released by the bureau of Food Safety Extension and Support, it is found that the officers find it difficult to trace back and forward through the food production and distribution chain, especially in case of identifying the pesticide residues in food crops because the information/record about food distribution have not yet been kept by the wholesalers. In fact, most of wholesalers cannot even remember the suppliers' name who has supplied them.

To solve this problem, traceability concept has been widely recognized. It facilitates identification of the source of the food safety problem, and also helps food operators as well as government authorities to identify, trace and effectively and rapidly remove unsafe foods at any stage of the food production and distribution chain. In legislation, traceability is known as legal requirement for food business operators to have, as a minimum, a documented one-step-back and one step forward traceability approach.¹⁶ Throughout UK, food business operators have to comply with the record-keeping requirement under the Article 18 of Regulation (EC) No 178/2002. While, traceability legislation in the US has been set by Section 1.361 under title 21 of the Code of Federal Regulations (21 CFR 1.361) as part of its implementation of the amendments to the Federal Food, Drug, and Cosmetic Act made by the USFDA Food

¹⁶ FAO/WHO, *Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System (CAC/GL 60-2006)*, **Joint FAO/WHO Food Standards Programme**, FAO, (2006).

Safety Modernization Act as well as the Bioterrorism Act of 2002. The effect of these compulsory requirements of record-keeping creates a new general obligation for food business operators at all stage of the food chain. The obligation includes a legal requirement to keep necessary information for identifying from whom and to whom a product has been supplied, and also the requirement to have system and procedures in place that allow for this information to be made available to the competent authorities upon their request.

In Thailand, capacity to control the safety of food supply is limited by several factors. Other than extensive costs related to have a recordkeeping system, compelling all food business operators to maintain record-keeping of suppliers might bring the difficulties to food business operators. For those food operators who have sufficient funds available in their account, establishing traceability requirement may not beyond their capability that much. They have already enough appropriate knowledge and expertise in dealing with the application of modern traceability requirement. But for those small food business operators, which account for a large proportion of the total food operators in Thailand, mandatory of traceability requirement may put too much of a burden on them. Apart from food operators' capability, legal basis for food licensing and registration under the Food Act B.E. 2522 itself cannot serve the purpose of an accurate and far-reaching traceability system. By means of Section 14, food business operators in general are not required to obtain food manufacturing license. Unless for those food operators who employ more than 7 workers or use equipment with more than 5 horsepower, their premises have to be approved before an operation begins. With this incomprehensive licensing function as well as capability of food operators, it is impractical to initiate a board traceability system that requires all the food business operators to be responsible for record-keeping requirement, or whether enables tracking of a large variety of food hazards throughout food supply chain at once. Instead, the Act should begin to facilitating traceability with a limited form of record-keeping requirement applicable for only certain food business operators.

The idea underlying “Additional Recordkeeping Requirements for High Risk Foods” in the US food legislation can probably point out the possible approach to implement traceability in Thailand. Based on different sets of record-keeping requirement, the Act may start to initiate traceability requirement with a limited form of record-keeping procedure only for High Risk Foods. On the other hands, for those foods are not listed as the High Risk Foods, the operators should have time to improve and change their current practices in order to meet traceability requirement. Timeframe for

establishing record-keeping procedure may be provided before such requirement become fully effective. During that time, traceability requirement will be applied as voluntary standard for the Non-High Risk Foods.

Conclusion

The Food Act B.E. 2522 is outdated and poorly designed to overcome the current food hazards in Thailand, especially in case of food-borne pathogens that leads to incident of diarrheal diseases. Lacking a well-established legal basis for food identification and control defines the inability to trace the source of food-borne hazards and indicates the Thai FDA's failure in conducting their duty to protect consumers' health. Therefore, the Act should be revised and amended, so that ability to trace the source of food-borne hazards can be improved effectively. The officers' control powers must be expanded to include the authority to access all relevant information kept by any person carrying on food business. At the same time, the notification concerning on record-keeping requirement should be promulgated to obligate a new food business operators' responsibility for maintaining necessary information that can identify the movement of the food from raw material through final products.

REFERENCES

Books and Book Articles

FAO and WHO. **Food Safety Risk Analysis: PART I; An Overview and Framework Manual. Provisional Edition.** Rome: n.p., 2005.

FAO. **Assuring Food Safety And Quality: Guidelines For Strengthening National Food Control Systems. FAO Food and Nutrition Paper 76.** Rome: FAO, 2003.

FAO/WHO. **Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System (CAC/GL 60-2006).** Joint FAO/WHO Food Standards Programme. FAO. Rome: n.p., 2006.

คณะกรรมการอาหารแห่งชาติ. กรอบยุทธศาสตร์ การจัดการด้านอาหารของประเทศไทย. พิมพ์ครั้งที่ 1. กรุงเทพฯ: สำนักงานกองทุนสนับสนุนการสร้างเสริมสุขภาพ. ม.ป.ป. (The National Food Commission. **Strategies of Food Management Program.** 1st. Bangkok: Thai Health Promotion Foundation, n.d.)

Articles

FAO. Foodborne Diseases: Situation of Diarrheal Diseases in Thailand. **in FAO/WHO Regional Conference on Food Safety for Asia and the Pacific.** Malaysia: n.p., 2004.

Electronic Media

FSA. Traceability in the Food Chain: A preliminary study. n.p.: FSA, 2002.
<<http://tna.europarchive.org/20110116113217/http://www.food.gov.uk/multimedia/pdfs/traceabilityinthefoodchain.pdf>> (accessed January 14, 2013).

USFDA. “*FDA’s Draft Approach for Designating High-Risk Foods as Required by Section 204 of FSMA February 2014.*” FDA. <<http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM380212.pdf>> (accessed March 14, 2014).

USFDA. “*Guidance for Industry: FDA Records Access Authority Under Sections 414 and 704 of the Federal Food, Drug, & Cosmetic Act.*” FDA.
<<http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm257978.htm#new>> (accessed March 14, 2014).

World Bank, Module 12: Global Markets, Global Challenges; Improving Food Safety and Traceability While Empowering Smallholders through ICT, **in Information and Communications for Development 2012: Maximizing Mobile (2012)**, <http://www.ictinagriculture.org/sites/ictinagriculture.org/files/final_Module12.pdf> (accessed July 9, 2013).

PROPOSED LEGAL FRAMEWORK FOR REPO TRANSACTION*

*Nutchanok Chaiyata***

ABSTRACT

The never-ending development in financial industry has one obvious goal to initiate financial product or arrangement that provides not only wider range of accessibility to financial resources but also stronger assurance for the compliance or the remedy in case of incompliance. Generally, financial products should be equipped with cost and time saving qualities as well as reliable risk mitigation approaches. Title finance or title-based financing is a financial arrangement designed to eliminate all these problems. This arrangement offers creditors stronger assurance, since the title of the assets is collateralized in order to put the creditor in a super-priority position. This kind of financing is not new; in fact, it is of the same concept as a well-known sale with the right of redemption, title retention, financial lease, as well as factoring, securitization, and sale and lease-back agreements.

This article will introduce one interesting transaction constituted as title finance. A repurchase agreement (“repo”) is a transaction in which one party sells its securities to another in exchange for funds with the agreement that the first party will repay the funds with an additional amount in return for the equivalent in securities from the latter. The underlying purpose is not only the ownership of securities, but also the provision of funds with stronger assurance from title ownership. With its underlying nature of formal-less convenience and reliability, repo constitutes a well-established financial product that is widely used in major financial markets in a variety of developed and developing countries.

* The article is summarized and rearranged from the thesis “Proposed Legal Framework for Repo Transactions” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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For Thailand, repo was first introduced in 1979 and has continued to be developed from merely monetary policy and liquidity management between the Bank of Thailand and financial institutions, in the structure of bilateral repo, to engagement among private sectors, as known as private repo transactions, which will be focused on this study as one interesting financial sources. However, despite constant improvements, the existing laws and regulations remain inadequate in terms of facilities in the transactions, especially on private repo transactions. The ongoing issues are both legal and policy related. Namely, the issues of dissociated definitions regarding characteristics, withholding tax matters that contradict to the underlying taxation policies, the lack of solid legal certainty that can result in ineffective enforceability, and the need of some operation systems for further improvement.

This article then provides a comprehensive study on legal approaches towards repo transactions in such leading jurisdictions as the US and EU to compare with Thailand. The analysis has been given on the mechanisms, problems, and varied resolution approaches taken by such jurisdictions to find some recommendable approaches that can possibly adapt to the situation faced in Thailand private repo transaction.

As a result, this article offers certain suggestions and guidelines to reach appropriate legal framework for private repo transactions in Thailand. Namely, to provide an assurance on validity and protection from recharacterization risk, instead of categorizing the transactions into existing principle of contract laws, repos is proposed to be recognized by its actual character as one form of financial agreement in which the title ownership is transferred to facilitate risk management. Secondly, the proposal is given to consider exempting withholding of certain types of exempted tax for private repo transactions. This tax incentive will eliminate unnecessary procedures and save costs and encourage potential participants to consider a private repo as a wider channel to financial arrangement. Third, in terms of enforcement, considering from one core purpose to create an effective and cost-saving financial arrangement and to mitigate the risks to the minimal level, the law should ensure the enforcement measures either in case of general default or the bankruptcy process, not just by selling out, but also by other practical means agreed, such as close-out or netting. Lastly, the development and improvement of repo transactions requires a great deal of cooperation by all the related parties. The support, both theoretically and practically, such as education for wide range of understanding and supporting systems should be given. The mistakes made and ways of

resolving problems can be compared, learned and adopted in order to create sustainable development.

Keywords: Repo, Title Finance, Financial Arrangement

บทคัดย่อ

การพัฒนาอย่างไม่หยุดยั้งในภาคการเงินมีวัตถุประสงค์หลักอันสามารถเห็นได้อย่างชัดเจนคือการคิดค้นผลิตภัณฑ์หรือธุรกรรมทางการเงินที่ไม่เพียงแต่ขยายช่องทางการเข้าถึงแหล่งเงินทุนแต่ยังช่วยสร้างความมั่นใจว่าธุรกรรมดังกล่าวจะสามารถสัมฤทธิ์ผลตามวัตถุประสงค์หรือมีช่องทางเยียวยาที่มีประสิทธิภาพหากเกิดการผิดสัญญา ทั้งนี้ ผลิตภัณฑ์ทางการเงินที่ดีควรมีคุณสมบัติในด้านการประหยัดค่าใช้จ่ายและเวลา รวมถึงมีวิธีการในการบริหารจัดการความเสี่ยงได้อย่างเหมาะสม การจัดหาเงินทุนโดยใช้กรรมสิทธิ์ในทรัพย์สินเป็นหลักประกัน (Title Finance หรือ Title-Based Financing) คือธุรกรรมทางการเงินซึ่งได้รับการออกแบบเพื่อจัดการปัญหาดังกล่าว ธุรกรรมดังกล่าวช่วยสร้างความมั่นใจอันมั่นคงมากขึ้นให้กับเจ้าหนี้ด้วยการใช้กรรมสิทธิ์ในทรัพย์สินเป็นหลักประกัน ซึ่งจะช่วยให้เจ้าหนี้ได้รับการป้องกันระดับสูง (Super-Priority) ในความเป็นจริง ธุรกรรมทางการเงินลักษณะนี้ไม่ใช่ของใหม่ แนวคิดดังกล่าวได้ปรากฏอยู่ในธุรกรรมทางการเงินที่เป็นที่รู้จัก อาทิเช่น ขายฝาก การซื้อขายแบบมีเงื่อนไขห่วงกรรมสิทธิ์ (Title Retention) สัญญาซื้อขายเงินกู้ (Financial Leasing) แฟคตอริง (Factoring) การแปลงสินทรัพย์ให้เป็นหลักทรัพย์ (Securitization) และการขายและเช่ากลับ (Sale and Lease Back Agreement)

บทความนี้นำเสนอธุรกรรมที่มีลักษณะของ Title Finance ประเภทหนึ่ง คือ ธุรกรรมซื้อคืน (Repurchase Agreement: Repo) อันเป็นธุรกรรมซึ่งคู่สัญญาฝ่ายหนึ่งขายหลักทรัพย์ให้กับคู่สัญญาอีกฝ่ายเพื่อแลกเปลี่ยนกับเงินสด โดยมีข้อสัญญาว่าคู่สัญญาฝ่ายแรกจะทำการชำระราคาในจำนวนที่สูงกว่าเพื่อเป็นการซื้อคืนหลักทรัพย์เทียบเท่า (Equivalent Securities) ซึ่งอีกฝ่ายมีหน้าที่จะต้องโอนคืนให้ วัตถุประสงค์ของธุรกรรมนี้ไม่ใช่เพียงการโอนกรรมสิทธิ์ในหลักทรัพย์เท่านั้น แต่รวมถึงการจัดสรรเงินทุนภายใต้การรับประกันที่มั่นคงกว่าจากกรรมสิทธิ์ในทรัพย์สิน โดยลักษณะอันเป็นการอำนวยความสะดวกจากการลดภาระทางรูปแบบและความน่าเชื่อถือ รวมถึงการประหยัดเวลาและค่าใช้จ่าย ธุรกรรมซื้อคืนได้รับการถือเป็นผลิตภัณฑ์ทางการเงินซึ่งนิยมใช้อย่างแพร่หลายในตลาดเงินขนาดใหญ่ทั้งในประเทศที่พัฒนาแล้วและประเทศที่กำลังพัฒนา

ในประเทศไทย ธุรกรรมซื้อคืนได้ริเริ่มในปี พ.ศ. 2522 และได้รับการพัฒนาจากการเป็นเครื่องมือในการดำเนินนโยบายทางการเงินและการดำรงรักษาสภาพคล่องระหว่างธนาคารแห่งประเทศไทยและสถาบันการเงินต่างๆ ในรูปแบบของการทำธุรกรรมซื้อคืนแบบทวิภาคีกับภาครัฐ (Bilateral Repo) มาจนถึงการเข้าทำธุรกรรมซื้อคืนภาคเอกชน (Private Repo) อันเป็นธุรกรรมที่มุ่งเน้นในบทความนี้ ในฐานะที่เป็นเครื่องมือทางการเงินที่น่าสนใจอย่างหนึ่ง อย่างไรก็ตาม แม้จะมีการพัฒนาอย่างต่อเนื่อง กฎหมายและระเบียบต่างๆ ยังคงขาดความสมบูรณ์ในด้านการส่งเสริมการเข้าทำธุรกรรม โดยเฉพาะในส่วนของธุรกรรมซื้อคืนภาคเอกชน ปัญหาและอุปสรรคต่างๆ มีทั้งปัญหาด้านกฎหมายและด้านนโยบาย อาทิเช่น ประเด็นปัญหาจากความไม่สอดคล้องของคำนิยามลักษณะของธุรกรรม (Characteristic) การเก็บภาษีโดยการหัก ณ ที่จ่ายอันขัดแย้งกับนโยบายทางภาษีที่วางไว้ การขาด

ความแน่นอนในกฎหมายเกี่ยวกับการบังคับตามสัญญาอย่างมีประสิทธิภาพ และความต้องการด้านระบบการดำเนินธุรกรรมเพื่อการพัฒนาต่อไป บทความนี้จะนำเสนอการศึกษาและการทำความเข้าใจในส่วนของแนวทางทางกฎหมายของธุรกรรมซื้อคืนในสหรัฐอเมริกา และสหภาพยุโรปเพื่อเปรียบเทียบกับประเทศไทย การวิเคราะห์มุ่งเน้นไปยังกลไก ปัญหา แนวทางการแก้ไขปัญหาของประเทศดังกล่าวเพื่อค้นหาแนวทางที่น่าสนใจอันสามารถที่จะปรับเข้ากับสภาวะการณ์ของธุรกรรมซื้อคืนภาคเอกชนในประเทศไทย

จากการศึกษาดังกล่าว บทความนี้จะเสนอแนะแนวทางในการวางกรอบทางกฎหมายที่เหมาะสมแก่ธุรกรรมซื้อคืนภาคเอกชน (Private Repo) ในประเทศไทย ได้แก่การเสริมสร้างการรับรองในส่วนของความมีผลของธุรกรรมและการป้องกันความเสี่ยงจากการถูกเปลี่ยนแปลงรูปแบบของธุรกรรม (Recharacterization Risk) โดยแทนที่จะจัดธุรกรรมซื้อคืนภาคเอกชนเข้ากับหลักกฎหมายสัญญาและเอกเทศสัญญา ธุรกรรมซื้อคืนภาคเอกชนได้รับการเสนอให้ได้รับการรับรองคุณลักษณะตามโครงสร้างที่แท้จริง คือเป็นธุรกรรมทางการเงินที่มีการโอนกรรมสิทธิ์ในทรัพย์สินเพื่อบริหารจัดการความเสี่ยง ประการที่สอง บทความนี้จะเสนอให้มีการพิจารณาว่าการเก็บภาษีโดยวิธีการหัก ณ ที่จ่ายสำหรับภาษีบางประเภทที่ได้รับการยกเว้น ซึ่งสิทธิประโยชน์ทางภาษีดังกล่าวนี้อาจช่วยลดขั้นตอนที่ไม่จำเป็นและประหยัดค่าใช้จ่าย และกระตุ้นให้ผู้สนใจพิจารณาธุรกรรมซื้อคืนภาคเอกชนในฐานะช่องทางหนึ่งในธุรกรรมทางการเงิน ประการที่สาม ในส่วนของการบังคับตามสัญญา ด้วยหนึ่งในวัตถุประสงค์หลักของธุรกรรมซื้อคืนคือการสร้างธุรกรรมทางการเงินที่มีประสิทธิภาพและประหยัดค่าใช้จ่ายและเวลา รวมถึงการบรรเทาความเสี่ยง กฎหมายจึงควรมีความแน่นอนว่ามาตรการในการบังคับตามสัญญานั้นจะสามารถสัมฤทธิ์ผลได้อย่างมีประสิทธิภาพ ทั้งในกรณีการผิดสัญญาหรือกรณีล้มละลาย สำหรับธุรกรรมซื้อคืนภาคเอกชน ประสิทธิภาพดังกล่าวรวมถึงการบังคับจากหลักทรัพย์และข้อตกลงตามสัญญา อาทิเช่น การหักกลบลบหนี้ สุดท้ายนี้ การพัฒนาและปรับปรุงธุรกรรมซื้อคืนจะต้องได้รับความร่วมมือจากทุกภาคส่วน ในการสนับสนุนทั้งด้านทฤษฎีและทางปฏิบัติ อาทิเช่น การส่งเสริมความรู้ความเข้าใจ และการสนับสนุนด้านระบบปฏิบัติการ ข้อผิดพลาดและแนวทางแก้ไขจากประเทศต่างๆ สามารถนำมาศึกษาเพื่อเปรียบเทียบและปรับใช้กับสภาวะการณ์ในประเทศไทย เพื่อให้เกิดการพัฒนาอย่างยั่งยืนสืบไป

คำสำคัญ: ธุรกรรมซื้อคืน, Title Finance, ธุรกรรมทางการเงิน

Introduction

Due to the growing needs and concerns for risk mitigation in financial arrangement, various methods and transactions have been developed by all related parties to secure and assure the confidence that the parties will be satisfied despite the outcome of the arrangement. The typical security transactions include those governed by legislation, such as pledge and mortgage, and those other non-legal-specific arrangement made between the parties. However, there remain problems for both kind of transaction, such as strict requirements the statutory types of security, especially in terms of creation, form, and enforcement procedures which could be quite costly and time consuming. On

the contrary, although the complicated requirements are greatly lesser, the unregulated arrangement may result in ineffective enforcement or even unenforceability.

Title finance¹ or title-based financing² is a financial arrangement designed to eliminate all these problems. This arrangement offers creditors stronger assurance, since the title of the assets is collateralized in order to put the creditor in a super-priority position. This kind of financing is not new. In fact, it possesses quite the same concept as a well-known sale with the right of redemption, title retention, financial lease, as well as factoring, securitization, and sale and lease-back agreement.

Repurchase agreement (repo) is one of the tools of which the structure can be considered as title finance explained above. In brief, it is a transaction where one party sells securities of their own, to the other party in exchange of fund with the agreement that the first will pay back the fund with additional amount in return of the equivalent securities from the latter. Both parties, therefore, are obligated not only to make payment and transfer the given securities, but also to repurchase at advanced fixed price and transfer the equivalent securities.

A repo transaction generally begins, in the first leg (open leg), when one party sells his assets to another party for a certain price and commits to repurchasing them in future at a different fixed price. The seller delivers the securities and receives cash from the buyer. The buyer then becomes the rightful owner of the transferred securities and is allowed to exercise the right as the owner of the securities to sell them, use them as collateral, or sell them in other repurchase agreement. At the second leg (close leg), the buyer becomes the seller with the obligation to return the equivalent securities,³ and the seller becomes the buyer who is obliged to pay the repurchase price with an additional sum at a predetermined rate of interest, known as the repo rate,⁴ which remains constant during the term of the trade.⁵ In the event of default, the general practice of repo offers a convenient and quick enforcing approach for the remedy of the non-defaulting party by set-off or netting, or enforcement from the securities.

In addition, one essential concept of repo transactions is their ability to mitigate risk, which not only includes the risk to the buyer if the seller fails to repurchase the

¹ Philip R. Wood, *Comparative Law of Security Interests and Title Finance*, 675 (2nd ed. 2007).

² H. G. Beale, *The Law of Security And Title-Based Financing*, 270 (2nd ed. 2012).

³ Under Global Master Repurchase Agreement (GMRA), Equivalent Securities with respect to a transaction means securities equivalent to purchased securities under that transaction. If and to the extent that such purchased securities have been redeemed, the expression shall mean a sum of money equivalent to the proceeds of the redemption.

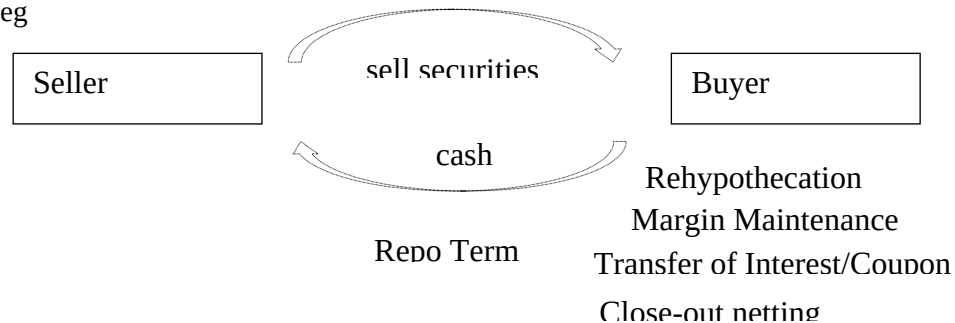
⁴ Wood, *supra* note 1, at 716.

⁵ *Id.* at 115.

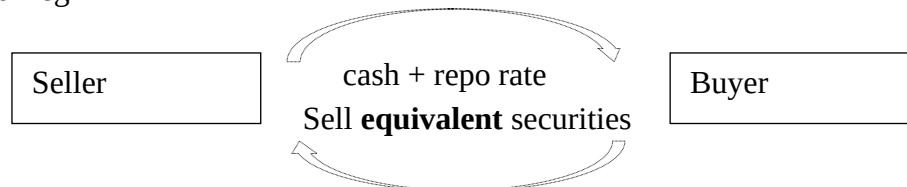
securities or, in other words, fails to repay the loan, but also the seller's risk of the buyer's failure to return the securities (which can be equivalent ones).⁶ Moreover, since the collateral used in the transaction consists of securities with diversified value, the value must be maintained during the term of the repo to ensure that it remains close to the purchase price. Therefore, repo transactions are subject to mark-to-market⁷ in three options, the first of which is allowing the buyer to demand the seller to transfer the margin to maintain the value. The second is repricing by terminating the previous agreement and re-entering into a new agreement, but adjusting the purchase price while retaining the same amount of securities. The third involves replacement by terminating the agreement and making a new one, maintaining the purchase price but adjusting the amount of securities.⁸

The whole transaction is illustrated below.

First Leg



Second Leg



With the underlying nature, the convenience and reliability, as well as the time and cost saving offered, the practicality and simplicity makes repo a well-established investment product widely used not only by commercial and investment banks, but also by fund managers, corporate treasuries, and local authorities. Repo, as one of title-based

⁶ Collateral Initiatives Coordination Forum, *Collateral Fundamentals*, Appendix 7 (2012), available at <http://www.icmagroup.org/assets/documents/Regulatory/CICF/Collateral-Fundamentals-7Nov2012.pdf>.

⁷ Id.

⁸ Bank of Thailand, *Private Repurchase Market* (January 30, 2002), <https://www.bot.or.th/English/FinancialMarkets/FinancialMarketDevelopment/Related%20Articles/Private%20repurchase%20market.pdf#search=private%2520repo> (last visited July 15, 2015).

financing plays a role in protection against insolvency and cost of credit reduction. Ever since introduced, repo has become one of financial market instruments, and quite an important one. The repo markets in various countries, both developed and developing, is growing fast, largely, and vitally.

Repo Transactions in Global Markets

Since the introduction of repo transactions in the United States (“US”) in 1918, repo has undergone widespread growth and development all over the world throughout the general agreement under the Global Master Repurchase Agreement (GMRA). The biggest markets are the US and Europe of which the structure and framework will be explained in this study.

1. Repo Transactions in United States

The first repo was introduced by the US Federal Reserve in 1918 with the aim of creating the primary instrument for the Federal Reserve Bank open market operation. Repos were used as a tool to manage liquidity in the system. In present, repos principally function as short-term corporate investment in the US. The settlement of interest and the transaction system used therein is the Federal Book Entry and the Federal Reserve Bank acts as the central registrar. In addition, the Federal Reserve Bank participates in the Treasury market to stimulate liquidity and adjust interest rate policy; therefore, the counterparties are mainly primary dealers.⁹

Since its introduction in 1918, the US Treasuries repo market has become the largest in the world with a daily volume of more than \$1,000 billion.¹⁰ However, despite its significance, the law on the treatment of repos is scant.¹¹ There are some regulations regarding securities laws or taxation that regulate repos. The essential legal issues regarding repos are mentioned under laws regarding secured transactions, which are also linked to bankruptcy laws.

2. Repo Transactions in European Union

According to the European Repo Market Survey undertaken by the International Capital Market Association (“ICMA”), the total value of repo agreements in the EU is

⁹ Moorad Choudhry, *The Global Repo Markets : Instruments & Applications*, 283 – 284. (2004).

¹⁰ Moorad Choudhry, *The REPO Handbook*, 7 (2nd ed. 2010).

¹¹ Jeanne L. Schroeder, *Repo Madness: The Characterization Of Repurchase Agreements Under The Bankruptcy Code And The U.C.C.*, 46 Syracuse L. Rev. 1001 (1996), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/syrlr46&div=34&id=&page=>.

around EUR 5,500 billion. This includes domestic and cross-border trading, 40% of which is conducted via direct business (telephone and electronic messaging), followed by Automatic Repo Trading Systems (“ATS”), voice-brokers, and tri-party respectively.¹²

One of the great obstacles that has hampered financial transactions in the EU since its formation is the variety of rules applicable to collateral in Member States, which has caused the participants more complex and costly problems than necessary. Three remarkable problems are particularly the requirement of perfection, bankruptcy legislation, and the rule of location of securities. Since these problems are related to each other, it is impossible to fix each of them separately, although it may be possible to solve them all together since they are each other’s cause and effect.

EU Directive 2002/47/EC on Financial Collateral Arrangement (“EU Directive 2002/47/EC” or “Directive”) was prepared as a result of a proposal by the European Commission to simplify the EU legal framework in 2001. The aim of the framework was to limit credit risk in financial transactions by the provision of securities and cash as collateral. The Directive establishes a framework to cope with issues that impede and adversely affect the efficient use of collateral, including formal requirements.¹³

3. Repo Transactions in Thailand

Repo transactions in Thailand are currently divided into two segments, using participants and purpose as criteria. The first consists of “Bilateral Repo” transactions conducted between the Bank of Thailand (“BOT”) and appointed primary dealers with the objective of exercising the operation of monetary policy, while the second consists of “Private Repo” transactions among firms in the private sector.

Similar to many other jurisdictions in the world, Thailand has no specific legislation that comprehensively governs private repo transactions. There are BOT regulations governing private repo transactions when one of the parties is a commercial bank or financial institution under the Financial Institution Business Act B.E. 2551 (2008) (“Financial Institution Business Act”), regulations of the Securities and Exchange Commission (“SEC”) for those securities companies, and a few for taxation issues. However, the law leaves other matters in the hands of general commercial laws. Similar to many other countries, although not as severe, there are inconclusive legal issues that need to be clarified.

¹² ICMA, *European repo market survey Number 28 - conducted December 2014*, (2015), available at <http://www.icmagroup.org/assets/documents/Market-Info/Repo-Market-Surveys/No-28-December-2014/ICMA-ERC-European-Repo-Survey-December-2014.pdf>.

¹³ Directive 2002/47/EC of The European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements art. 3 [hereinafter *EU Directive 2002/47/EC*].

Legal Problems and Impediments

Although the development of repo transactions has long been encouraged in Thailand and the growth in the number of such transactions has progressively increased, especially private repos, knowledge is still limited to specific groups. In fact, there is still plenty of room and loopholes that need to be filled for the sustainable development of repo transactions and to make them one of the foremost choices in terms of access to finance. Despite the great effort taken by government authorities, especially the Ministry of Finance, the BOT, the SEC, as well as the Stock Exchange of Thailand (“SET”) and bond market-related organizations, several inconclusive matters remain.

To create sustainable development, the mechanisms, problems, and varied resolution approaches taken by the US and EU should be comparatively studied and analyzed in order to find the suitable legal framework to be adopted for repo transactions in Thailand.

1. Characteristics

The first and primary issue concerns the unclear treatment and loopholes that are still varied and dissociated in terms of the characteristics of private repos; for instance, the definitions provided in each related regulation are somewhat inconsistent. In the regulations of the BOT, private repo transactions are defined as “the engagement in securities trading with an agreement to resell or repurchase the securities at a future date for the purpose of lending or borrowing, as the case may be, having a financial instrument as collateral. As such, the private repo transaction is determined similar to credit granting under the Section 4 of the Financial Institution Business Act.”¹⁴

The regulations of the SEC provide no definition of repo transactions for securities companies, but a definition is given in relation to mutual funds, as “the sale of securities or debt instruments with an agreement to repurchase such securities or debt instruments on the specific date agreed.”¹⁵ Meanwhile, the tax regulations define private repo transactions as “a transaction agreed by the seller of securities and the buyer of

¹⁴ Notification of the Bank of Thailand No. SorNorSor 19/2552 Re: Permission for Commercial Banks to Engage in Private Repo Transaction [hereinafter *BOT Notification on Private Repo for Commercial Banks*]; Notification of the Bank of Thailand No. SorNorSor 23/2551 Re: Permission for Finance Company and Credit Foncier Company to Engage in Private Repo Transaction [hereinafter *BOT Notification on Private Repo for Finance Company and Credit Foncier Company*].

¹⁵ Notification of the Office of the Securities and Exchange Commission Regulations No. KorNor 11/2552 Re Criteria, Conditions, and Methods of Money Borrowing by Mutual Fund and Asset Commitment of Mutual Fund [hereinafter *SEC Notification on Private Repo for Mutual Fund No. KorNor 11/2552*]

securities under which the seller agrees to sell securities to the buyer with the agreement to repurchase in the future in accordance with the term and price agreed in advance.”¹⁶

These varied definitions raise questions regarding the applicable legal principle, since the regulations provide no practical treatment.

Moreover, to get back to the provisions of general laws, Civil and Commercial Code (“CCC”) does not provide enough applicable assurance and certainty. To define each leg as a contract of sale remains uncertainty for repo term enforcement, such as mark-to-market measures; a sale with promise is different from repo in term of revocability and there is no commitment of the promised parties to respond, whilst repo is an agreement that commits both parties to resale and repurchase without exemptions. Repo is not a sale with an agreement to sale as the subject matter is obviously dissimilar between the aim to enter to another sale agreement and the aim to repurchase upon fully agreed terms. And although the structure and mechanism may be familiar, repo is not a sale with right to redemption. This is not only because the repurchasing leg is not a right but obligation, the requirements of the same actual property and the limited period of redemption are not something repo is constructed for.

Besides, although the concept of repo is viewed as more of a loan secured by securities, the interpretation will severely impact and disqualified repo from its main purpose. Seeing repo as loan of money secured by securities pledge will surely raise questions regarding troublesome formal requirements and enforcement procedures.

Hence, it is recommended that repo has its own way of characteristic that would allow the agreed term reach the most effective goal to create one great financial arrangement.

2. Tax Treatments

Despite the promotion and tax incentives given, one of the major problems concerns the withholding of tax. The title of the collateral is fully transferred to the buyer during the term of the repo, but it is normally always provided in the agreement that the buyer must transfer any interest or coupons received during the repo term in the full amount. However, from a taxation perspective, the buyer is deemed to be the owner of the collateral during the term, and the one who receives such interest or coupons from the securities issuer; therefore, the buyer is subject to withholding tax upon receipt. Even though this withholding of tax

¹⁶ Royal Decree Regarding Exemption from Revenue Taxes (No.364) B.E.2542 (1999) sec. 3 [hereinafter *Royal Decree Regarding Exemption from Revenue Taxes (No.364)*].

deducted can be applied to a tax return at the end of the year, most participants view this as a great legal impediment that discourages them from choosing a private repo transaction as the primary option.

3. Enforcement

Due to the lack of a solid practical legal approach, uncertainty is caused by alternative measures applied to manage the risks of the transaction, such as mark-to-market, margin maintenance, as well as close-out netting provisions. Although these measures are designed to facilitate the effective remedy of any damage that may be incurred due to the default or insolvency of the party, there are no solid legal approvals, which results in an ineffective imposition or even invalidity. For example, a question may be raised of whether these alternatives could stand against the creditor protection principle. For instance, without lawful assurance, mark-to-market and margin maintenance may raise the question of whether it is a fraudulent act to the creditor under Section 237 of the CCC, or Section 90/40, Section 113, and Section 114 of the Bankruptcy Act, as the case may be.¹⁷

4. Operation System

The engagement of the transaction remains substantially inflexible. Certain procedural requirements are non-essential.¹⁸ For example, the complexity of standard agreements, securities assessment, and margin maintaining management are still troublesome for some potential participants, especially those who are not familiar with financial arrangements. Related impeding factors include the readiness of a transaction supporting system, in-depth knowledge and understanding of investors, as well as of the related staff or authorities.

As a result of the aforementioned factors, despite the tremendous potential of repos, participants in the private repo market remain limited to financial institutions and there has been inadequate expansion to other groups of investors, whose assets have excess liquidity.

¹⁷ วรณรัตน์ จันทร์แสงทอง, ปัญหาทางกฎหมายเกี่ยวกับการประกอบธุรกรรมซื้อคืนหลักทรัพย์ (2546) (วิทยานิพนธ์, จุฬาลงกรณ์มหาวิทยาลัย) (Wannarat Jansangtong, *Legal Problems Concerning Repurchase Transaction*, 103-106 (2003) (Master of Laws Thesis, Chulalongkorn University)).

¹⁸ ศิริดาว สว่างเมือง, การศึกษาตลาดซื้อคืนพันธบัตรภาคเอกชนในประเทศไทย (2552) (การศึกษาค้นคว้าอิสระ, มหาวิทยาลัยเกษตรศาสตร์) (Siridow Sangamuang, *Study of Private Repurchase Market in Thailand*, 52 (2009) (Independent Study, Kasetsart University)).

Comparative Analysis and Recommendations

Private repo transactions can currently only respond to the need of certain large primary dealers to manage their excess liquidity, yet they remain unable to respond to need for a liquidity arrangement of certain large to medium institutions due to the inflexibility of the transactions, which is of primary concern. Therefore, this article proposes that the laws and regulations should be amended to become more united under the same standard, especially for the material issues, which should be clarified as explained below.

1. Characteristics

The clarity of the transaction has an extremely significant impact on the performance and the result, especially in the event of enforcement. Many jurisdictions have different opinions and treat these transactions differently. In Thailand, the regulations regarding repos are quite unsettled. While the BOT defines a private repo as a sale of securities with an agreement to repurchase with the underlying intention to acquire a loan secured by securities of a similar nature to a credit-granting service, the SEC leaves a repo transaction undefined. Additionally, the confusing factors that seem to point to the nature of true sale include the intention of the parties that engage in the transaction for funding or liquidity, the transfer of title of the collateral, and the requirement to sell back the equivalent securities.

Despite the theoretical argument, instead of trying to push the transaction into a specific category of contract, as the US treats repos by making them neutral and characterizing the transaction differently on a case by case basis, there is another option to treat the transaction as it is. Just like the treatment used in the EU Directive, it would be better if the policy was set and designed to admit the fact that a repo is just a financial agreement in which the title of asset is fully and legally transferred to facilitate risk management for both parties. In this way, repos will not be required to conform to formal legal requirements in order to ensure their validity. In other words, the laws will be framed so that repos are treated and considered as if they have been structured for neither a true sale nor a secured loan. Thus, the non-compliance with existing laws, the rehypothecation, or the return of different but equivalent assets will not invalidate the enforceability of the transaction.

2. Tax Treatment

Being aware that a private repo transaction is not exactly an outright sale, but rather a way to access finances, the Revenue Department of Thailand has tried to support such transactions by providing exemptions for income tax, specific business tax, and stamp duty. However, one of the impediments concern the duty of the repo buyer (lender)

to not only return the full manufactured interest to the original owner of the collateral, but to remain obliged to withhold tax upon receipt of such interest. Although the sum withheld can be credited at the end of the year, the potential buyer or lender, who has excess liquidity, seriously considers this issue and may decide to avoid engagement due to the costs and expense.

This is also a problem faced in other markets. In the EU, some member states provide exemption for manufactured interest/coupon withholding tax in case of repo or financial arrangement that constitutes short-term loan, e.g. UK, Austria. However, in the US the problem is not considered and substitute dividends made pursuant to a securities lending or a repo would be subject to US withholding tax at a rate of 30 per cent.¹⁹

Hence, when designing as policy that can reflect the laws and regulations, the authorities should consider exempting the withholding of tax for private repo transactions. This will not only eliminate an unnecessary procedure and save costs, but it will also encourage those who have an excess of assets to consider investing in private repo transactions to manage their liquidity and those in need of money can access funding from a wider channel via a private repo.

3. Enforcement

Repos, as one approach to financing by title transfer, provide the creditor with the ability to directly enforce his right of the debt from the collateral given to him without any conditions or requirements that are so burdensome that they may cause him to hesitate to provide the finance in the first place. However, the principle of unsecured creditor protection is why the law creates enforcement formalities and requirements to ensure that the creditor who facilitated the debtor without any securities will also be facilitated when it comes to the default or insolvency of the debtor. This is why the imposition of fraudulent acts would prejudice other creditors' right.

It is a one great concern that repo is one important financial product, and its facilitating enforcement methods should not be disapproved. EU Directive 2002/47/EC ensures the effectiveness of mutually agreed arrangement by requiring that methods of enforcement agreed by the parties must be realizable.²⁰ In the US, although the characteristic issues are left undealt, aware that such hole could hamper the effectiveness

¹⁹ Freshfields Bruckhaus Deringer LLP, *Dividend Taxation For Cross-Border Transactions* (March 2012), available at <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Dividend%20taxation%20for%20cross-border%20transactions.pdf>.

²⁰ EU Directive 2002/47/EC, *supra* note 13 art. 4 and art. 7

of enforceability, the bankruptcy code has exempt repo from automatic stay and allowing the enforcement outside bankruptcy court.²¹

Hence, for Thailand, a clear line should be made to determine which creditors are fraudulent and which just want to be assured, and since a repo transaction is an arrangement in which the title of collateral is transferred, the law should constitute certain assurance of effective enforcement and adjust unnecessary inflexibility in financial transaction, not just by selling out, but also by other practical means agreed, such as close-out or netting. The assurance of enforceability includes the endorsement of title transfer collateral, and the process of debt settlement should not be viewed as an impediment to protect unsecured creditors.

4. Operation System

Another leading problem of private repo transactions in Thailand concerns the knowledge and understanding of the transaction procedure. The complexity of the transaction includes the standard agreement, in which many conditions are required to be met, and the need for an in-depth understanding of the principles. For example, in order to mitigate risk, the transaction has been structured by certain measures to ensure the equal value between the sale price and the collateral, known as margin maintenance. The requirement of coupon transfer and the withholding of tax, the obligation regarding clearing and settlement, the management of collateral and the dispute resolution in cases of default all require an effective system, and this is too heavy a burden, even for large commercial banks to establish a back office to operate the transaction on their own, let alone other kinds of organizations. The Thailand Securities Depository Co., Ltd (“TSD”), a subsidiary of the SET, is currently providing a repo service to facilitate transactions. However, the number of users and members of the service remain limited²² and most of them are commercial banks and securities companies who also receive other kinds of services from the TSD.

In view of the foregoing, the operational system should be improved and the concept of a collateral management service offered by the TSD could be a great example of such improvement. Policy-makers may establish an official office for the collateral

²¹ Bankruptcy Code §§ 362(b)(6), (7), (17), & (27); § 553(b)(1); §§ 555-556, §§ 559-562; see also Steven L. Schwarcz & Ori Sharon, *The Bankruptcy-Law Safe Harbor for Derivatives: A Path-Dependence Analysis*, 71 Washington & Lee Law Review (forthcoming), (November 12, 2013), available at http://scholarship.law.duke.edu/faculty_scholarship/3151.

²² Thai Securities Depository, *User of REPO Services as of September 15, 2010* (September 15, 2010), <http://www.set.or.th/tsd/th/service/repo/RepoSiteReference20100915.pdf> (last visited July 21, 2015).

management of the private repo market or improve the service provided by the TSD. Either way, the operational system of private repo transactions should be capable of satisfying investors by saving costs, with expert staff to attract investors and expand the market to other non-bank participants.

REFERENCES

1. Books

1.1 English Books

Beale, H. G., *The Law of Security And Title-Based Financing*. 2nd ed. Oxford: Oxford University Press, 2012.

Choudhry, Moorad, *The Global Repo Markets : Instruments & Applications*. Singapore : Wiley, 2004.

Choudhry, Moorad. *The REPO handbook*. 2nd ed. Oxford: Elsevier Ltd, 2010.

Wood, Philip R., *Comparative Law of Security Interests and Title Finance*. 2nd ed. London : Sweet & Maxwell, 2007.

1.2 Thai Books

วรรณรัตน์ จันทร์แสงทอง, ปัญหาทางกฎหมายเกี่ยวกับการประกอบธุรกรรมซื้อคืนหลักทรัพย์, (บทความ, จุฬาลงกรณ์มหาวิทยาลัย) (2546) Jansangtong, Wannarat, *Legal Problems Concerning Repurchase Transaction*, Master of Laws, Chulalongkorn University, 2003.

ศิริดาว สง่าเมือง, การศึกษาตลาดซื้อคืนพันธบัตรภาคเอกชนในประเทศไทย (การศึกษาค้นคว้าอิสระ, มหาวิทยาลัยเกษตรศาสตร์) (2552) Sangamuang, Siridow. *Study of Private Repurchase Market in Thailand*. Master of Economics (Business Economics), Major Field: Business Economics, Department of Economics, Kasetsart University, 2009.

2. Articles

Schwarcz, Steven L. & Sharon, Ori, *The Bankruptcy-Law Safe Harbor for Derivatives: A Path-Dependence Analysis*, 71 **Washington & Lee Law Review** (forthcoming), (November 12, 2013), available at http://scholarship.law.duke.edu/faculty_scholarship/3151.

Schroeder, Jeanne L. *Repo Madness: The Characterization Of Repurchase Agreements Under The Bankruptcy Code And The U.C.C.*, 46 **Syracuse L. Rev.** (1996): 999-1049, available at

<<http://heinonline.org/HOL/LandingPage?handle=hein.journals/syrlr46&div=34&id=&page=>.

3. Electronic materials

Bank of Thailand, “*Private Repurchase Market*” (January 30, 2002),
 <<https://www.bot.or.th/English/FinancialMarkets/FinancialMarketDevelopment/Related%20Articles/Private%20repurchase%20market.pdf#search=private%2520repo>> (last visited July 15, 2015).

Collateral Initiatives Coordination Forum, “*Collateral Fundamentals.*” (2012)
 <<http://www.icmagroup.org/assets/documents/Regulatory/CICF/Collateral-Fundamentals-7Nov2012.pdf>> (last visited July 15, 2015).

Freshfields Bruckhaus Deringer LLP, “*Dividend Taxation For Cross-Border Transactions.*” (March 2012),
 <<http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Dividend%20taxation%20for%20cross-border%20transactions.pdf>> (last visited July 15, 2015).

International Capital Market Association, “*European repo market survey Number 28 - conducted December 2014.*” (2015)
 <<http://www.icmagroup.org/assets/documents/Market-Info/Repo-Market-Surveys/No-28-December-2014/ICMA-ERC-European-Repo-Survey-December-2014.pdf>> (last visited July 15, 2015).

Thai Securities Depository, “*User of REPO Services.*” (September 15, 2010),
 <<http://www.set.or.th/tsd/th/service/repo/RepoSiteReference20100915.pdf>>
 (last visited July 21, 2015).

4. Laws and Regulations

Directive 2002/47/EC of The European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements

Directive 2009/44/EC amending the Settlement Finality Directive and the Financial Collateral Arrangements Directive

Notification of the Bank of Thailand No. SorNorSor 23/2551 Re: Permission for Finance Company and Credit Foncier Company to Engage in Private Repo Transaction

Notification of the Bank of Thailand No. SorNorSor 19/2552 Re: Permission for
Commercial Banks to Engage in Private Repo Transaction

Royal Decree Regarding Exemption from Revenue Taxes (No.364) B.E.2542

5. Other Materials

TBMA/ISMA Global Master Repurchase Agreement Version 2000

LEGAL MEASURES FOR CONTROLLING DANGEROUS SUBSTANCES IN TEXTILE AND GARMENT PRODUCTS: A CASE STUDY OF AROMATIC AMINES*

*Oranee Kanoksophit***

ABSTRACT

Aromatic amines are widely used for preparing and manufacturing of dyes using in textile and garment businesses. After the last process of manufacturing of textile and garment products, aromatic amines can be remained as a residue in finished products and may be migrated and absorbed into a human body through the skin or mouth. The International Agency for Research on Cancer (IARC) of the World Health Organization (WHO) has classified some aromatic amines as known human carcinogens that are capable of causing cancer. Epidemiological studies have shown that the exposure to aromatic amines is strongly associated with the occurrence of bladder cancer and the abnormality of bladder such as a spectrum of lesions of the epithelium of the urinary bladder, dysuria, and painful in the lower abdomen. Moreover, aromatic amines have also been reported to exert a high level of acute and chronic toxicity causing the fatality.

At present, many countries have placed important on this matter and have restricted and controlled the use of aromatic amines by means of legal measures. However, the existing laws of Thailand are not sufficient to control the use of aromatic amines. Thus, consumers may be exposed to aromatic amines and harmed by them. This thesis mainly focuses on the legal measures for controlling the use of aromatic amines in foreign countries including the European Union, the United States of America and the People's Republic of China in order to propose the appropriate and effective legal measures for protecting Thai consumers from aromatic amines causing cancer contaminating in textile and garment products.

By studying and investigating the legal measures for controlling aromatic amines in those foreign countries and relating Thai laws, the outcome illustrates that the proposed appropriate regime is designating the Thai Industrial Standard for Fabrics: Safety from Harmful Dyestuffs and Chemical Substances or TIS 2231-2550 (2007) and the Thai Industrial Standard for Garments: Safety from Harmful Dyestuffs and Chemical Substances or TIS 2346-2550 (2007) to be the industrial standards which are required by a Royal Decree to manufacture fabric and garment products in conformity with the requirements of the TIS 2231-2550 (2007) and TIS 2346-2550 (2007) according to Section 17 of the Industrial Standards Act B.E. 2511 (1968). Thus, Thailand can prevent importation of the products which do not conform to the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007). By this means, the consumers in Thailand will be protected.

* The article is summarized and rearranged from the thesis "Legal Measure for Controlling Dangerous Substances in Textile and Garment Products: A Case Study of Aromatic Amines" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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Keywords: Aromatic Amines, Textile and Garment, Industrial Product Standards, Hazardous Substances

บทคัดย่อ

สารแอมโรแมติกแอมีนเป็นสารเคมีที่มีการนำมาใช้อย่างแพร่หลายในการผลิตสีย้อมสำหรับใช้ในอุตสาหกรรมสิ่งทอและเสื้อผ้าสำเร็จรูป สารแอมโรแมติกแอมีนสามารถตกค้างในผลิตภัณฑ์สิ่งทอและเสื้อผ้าสำเร็จรูป โดยที่สามารถถูกดูดซึมเข้าสู่ร่างกายมนุษย์ผ่านทางผิวหนังหรือผ่านช่องปากได้ หน่วยงานวิจัยโรคมะเร็งนานาชาติ (International Agency for Research on Cancer, IARC) ซึ่งเป็นหน่วยงานหนึ่งขององค์การอนามัยโลก (World Health Organization, WHO) ได้จัดให้สารแอมโรแมติกแอมีนบางประเภทเป็นสารเคมีที่ก่อให้เกิดมะเร็งในร่างกายมนุษย์ ผลงานวิจัยจำนวนมากพบว่า การสัมผัสกับสารแอมโรแมติกแอมีนมีความเกี่ยวข้องโดยตรงกับการเกิดมะเร็งกระเพาะปัสสาวะ รวมไปถึงการเกิดภาวะความผิดปกติต่างๆ ของกระเพาะปัสสาวะ อาทิ เยื่อบุผิวของกระเพาะปัสสาวะอักเสบ อาการปัสสาวะลำบากหรือปัสสาวะขัด และเกิดความเจ็บปวดในช่องท้อง นอกจากนี้ การได้รับสารแอมโรแมติกแอมีนในปริมาณสูงอาจทำให้ร่างกายเกิดความผิดปกติเฉียบพลัน และถึงแก่ความตายได้

ในปัจจุบัน นานาประเทศต่างให้ความสำคัญกับผลกระทบดังกล่าวของสารแอมโรแมติกแอมีนที่มีต่อร่างกายมนุษย์ จึงได้มีการจำกัดและควบคุมการใช้สารแอมโรแมติกแอมีนผ่านมาตรการทางกฎหมายรูปแบบต่างๆ อย่างไรก็ตาม จากการศึกษาพบว่า กฎหมายของประเทศไทยในปัจจุบันยังไม่เพียงพอที่จะสามารถควบคุมการใช้สารแอมโรแมติกแอมีนได้อย่างมีประสิทธิภาพ ซึ่งอาจทำให้ผู้บริโภคในประเทศไทยได้รับอันตรายจากสารแอมโรแมติกแอมีนได้ ดังนั้น วิทยานิพนธ์ฉบับนี้จึงมุ่งศึกษาเกี่ยวกับมาตรการทางกฎหมายที่ใช้ในการควบคุมสารแอมโรแมติกแอมีนในต่างประเทศ ได้แก่ สหภาพยุโรป สหรัฐอเมริกา และสาธารณรัฐประชาธิปไตยประชาชนจีน เพื่อนำเสนอมาตรการทางกฎหมายที่เหมาะสมและมีประสิทธิภาพในการคุ้มครองผู้บริโภคในประเทศไทย เพื่อไม่ให้ได้รับอันตรายจากสารแอมโรแมติกแอมีนที่ก่อให้เกิดมะเร็งซึ่งตกค้างอยู่ในผลิตภัณฑ์สิ่งทอและเสื้อผ้าสำเร็จรูป

จากการศึกษามาตรการทางกฎหมายที่ใช้ในการควบคุมสารแอมโรแมติกแอมีนในสามประเทศดังกล่าวข้างต้น ประกอบกับการศึกษาบทบัญญัติกฎหมายของไทยที่เกี่ยวข้องพบว่า มาตรการทางกฎหมายที่เหมาะสมสำหรับประเทศไทยคือ การกำหนดให้มาตรฐานผลิตภัณฑ์อุตสาหกรรม ผ้า : ความปลอดภัยจากสีและสารเคมีที่เป็นอันตราย (มอก. 2231-2550) และมาตรฐานผลิตภัณฑ์อุตสาหกรรม เสื้อผ้าสำเร็จรูป : ความปลอดภัยจากสีและสารเคมีที่เป็นอันตราย (มอก. 2346-2550) เป็นมาตรฐานผลิตภัณฑ์อุตสาหกรรมที่กำหนดให้ต้องทำผลิตภัณฑ์ผ้าและเสื้อผ้าสำเร็จรูปให้เป็นไปตามมาตรฐาน มอก. 2231-2550 และมอก. 2346-2550 ตามความในมาตรา 17 ของพระราชบัญญัติมาตรฐานผลิตภัณฑ์อุตสาหกรรม พ.ศ. 2511 ด้วย มาตรการดังกล่าวนี้ ผู้บริโภคในประเทศไทยก็จะมีความปลอดภัย และได้รับความคุ้มครองจากสารแอมโรแมติกแอมีนที่ก่อให้เกิดมะเร็ง

คำสำคัญ: แอมโรแมติกแอมีน, สิ่งทอและเสื้อผ้าสำเร็จรูป, มาตรฐานผลิตภัณฑ์อุตสาหกรรม, วัตถุอันตราย

INTRODUCTION

There are many types of chemicals involving in every day of human's life. With respect to textile and garment manufacturing, aromatic amines are widely used in the dyeing process as a starting material or initial substance for preparing and manufacturing of dyes. After the last process of manufacturing of textile and garment products, aromatic amines can remain as a residue in finished products and may be migrated and absorbed into the human body through the skin or mouth. Since they can

be absorbed through the skin or mouth, consumers may absorb them by daily exposure. Expert authorities such as the International Agency for Research on Cancer (IARC) of the World Health Organization (WHO) have classified some aromatic amines as known human carcinogens that are capable of causing cancer. Many countries have given great attention on this matter and have controlled and restricted using aromatic amines¹ in textile and garment products.

In Thai laws, there are industrial standards prescribed by the Notification of the Ministry of Industry according to Section 15 of the Industrial Product Standards Act B.E. 2511 (1968) involving textile and garment business, namely the Thai Industrial Standard for Fabrics: Safety from Harmful Dyestuffs and Chemical Substances or TIS 2231-2550 (2007) under the Notification of the Ministry of Industry No. 3764 (B.E. 2550) and the Thai Industrial Standard for Garments: Safety from Harmful Dyestuffs and Chemical Substances or TIS 2346-2550 (2007) under the Notification of the Ministry of Industry No. 3765 (B.E. 2550). These standards restrict the use of 24 aromatic amines that they shall not be contained in finished fabric and garment products at the concentration over 30 mg/kg. Section 16 of the Industrial Product Standards Act B.E. 2511 (1968), the manufacturers of textile and garment products conforming to these standards may submit the application for a license to display the standard mark on their products. Once a license is granted by the Thai Industrial Standards Institute, they shall have the right to exhibit the standard mark on their products. One of the implications of the standards prescribed by Section 15 of the Industrial Product Standards Act B.E. 2511 (1968) is the Thai manufacturers who fails to comply with them may not be able to export their textile and garment products to any countries which control or restrict the use of aromatic amines such as the European Union and the People's Republic of China. Further, although some countries do not have specific laws and regulations controlling or restricting the use of aromatic amines in some countries, Thai manufacturers may expose to liability according to the product liability laws if their products cause damage or injury to the consumers in those countries. In addition, without the standard mark displaying on the products, consumers may not trust in the quality and standard of the products and may decide not to purchase them. Therefore, in order to enhance the control measure under the Industrial Product Standards Act B.E. 2511 (1968), the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007) shall be made in the form of a Royal Decree issued according to Section 17 of the Industrial Product Standards Act B.E. 2511 (1968).

I. THE MANUFACTURING OF TEXTILE AND GARMENT PRODUCTS

The manufacturing of textile and garment products begins with the yarn production. In this process, the natural fibers, as the raw materials, will be transformed into yarn and thread. After that, yarn and thread will be sewed up together into a fabric

¹ According to the list of aromatic amines restricted to use in many countries, there are totally 24 aromatic amines widely limited and restricted to use in textile and garment articles which may come into direct and prolonged contact with the human skin or oral cavity, consisting of 4-aminobiphenyl; benzidine; 4-chloro-o-toluidine; 2-naphthylamine; o-aminoazotoluene; 5-nitro-o-toluidine; 4-chloroaniline; 4-methoxy-m-phenylenediamine; 4,4'-methylenedianiline; 3,3'-dichlorobenzidine; o-dianisidine; 3,3'-dimethoxybenzidine; 4,4'-methylenedi-o-toluidine; 6-methoxy-m-toluidine p-cresidine; 4,4'-methylene-bis-(2-chloro-aniline); 4,4'-oxydianiline; 4,4'-thiodianiline; o-toluidine; 4-methyl-m-phenylenediamine; 2,4,5-trimethylaniline; o-anisidine; 4-aminoazobenzene; 2,4-xylylidine; and 2,6-xylylidine.

by being jointly transferred through the weaving or knitting machine.² This fabric may be contaminated by many chemical substances, such as oils, waxes and other components which naturally occur in the making process of most fibers, therefore, those fibers must be cleaned with several chemicals and cleaners. Furthermore, as the fabric is colorless, it will be bleached in order to refine its based color and also to make it ready for dyeing. Other than the dyeing process, the fabrics may be passed to the printing process in order to apply color with definite patterns or designs. In addition, to improve the quality of fabric, the manufacturers will apply the functional characteristics to the fabric by conveying them toward the finishing process, such as mercerizing, flame retardant, anti-wrinkle, water repellent, waterproof and antistatic finish.³

Through the above-mentioned processes, the fabric is ready to be manufactured as finished garments. The production process starts with design or sketch, patternmaking, cutting, sewing, assembling, doing a quality control, and ends with packing and delivering to customers.

II. AROMATIC AMINES USED IN DYEING PROCESS

Different chemical substances are used in the manufacturing of textile and garment for cleaning, bleaching, dyeing, printing as well as bringing some special functions and appearances to the finished products; for example, improving the visual brightness, increasing sweat-absorption and reducing shrinkage. When the products are laundered, many of these substances can be rinsed out with detergents and water; however, residual in significant level may still remain in the finished products.⁴ This research will emphasize on aromatic amines using in the dyeing process. Aromatic amines are widely used as the initial substances for preparing and manufacturing of different types of dyes.⁵ The carcinogenesis literature documents and innumerable studies demonstrate that administration of a considerable variety of aromatic amines to experimental animals of different species induces cancers in those animals.⁶

□ LIST OF RESTRICTED OR CONTROLLED AROMATIC AMINES

There are more than one hundred aromatic amines used in the industries, but only some of them have been proven to be carcinogenic to human. There are totally 24 aromatic amines widely restricted or controlled to use in textile and garment articles.

² Howstuffworks?, *How is fabric created?* “*The Manufacturing Process of Fabric*”, available at <http://home.howstuffworks.com/home-decor/accessories/how-is-fabric-created2.htm>

³ Textile Learner, *Introduction of Textile Finishing Process*, available at http://textilelearner.blogspot.com/2011/03/description-of-textile-finishing_1796.html.

⁴ The Organization for Economic Co-operation and Development (OECD), *Case Study 10: Release from the Use Phase of Textile and Leather Products* Resource Compendium of PRTR Release Estimation Techniques Part 4: Summary of Techniques for Releases from Products at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/jm/mono\(2011\)7/part2&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/jm/mono(2011)7/part2&doclanguage=en).

⁵ Derelanko, M. & Hollinger, M., *Handbook of Toxicology*, Informa Healthcare, Second Edition (2001).

⁶ US National Library of Medicine National Institutes of Health, *Monocyclic Aromatic Amines as Potential Human Carcinogens: Old is New Again* at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2802674/>.

Aromatic amines may cause harm when they come into direct or prolonged contact with the human skin or oral cavity. Those aromatic amines consist of 4-aminobiphenyl; benzidine; 4-chloro-o-toluidine; 2-naphthylamine; o-aminoazotoluene; 5-nitro-otoluidine; 4-chloroaniline; 4-methoxy-m-phenylenediamine; 4,4'-methylenedianiline; 3,3'-dichlorobenzidine; o-dianisidine; 3,3'-dimethylbenzidine; 4,4'-methylenedi-o-toluidine; 6-methoxy-m-toluidine p-cresidine; 4,4'-methylene-bis-(2-chloro-aniline); 4,4'-oxydianiline; 4,4'-thiodianiline; o-toluidine; 4-methyl-m-phenylenediamine; 2,4,5-trimethylaniline; o-anisidine; 4-amino azobenzene; 2,4-xylidine; and 2,6-xylidine.

□ **IMPACT OF AROMATIC AMINES ON HUMAN HEALTH AND ENVIRONMENT**

Epidemiological studies have shown that the exposure to aromatic amines, such as 2-naphthylamine; either presents alone or with the other compounds as an impurity, is strongly associated with the occurrence of bladder cancer.⁷ Exposure to benzidine has been proved to produce a spectrum of lesions of the epithelium of the urinary bladder which may precede appearance of cancer.⁸ The toxic effects of 4-chloro-ortho-toluidine are either macroscopic or microscopic haematuria. Furthermore, aromatic amines can cause other symptoms including decreased bladder capacity and dysuria.⁹ The patients may also pain in the lower abdomen. Aromatic amines have also been reported to exert a high level of acute and chronic toxicity. The symptoms include allergy, ataxia, anaemia, methemoglobinaemia, reticulocytosis, hematuria, kidney and liver damage, and poisonously causing the fatality. Aromatic amines can migrate from textile and garment articles so that the consumers may absorb them through their skin or mouth. Many researches show that the risk of exposure to aromatic amines increases with body heat, sweat or saliva.¹⁰

Since the aromatic amines linkage is not always tightly bound to textile and garment articles, surplus dyes may be released in the laundering process. They can harm the aquatic environment and agricultural land, cause problem to the biological systems as to aquatic animals and plants, affect to the water quality, and accumulate in human and animal's body when they consume those aquatic animals and plants.

III. THE CONTROL MEASURE OF AROMATIC AMINES IN FOREIGN COUNTRIES

Many countries have recognized the important of the problems due to the effects of aromatic amines. Since the 1990s, several countries have adopted the legal measures in order to restrict or control the use of aromatic amines known to be the cause

⁷ The World Health Organization The International Agency for Research on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man*, Volume 4 (1974).

⁸ The World Health Organization The International Agency for Research on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man*, Volume 29 (1982).

⁹ The World Health Organization The International Agency for Research on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man*, Volume 77 (2000).

¹⁰ The Australian Competition and Consumer Commission, *Options to limit hazardous aromatic amines in clothing, textiles and leather articles at* http://www.strtrade.com/media/publication/7218_AUS97_english_.pdf.

of cancer, in the production of textiles and garments.¹¹ This topic describes the existing legislations and legal measures to control aromatic amines in foreign countries including the European Union, the United States of America and the People's Republic of China.

□ **THE CONTROL MEASURES OF AROMATIC AMINES IN THE EUROPEAN UNION**

The Directive 2001/95/EC of the European Parliament and of the Council on General Product Safety (hereinafter referred to as GPSD) requires that “products placed on the market shall be safe product.” It is considered to be the post-market measures after producing the products. In this regard, Article 3 of the GPSD¹² sets a requirement and criteria for determining if the product is safe that a product is considered to be safe once it complies with the specific safety provisions provided in European legislations. In the absence of such provisions, if it complies with the specific rules of national law of the Member State where it is being marketed or sold, it is considered as a safe product. The product is also presumed safe if it conforms to the voluntary national standards of the Member States which are established in accordance with the European standards.

In conclusion, the GPSD sets a general requirement that only safe product can be placed on the market with the presumption clause that it is also presumed safe if it complies with voluntary national standards or technical standards. As a result, the GPSD is considered to be horizontal legislation which covers all types and categories of the consumer products.

The Regulation (EC) No. 1907/2006 relating to the Registration, Evaluation, Authorization and Restriction of Chemicals (hereinafter referred to as REACH) describes how substances may be restricted. Article 67 of the REACH¹³ states

¹¹ The Policy Research Center for Environment and Economy, *Impacts of Environmental Standards and Requirements in EU Countries on China's Textile Industry* at <http://www.iisd.org/pdf/EUtextiles.pdf>.

¹² GPSD, Article 3

2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed.

A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the references of such national standards.

¹³ REACH, Article 67

1. A substance on its own, in a mixture or in an article, for which Annex XVII contains a restriction shall not be manufactured, placed on the market or used unless it

that a substance, or a substance in a mixture, or a substance in an article listed in Annex XVII of the REACH shall not be manufactured, placed on the market or used. Under Annex XVII of the REACH,¹⁴ 22 aromatic amines listed in Appendix 8¹⁵ shall not be used over 30 mg/kg in textile and leather articles, including clothing, yarn and fabrics, intended for use by the final consumer.

□ **THE CONTROL MEASURES OF AROMATIC AMINES IN THE UNITED STATES OF AMERICA**

The Toxics Substances Control Act (hereinafter referred to as TSCA) authorizes the U.S. Environmental Protection Agency (hereinafter referred to as EPA) to determine that a use of any chemical substances is a significant new use. Then, under Section 5(a)(1)(B) of the TSCA,¹⁶ it is required the manufacturers to submit a Significant New Use Notice (SNUN) to the EPA at least 90 days before they produce and import those chemical substances. Since benzidine is one of aromatic amines listed

complies with the conditions of that restriction. This shall not apply to the manufacture, placing on the market or use of a substance in scientific research and development. Annex XVII shall specify if the restriction shall not apply to product and process orientated research and development, as well as the maximum quantity exempted.

¹⁴ REACH, Annex XVII, 43. Azocolourants and Azodyes

1. Azodyes which, by reductive cleavage of one or more azo groups, may release one or more of the aromatic amines listed in Appendix 8, in detectable concentrations, i.e. above 30 mg/kg (0,003 % by weight) in the articles or in the dyed parts thereof, ..., shall not be used, in textile and leather articles which may come into direct and prolonged contact with the human skin or oral cavity, such as:

- clothing, bedding, towels, hairpieces, wigs, hats, nappies and other sanitary items, sleeping bags;
- footwear, gloves, wristwatch straps, handbags, purses/wallets, briefcases, chair covers, purses worn round the neck;
- textile or leather toys and toys which include textile or leather garments;
- yarn and fabrics intended for use by the final consumer.

2. Furthermore, the textile and leather articles referred to in paragraph 1 shall not be placed on the market unless they conform to the requirements set out in that paragraph.

¹⁵ Aromatic amines listed in Appendix 8 consisting of 4-aminobiphenyl; benzidine; 4-chloro-o-toluidine; 2-naphthylamine; o-amino azotoluene; 5-nitro-otoluidine; 4-chloroaniline; 4-methoxy-m-phenylenediamine; 4,4'-methylenedianiline; 3,3'-dichlorobenzidine; o-dianisidine; 3,3'-dimethoxy benzidine; 4,4'-methylenedio-toluidine; 6-methoxy-m-toluidine p-cresidine; 4,4'-methylene-bis-(2-chloro-aniline); 4,4'-oxydianiline; 4,4'-thiodianiline; o-toluidine; 4-methyl-m-phenylenediamine; 2,4,5-trimethylaniline; o-anisidine; and 4-amino azobenzene.

¹⁶ TSCA, Section 5. Manufacturing and Progressing Notices.

(a) IN GENERAL. –

(1) Except as provided in subsection (h), no person may:

(A) ...

(B) manufacture or process any chemical substance for a use which the Administrator has determined, in accordance with paragraph (2), is a significant new use, unless such person submits to the Administrator, at least 90 days before such manufacture or processing, a notice, in accordance with subsection (d), of such person's intention to manufacture or process such substance and such person complies with any applicable requirement of subsection (b).

as a significant new use, the manufacturers must submit a SNUN to the EPA at least 90 days before they produce and import benzidine.

The Safe Drinking Water and Toxic Enforcement Act of 1986 (hereinafter referred to as Proposition 65) defines the control measures of aromatic amines contained in textile and garment products in Section 25249.6 of the Proposition 65¹⁷ by imposing the responsibility for any businesses involving them to provide clear and reasonable warning to individuals. The warning must: (1) clearly make known that aromatic amines are known to cause cancer; and (2) be given in the way that consumers will effectively reach it before they are exposed to aromatic amines.

□ **THE CONTROL MEASURES OF AROMATIC AMINES IN THE PEOPLE'S REPUBLIC OF CHINA**

The National General Safety Technical Code for Textile Products (hereinafter referred to as GB 18401-2010) is a safety standard for textile and garment industry. The GB 18401-2010 sets the compulsory requirement that 24 aromatic amines, listed in Appendix C¹⁸ are forbidden to use with a limited concentration of 20 mg/kg in textile products. Furthermore, Article 14¹⁹ of the Standardization Law regulates that every unit, both juristic person, and individual, must comply with the GB 18401-2010. It shall be forbidden to manufacture, sell or import textile products that do not conform to the requirements of the GB 18401-2010 which is a compulsory standard.

IV. THE CONTROL MEASURE OF AROMATIC AMINES IN THAI LAWS

In Thailand, there is some legislation that is involving and relating to the control of hazardous chemicals in textile and garment products such as the Hazardous Substance Act B.E. 2535 (1992), the Industrial Product Standards Act B.E. 2511 (1968) and the Factory Act B.E. 2535 (1992). There is also a legislation regarding the labeling of consumer products stipulated in the Consumer Protection Act B.E. 2522 (1979).

□ **HAZARDOUS SUBSTANCES ACT B.E. 2535 (1992)**

¹⁷ Proposition 65, § 25249.6 Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity: No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, ...

¹⁸ The forbidden aromatic amines are listed in Table C.1, Appendix C consisting of 4-aminobiphenyl; benzidine; 4-chloro-o-toluidine; 2-naphthylamine; o-amino azotoluene; 5-nitro-otoluidine; 4-chloroaniline; 4-methoxy-m-phenylenediamine; 4,4'-methylenedianiline; 3,3'-dichlorobenzidine; o-dianisidine; 3,3'-dimethoxybenzidine; 4,4'-methylenedi-otoluidine; 6-methoxy-m-toluidine p-cresidine; 4,4'-methylene-bis-(2-chloro-aniline); 4,4'-oxydianiline; 4,4'-thiodianiline; o-toluidine; 4-methyl-m-phenylenediamine; 2,4,5-trimethylaniline; o-anisidine; 4-amino azobenzene; 2,4-xylylidine; and 2,6-xylylidine.

¹⁹ Standardization Law, Article 14 Compulsory standards must be complied with. It shall be prohibited to produce, sell or import products that are not up to the compulsory standards. With regard to voluntary standards, the State shall encourage their adoption by enterprises on an optional basis.

The list of hazardous substances is provided in the **Notification of Ministry of Industry on List of Hazardous Substances B.E. 2556 (2013)**. There are totally 6 lists of the hazardous substances; List 1 to List 6. Under this Notification, 4-aminobiphenyl (CAS Number 92-67-1) and benzidine (CAS Number 92-87-5) are designated as a hazardous substance *Type 3* and *Type 4*. At present, the latest list of hazardous substances is amended by the **Notification of Ministry of Industry on List of Hazardous Substances (No. 2) B.E. 2558 (2015)**. Its objective is to add List 5.6 regarding Group of Substance Controlled on its Property as new list of hazardous substances which is under the responsibility of the Department of Industrial Works. The substances in List 5.6 consist of 10 types of substances including: Explosive, Flammable Substance, Oxidizing Agent or Peroxide, Toxic Substance, Mutagen, Corrosive, Irritant, Carcinogen, Toxic Substance to Reproductive Organ, and Environmentally Hazardous Substance. They are designated as hazardous substances *Type 1* which the production, import, export, or having in possession of such substances must comply with the specified criteria and procedures. Aromatic amines can be considered as carcinogen substances in List 5.6. The criteria and procedure are specified by the **Notification of Ministry of Industry on Notification of the Fact regarding the Production or Import of Hazardous Substance Defined in List 5.6 which is in the responsibility of the Department of Industrial Works B.E. 2558 (2015)** that the producers or importers of hazardous substances under List 5.6, including aromatic amines, with the quantity of more than 1,000 kilograms per year must notify such fact to the Department of Industrial Works within 60 days from the date of the production or import of those aromatic amines.

However, as the researches show that aromatic amines can be used without any harmful under the limited concentration²⁰ and they may be absorbed into human skin only through daily exposure, therefore, they are probably allowed to use in other products which are not directly contact with human skin. Thus, in the author's opinion, to prohibit the production, import, export, or having in possession of aromatic amines may not be the effective and appropriate solution.

□ **INDUSTRIAL PRODUCT STANDARDS ACT B.E. 2511 (1968)**

According to the Industrial Product Standards Act B.E. 2511 (1968), the industrial standards may be classified into two categories consisting of the industrial standards prescribed by the Notification of the Ministry of Industry under Section 15 and the industrial standards determined by a Royal Decree that any particular kind of the industrial products shall conform with the standards under Section 17. There are two industrial standards involving textile and garment business namely the Thai Industrial Standard for Fabrics or TIS 2231-2550 (2007)²¹ and Thai Industrial Standard for Garments or TIS 2346-2550 (2007) prescribed by the Notification of the Ministry of Industry under Section 15. They set the requirements for controlling the use of aromatic amines in fabric and garment products that 24 aromatic amines shall not be contained in finished fabric and garment products at the concentration over 30 mg/kg. The list of

²⁰ The Australian Competition and Consumer Commission, *Azo Dyes at* <https://www.productsafety.gov.au/content/index.phtml/itemId/1006626>.

²¹ This standard was notified by the Ministerial Notification No. 3332 of the Ministry of Industry. There are two amendments of this standard namely the Ministerial Notification No. 3436 and No. 3764. Now, the TIS 2231-2548 (2005) is amended to the TIS 2231-2550 (2007).

controlled 24 aromatic amines is stated in Appendix A²² of the Notification of the Ministry of Industry No. 3332 and the Notification of the Ministry of Industry No. 3765.

According to Section 16, the manufacturers of textile and garment products conforming to these standards may submit the application for a license to display the standard mark on their products. Once a license is granted by the Thai Industrial Standards Institute, they shall have the right to exhibit the standard mark on their products. In case of violating the Notification of the Ministry of Industry, they shall have the sanction according to the Industrial Product Standards Act B.E. 2511 (1968). One of the implications of the standards prescribed by Section 15 of the Industrial Product Standards Act B.E. 2511 (1968) is the Thai manufacturers who fails to comply with them may not be able to export their textile and garment products to any countries which control or restrict the use of aromatic amines such as the European Union and the People's Republic of China. Further, although some countries do not have specific laws and regulations controlling or restricting the use of aromatic amines in some countries, Thai manufacturers may expose to liability according to the product liability laws if their products cause damage or injury to the consumers in those countries. In addition, in case that the manufacturers do not receive a license to display the standard mark from the Thai Industrial Standards Institute, they shall not have the right to exhibit the standard mark on their products.²³ Without the standard mark displaying on the products, consumers may not trust in the quality and standard of the products and may decide not to purchase them. On the other hand, as the Royal Decree has the higher level than the Notification of the Ministry of Industry. In case of designating the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007) in the form of a Royal Decree according to Section 17, the manufacturers shall be required to produce their products only in conformity with the requirements of the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007). Last but not least, by adoption of the Royal Decree to the aforesaid mentioned effect, Thailand can prevent importation of the products which do not conform to the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007). By this means, the consumers in Thailand will be protected.

□ **FACTORY ACT B.E. 2535 (1992)**

Under the **Notification of the Ministry of Industry No. 10 B.E. 2537 (1994) issued pursuant to the Factory Act B.E. 2535 (1992)**, benzidine, benzidine compounds, chromium, and chromic compounds are prohibited to use as raw material producing dyes. Also, dyes containing benzidine, benzidine compounds, chromium, and chromic compounds are prohibited to use. However, the prohibition under this Notification do not restrict on all types of aromatic amines. Benzidine is classified as one type of aromatic amines, while, aromatic amines comprise of 24 substances. In addition, there is the limitation of the control measures under this law. Only the

²² The controlled aromatic amines are listed in Appendix A consisting of 4-aminobiphenyl; benzidine; 4-chloro-o-toluidine; 2-naphthylamine; o-amino azotoluene; 5-nitro-otoluidine; 4-chloroaniline; 4-methoxy-m-phenylenediamine; 4,4'-methylenedianiline; 3,3'-dichlorobenzidine; o-dianisidine; 3,3'-dimethoxy benzidine; 4,4'-methylenedi-otoluidine; 6-methoxy-m-toluidine p-cresidine; 4,4'-methylene-bis-(2-chloro-aniline); 4,4'-oxydianiline; 4,4'-thiodianiline; o-toluidine; 4-methyl-m-phenylenediamine; 2,4,5-trimethylaniline; o-anisidine; 4-amino azobenzene; 2,4-xylylidine; and 2,6-xylylidine.

²³ Industrial Product Standards Act B.E. 2511 (1968) Section 31 No person other than the licensee under Section 16, Section 20 or Section 21 shall use the standard mark.

“factory” under the definition of Section 5²⁴ is enforced by the Notification. In case that the manufacturers of textile and garment products are not considered as a factory according to such definition, they will not be obliged to comply with the requirements of the Notification. Accordingly, the Factory Act and its subordinate law are not sufficient to control the use of aromatic amines and to protect consumers from their toxicity.

□ **CONSUMER PROTECTION ACT B.E. 2522 (1979)**

Generally, textile and garment products manufactured for sale by the factories under the law on factories shall be controlled the labeling under Section 30 of the Consumer Protection Act B.E. 2522 (1979). However, under Section 31, the descriptions required to place on a label may not sufficient to provide information about the toxicity of aromatic amines to consumers. In addition, if textile and garment products are manufactured by any persons but the factory as defined in the Factory Act B.E. 2535 (1992), the products are not considered as a label-controlled product under Section 30. Without the label providing sufficient information about carcinogenicity of aromatic amines, the consumers will certainly not realize this fact and will have the opportunity to expose to aromatic amines contaminating in textile and garment products. Therefore, textile and garment products containing aromatic amines should propose to be a label-controlled product under the Announcement of the Committee on Labels. The label should provide sufficient information warning the consumers that aromatic amines are carcinogenic and may cause cancer to consumers.

V. CONCLUSIONS AND RECOMMENDATIONS

In order to prevent and protect Thai consumers from aromatic amines causing cancer, awareness, and appropriate solutions are, therefore, certainly and urgently required in practice. As highlighted earlier, the legal measures of three countries are discussed. All aim at controlling the use of aromatic amines and preventing consumers from them; although, there are some differences in detail. As any regulation is likely to permit using aromatic amines within an acceptable level, a safety standard may be more appropriate than a permanent ban. After thoroughly studying all three schemes with Thai legal backgrounds, the most appropriate mechanism, from the author’s opinion, is prescribing the TIS 2231-2550 (2007) designated by the Notification of the Ministry of Industry No. 3764 (B.E. 2550) and the TIS 2346-2550 (2007) designated by the Notification of the Ministry of Industry No. 3765 (B.E. 2550) in the form of a Royal Decree required to manufacture fabric and garment products only in conformity with the requirements of the TIS 2231-2550 (2007) and TIS 2346-2550 (2007) according to Section 17.

□ **PRESCRIBING THE TIS 2231-2550 (2007) AND TIS 2346-2550 (2007) IN THE FORM OF A ROYAL DECREE REQUIRED TO MANUFACTURE FABRIC AND GARMENT PRODUCTS ONLY IN CONFORMITY WITH THE TIS 2231-2548 (2005) AND TIS 2346-2550 (2007) ACCORDING TO SECTION 17**

²⁴ Factory Act B.E 2535 (1992), Section 5 “Factory” means a building, place, or vehicle which uses a machine from five horse powers or an equivalent thereof or more or which employs seven workers or more with or without any machine for manufacturing, producing, assembling, filling, repairing, maintaining, testing, improving, altering, transporting, keeping, or destroying anything in accordance with the type or kind of factory as provided for in a Ministerial Rule.

At present, Thailand has the Notification of the Ministry of Industry No. 3764 (B.E. 2550) issued pursuant to the Industrial Product Standards Act B.E. 2511 in regard to the Thai Industrial Standard for Fabrics or TIS 2231-2550 (2007) and the Notification of the Ministry of Industry No. 3765 (B.E. 2550) issued pursuant to the Industrial Product Standards Act B.E. 2511 in regard to the Thai Industrial Standard for Garments or TIS 2346-2550 (2007). They set a requirement that 24 aromatic amines shall not be contained in finished fabric and garment products at the concentration not over 30 mg/kg. In case of prescribing the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007) in the form of a Royal Decree required to manufacture fabric and garment products only in conformity with the TIS 2231-2550 (2007) and TIS 2346-2550 (2007) according to Section 17, the manufacturer and importer are required to receive a license before produce or import their products. After having received the license, they will be granted the right to display the standard mark on their products. In this connection, the manufacturer and importer are required to manufacture or import fabric and garment products only in conformity with the TIS 2231-2550 (2007) or the TIS 2346-2550 (2007). Therefore, to propose to prescribe the TIS 2231-2550 (2007) and the TIS 2346-2550 (2007) in the form of a Royal Decree required to manufacture fabric and garment products in conformity with the TIS 2231-2550 (2007) and TIS 2346-2550 (2007) according to Section 17 would help to enhance the control measures of aromatic amines in Thailand. With this measure, the consumers in Thailand will be protected.

□ **CONSUMER PROTECTION AGAINST LABELING**

It is advisable that textile and garment products containing aromatic amines should proposed to be a label-controlled product under the Announcement of the Committee on Labels. The label should provide information warning the consumers that aromatic amines are carcinogenic and may cause cancer to consumers. The content of label to declare textile and garment products containing aromatic amines could be “This product contains a chemical known to cause cancer at the concentration which is not over the limitation of 30 mg/kg.” In the author’s point of view, the labeling placed on textile and garment products is the alternative solution which helps to maintain consumer’s rights and to protect them from dangerous aromatic amines in textile and garment products.

□ **GENERAL SAFETY REQUIREMENT**

It is necessary to propose a subordinate law regarding the consumer protection, by using a concept of the general safety requirement according to the GPSD of the European Union as a model law, providing general requirement concentrated on the safety of consumer products. The general requirement can be imposed that “only safe products can be placed on the market” with the presumption clause that “any products conforming to any industrial or technical standards are also considered to be safe.” In such case, this general requirement can be considered as horizontal legislation which covers all types and categories of consumer products in the market.

□ **POST-MARKET MEASURE: PRODUCT RECALL MEASURE**

A product recall measure can help to protect the consumer when there is a reasonable ground to believe that any of the products is dangerous. It can prevent consumers before they will be injured as a result of harmful products. Since the manufacturers are in the best position to know any defects and dangers of their products, as well as they certainly, by their business chains, know so well about the number of their products placed in the market and the number of product which had been sold to consumers, the effective recall measure should be carried out voluntarily by them. However, practically, the voluntary recall may not be undertaken, or it may be performed ineffectively. This is because to carry out the recall measure may constitute

with high cost, which includes the actual amount of repair, the cost of contacting the consumers, the cost of delivery, and the cost of recovering the product.²⁵ As a result, when voluntary recall seems to be ineffective, the competent authority should be empowered to monitor the voluntary recall so as to ensure the effectiveness of this measure. In this regard, Section 36 of the Consumer Protection Act B.E. 2522 (1979) states that when any products have been tested or verified that they are dangerous to consumers, and such harmfulness cannot be prevented by other means, the Consumer Protection Board shall have the power to order the businessman to recall of such products from the market or consumers who bought such products. It is said that product recall measure is an effective method of removing or correcting products which are in violation of laws or standards.

□ **PROMOTING TO USE ALTERNATIVE DYES**

Fiber-reactive dyes are one of the proposed low-impact dyes in textile and garment industry. They are a synthetic dye that chemically bonds directly to the clothing fiber molecules. The fixation or absorption rate of low-impact dyes is at least 70 percent,²⁶ creating less waste water drain and, therefore, a lower impact on the environment. They contain no heavy metals or other known toxic substances, and they meet all the European Union criteria, including Oeko-Tex, for being an eco-friendly pigment. Also, natural dyes should be proposed to use instead of synthetic dyes. They are dyes or colorants derived from plants, invertebrates, or minerals. They are environmental friendly and safe for human's health. It is also easy to find raw materials for being used as dyes such as branch, leaf stalk, gourami, root, and flower, with very cheap price comparing to chemicals. For example, root and heartwood of jackfruit and peel of mango give yellow color and leaf of indigo gives dark blue, blue and green color.

With these legislative and non-legislative solutions, the Thai textile and garment industries will be effectively controlled to use aromatic amines. As a result, consumers will have more opportunity to consume safety textile and garment articles without taking a risk from products containing aromatic amines which prolonged contact with skin and may cause cancer.

²⁵ Pakorn Nilprapunt, *Product Recall Measure: Australia and the United States at* http://www.lawreform.go.th/lawreform/index.php?option=com_content&task=view&id=246&Itemid=11.

²⁶ Aboynamedsue, *Ecodictionary: Dyes (Low Impact)*, available at <http://www.aboynamedsue.co/about/ecodictionary/>.

REFERENCES

- (IARC), The International Agency for Research on Cancer. **“IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man.”** Volume 4, (1974).
- (IARC), The International Agency for Research on Cancer. **“IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man.”** Volume 29, (1974).
- (IARC), The International Agency for Research on Cancer. **“IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man.”** Volume 77, (1974).
- (OECD), The Organization for Economic Co-operation and Development. *“Case Study 10: Release from the Use Phase of Textile and Leather Products.”* Resource Compendium of PRTR Release Estimation Techniques Part 4: Summary of Techniques for Releases from Products.
<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=en/jm/mono\(2011\)7/part2&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=en/jm/mono(2011)7/part2&doclanguage=en)> [accessed October 5, 2014].
- Aboynamedsue, *“Ecodictionary: Dyes (Low Impact).”* <<http://www.aboynamedsue.co/about/ecodictionary/>> [accessed September 9, 2014].
- Commission, The Australian Competition and Consumer. *“Azo Dyes.”* <<https://www.productsafety.gov.au/content/index.phtml/itemId/1006626>> [accessed February 27, 2015].
- Commission, The Australian Competition and Consumer. *“Options to Limit Hazardous Aromatic Amines in Clothing, Textiles and Leather Articles.”*
<http://www.strtrade.com/media/publication/7218_AUS97_english_.pdf> [accessed September 19, 2014].
- Economy, The Policy Research Center for Environment and. *“Impacts of Environmental Standards and Requirements in Eu Countries on China’s Textile Industry,”* The 3rd Meeting of the 2nd Phase of CCICED (1999). <<http://www.iisd.org/pdf/EUtextiles.pdf>> [accessed September 12, 2014].
- Howstuffworks?, *“How Is Fabric Created? “The Manufacturing Process of Fabric.”*
<<http://home.howstuffworks.com/home-decor/accessories/how-is-fabriccreated2.htm>> [accessed September 10, 2014].
- Learner, Textile, *“Introduction of Textile Finishing Process.”*
<http://textilelearner.blogspot.com/2011/03/description-of-textilefinishing_1796.html> [accessed September 15, 2014].
- Nilprapunt, Pakorn. *“Product Recall Measure: Australia and the United States.”*
<http://www.lawreform.go.th/lawreform/index.php?option=com_content&task=view&id=246&Itemid=11> [accessed April 21, 2015].
- US, National Library of Medicine National Institutes of Health. *“Monocyclic Aromatic Amines as Potential Human Carcinogens: Old is New Again.”*
<<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2802674/>> [accessed April 21, 2015].

CIVIL LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE RESULTING FROM OFFSHORE OIL EXPLORATION AND EXPLOITATION*

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ABSTRACT

Technological advancement and the increase in the demand for petroleum products will increase the possibility of incidents involving offshore oil exploration and exploitation in Thailand, leading to rising of marine oil pollution damage from such activities which is normally massive and has substantial impact upon marine environment and relevant natural resources. In this regard, appropriate civil liability and compensation regime is acceptable as one useful mechanism to recoup the damage and restore the damaged natural resources to their baseline.

Thai law recognizes civil liability and compensation regime for natural resource damages caused by oil pollution from offshore oil exploration and exploitation and natural resource damages acceptable. However the compensation is still, in practice, not effectively and efficiently enforceable in Thailand due to the problem on quantification of natural resource damages. This problem is also an obstacle for court to award reasonable and fair compensation for natural resource damages.

This article aims at studying on the US law and Thai law relating to civil liability and compensation for natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation to analyze relevant problems and to seek solutions to make compensation for natural resource damages for such case more practical, effectively and efficiently in Thailand. In conclusion, this thesis proposes that the responsible governmental authority in charge for natural resource damage assessment (NRDA) and establishment of a claim against the offshore oil operator should be designated and NRDA regulations providing the NRDA process as well as the economic criteria and methods utilized to assess the natural resource damages caused by oil pollution from offshore oil exploration and exploitation should be established. For the court's standard practice to quantify natural resource damages, the President of the Supreme Court should issue the guideline for the court to award compensation in this case. Moreover, the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 should be amended to add financial security and a fund scheme against the offshore oil operator to ensure the payment of compensation for natural resources.

Keywords: Oil Pollution Damage, Marine Natural Resource Damage, Offshore Oil Exploration and Exploitation, Quantification of Natural Resource Damages, Natural Resource Damage Assessment

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บทคัดย่อ

ความก้าวหน้าทางเทคโนโลยีและความต้องการผลิตภัณฑ์ปิโตรเลียมที่เพิ่มขึ้นทำให้ความเป็นไปได้ที่จะเกิดอุบัติเหตุเกี่ยวกับการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่งในประเทศไทยเพิ่มขึ้น และนำไปสู่ปัญหาความเสียหายจากมลพิษน้ำมันทางทะเลที่เกิดจากกิจกรรมดังกล่าวมากขึ้น ซึ่งโดยปกติมักเป็นความเสียหายอย่างใหญ่หลวงและมีผลกระทบต่อสภาพแวดล้อมทางทะเลและทรัพยากรธรรมชาติที่เกี่ยวข้องเป็นอย่างมาก ระบบความรับผิดชอบทางแพ่งและการชดเชยค่าเสียหายที่เหมาะสมเป็นที่ยอมรับว่าเป็นกลไกหนึ่งที่มีประโยชน์ที่จะช่วยชดเชยความเสียหายและฟื้นฟูทรัพยากรทางธรรมชาติให้กลับสู่สถานะเดิมได้

กฎหมายไทยยอมรับให้มีการชดเชยค่าเสียหายต่อทรัพยากรธรรมชาติที่เกิดจากมลพิษน้ำมันอันเป็นผลมาจากการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่ง อย่างไรก็ตาม การชดเชยค่าเสียหายดังกล่าวในประเทศไทยยังไม่สามารถบังคับใช้ได้อย่างมีประสิทธิภาพและมีประสิทธิผลในทางปฏิบัติเนื่องจากมีปัญหาเกี่ยวกับการประเมินความเสียหายต่อทรัพยากรธรรมชาติ และปัญหานี้ยังเป็นอุปสรรคสำหรับศาลไทยในการวินิจฉัยชี้ขาดและกำหนดค่าเสียหายต่อทรัพยากรธรรมชาติที่เหมาะสมและเป็นธรรมอีกด้วย

บทความนี้มุ่งศึกษากฎหมายของประเทศสหรัฐอเมริกาและกฎหมายไทยที่เกี่ยวกับความรับผิดชอบทางแพ่งและการชดเชยค่าเสียหายต่อทรัพยากรธรรมชาติที่เกิดจากมลพิษน้ำมันซึ่งเป็นผลมาจากการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่ง เพื่อวิเคราะห์ปัญหาที่เกี่ยวข้องและวิธีการแก้ไขปัญหามาเพื่อให้การชดเชยค่าเสียหายต่อทรัพยากรธรรมชาติในกรณีดังกล่าวในประเทศไทยเป็นไปได้ในทางปฏิบัติและมีผลบังคับใช้ได้อย่างมีประสิทธิภาพ โดยสรุป วิทยานิพนธ์ฉบับนี้เสนอให้แต่งตั้งหน่วยงานรัฐที่รับผิดชอบในการประเมินความเสียหายต่อทรัพยากรธรรมชาติและดำเนินคดีต่อผู้ประกอบการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่งในกรณีดังกล่าวและให้มีการออกหลักเกณฑ์การประเมินความเสียหายต่อทรัพยากรธรรมชาติเพื่อกำหนดขั้นตอนในการประเมินความเสียหายรวมถึงหลักเกณฑ์และวิธีการที่ใช้ในการประเมินความเสียหายต่อทรัพยากรธรรมชาติที่เกิดจากมลพิษน้ำมันอันเนื่องมาจากการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่ง ในทางศาล ประธานศาลฎีกาควรออกข้อกำหนดเกี่ยวกับหลักเกณฑ์และวิธีการที่ศาลจะใช้ในการพิจารณาค่าเสียหายต่อทรัพยากรธรรมชาติเพื่อให้การวินิจฉัยของศาลในกรณีดังกล่าวเป็นมาตรฐานเดียวกันในทางปฏิบัติ นอกจากนี้ ควรมีการแก้ไขพระราชบัญญัติส่งเสริมและรักษาคุณภาพสิ่งแวดล้อมแห่งชาติ พ.ศ. 2535 เพิ่มเติมให้ผู้ประกอบการสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่งมีหน้าที่ต้องวางหลักประกันทางการเงิน รวมทั้งให้มีการจัดตั้งกองทุนเพื่อเป็นหลักประกันในการชดเชยค่าเสียหายต่อทรัพยากรธรรมชาติด้วย

คำสำคัญ: ความเสียหายจากมลพิษน้ำมัน, ความเสียหายต่อทรัพยากรธรรมชาติทางทะเล, การสำรวจและแสวงหาประโยชน์จากน้ำมันนอกชายฝั่ง, การประเมินความเสียหายต่อทรัพยากรธรรมชาติ

Introduction

There are a number of offshore oil exploration and exploitation operations conducted in the marine area of Thailand. Such operations are regarded as a high-risk activity that presents constant risk of oil pollution which would cause massive damage

upon marine environment and natural resources. Primary environmental law dealing with civil liability and compensation for natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation in Thailand is the Enhancement and Conservation of National Environmental Quality Act B.E. 2535. Compensation for natural resource damage in such a case is admitted as compensable under such Act. However, a practical problem still arises as to how to quantify such natural resource damages to reasonably and appropriately remedy the damage and restoration of the damaged natural resources because the criteria and methods for natural resource damage assessment in such a case have never been established under relevant laws. This also impedes court's consideration in awarding compensation for the injured natural resources. Therefore, relevant laws should be developed regarding the determination of criteria and methods for quantification of damages to natural resources.

In the US, civil liability and compensation regime for natural resource damages caused by oil pollution from offshore oil exploration and exploitation has been well established, as provided in Oil Pollution Act of 1990 (OPA). This article therefore aims at studying the US law and Thai law relating to civil liability and compensation for natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation to analyze relevant problems and to seek solutions to make compensation for natural resource damages for such case more practical, effectively and efficiently in Thailand.

To seek practical, effectively and efficiently compensation for natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation, the concepts of civil liability and compensation for natural resources damages, civil liability and compensation for natural resource damages caused by oil pollution from offshore oil exploration and exploitation in the US and problems concerning compensation for natural resource damages caused by oil pollution from offshore oil exploration and exploitation in Thailand will be respectively addressed herein.

1. The Concepts of Civil Liability and Compensation for Natural Resource Damages

To understand the concepts of civil liability and compensation for natural resource damages, it is essential to comprehend environmental principles relating to civil liability and compensation for natural resource damages as well as economic aspects of natural resources for quantification of natural resource damage.

1.1 Environmental Principles Relating to Civil Liability and Compensation for Natural Resource Damages

Environmental principles relating to civil liability and compensation for natural resource damages are “the public trust doctrine”, “strict liability principle” and “polluter pays principle”.

The public trust doctrine has been traditionally used by courts in the United States to protect public interests in navigable waters, submerged lands, and the shores of navigable waterways.¹ The public trust doctrine provides that natural resources are held

¹ James J. Lawler & William M. Parle, *Expansion of the Public Trust Doctrine in Environmental Law: An Examination of Judicial Policy Making by State Courts*, 70 **Social Science Quarterly**, 134, 135 (March 1989), available at <http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=a027d724-26ec-4369-9224-e4a2b5e8fa86%40sessionmgr4003&vid=0&hid=4102>

in trust by the government for the benefit of the people and the government is regarded as trustee of resources.² Accordingly, damage to those natural resources is also deemed damage to the public's interest.

Strict liability is grounded on the concept that damage occurred shall be compensated and remedied regardless of intention or negligence of the actor. Under strict liability principle, the accused is assumed liability and shall be responsible for damage. To discharge from the assumed liability, the defendant or the accused shall have to prove that his action falls into exemptions provided by law.³

The "polluter pays principle" was first endorsed by the Organizations for Economic Co-operation and Development (OECD) in the 1970s. As defined by the OECD, the principle entailed that the polluter should bear the expense of carrying out measures decided by public authorities to ensure that the environment is in an acceptable state and that the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and or in consumption.⁴

1.2 Economic Aspects of Natural Resources

Civil liability and compensation regime for natural resource damages is set for remediation and restoration of the damaged resources. In order to achieve so, natural resource damage assessment must be taken into consideration and an actual value of such injured natural resources is necessary to be known therefor. Accordingly, monetary values of the damaged natural resources shall be determined and as such economics is directly and unavoidably involved.

Valuing natural resources is difficult and challenging to estimate because most natural resources and their services do not have a market value. Despite the fact that no market price exists for natural resources, it is obviously appeared that individuals attach a certain value to natural resources and their services. Valuation of natural resources which are nonmarket products or services is therefore to assign monetary value to them regardless of whether they can be traded in the market or have a market price or not.⁵

Within non-market values, economic value of natural resources comprises of three main elements which are use value, non-use value, and option value. Use values are those associated with tangible uses of natural resources, such as recreational benefits.⁶ Non-use value captures those elements of value that are unrelated to a current, future, or potential use.⁷ Natural resources may also be valued for their potential to be available in the future. These potential future benefits constitute an option value.

²*Id.*

³อุตมศักดิ์ สินธิพงษ์, กฎหมายเกี่ยวกับสิ่งแวดล้อม 29 (กรุงเทพมหานคร: พิมพ์ครั้งที่ 4 สำนักพิมพ์วิญญูชน Publication House 2013)).

⁴Patricia Birnie & Alan Boyle, *International Law & The Environment* 92 (2nd ed., Oxford University Press 2002).

⁵Economic Assessment of Natural Resource Damages, http://www.exponent.com/economic_assessment_of_natural_resource_damages_3/ (last visited Jun. 3, 2015).

⁶James R. Kahn, *The Economic Approach to Environmental and Natural Resources* 87 (Harcourt Brace & Company 1995).

⁷Dominika Dziegielewska & Tom Tietenberg, *Total Economic Value* (Oct. 13, 2013), <http://www.eoearth.org/view/article/51cbef167896bb431f69c4b5/> (last visited 5 June 2015).

1.2.1 Economic Methods for Valuation of Natural Resources

In order to measure the value of natural resources, economic methods are required. Valuation methods are usually divided into five approaches below.

1.2.1.1 Direct Market Valuation Approaches

(1) Market Price-Based Approach

Market price-based approaches are most often used to obtain the value of provisioning natural resource services, since the commodities produced by provisioning services are often sold on, e.g., fisheries, seafood markets. In well-functioning markets preferences and marginal cost of production are reflected in a market price, which implies that these can be taken as accurate information on the value of commodities. The price of a commodity times the marginal product of the ecosystem service is an indicator of the value of the service, consequently, market prices can also be good indicators of the value of the natural resource service that is being studied.⁸

(2) Cost-Based Approaches

Cost-based approaches are based on estimations of the costs that would be incurred if natural resource benefits needed to be recreated through artificial means.⁹ The approaches assume that the costs of avoiding damages or replacing natural resources or their services provide useful estimates of the value of these resources or services. This is based on the assumption that, if people incur costs to avoid damages caused by lost marine resources and services, or to replace the resources and services, then those services must be worth at least what people paid to replace them. Thus, the methods are most appropriately applied in cases where damage avoidance or replacement expenditures have actually been, or will actually be, made.¹⁰

(3) Production Function-Based Approach (PF)

Production function-based approach is based on the fact that many natural resources, processes and qualities are used as production factors. The PF method tries to value natural qualities by valuing their impacts on production costs. The PF approach generally consists of two-step procedure. The first step is to determine the physical effects of changes in a biological resource or ecosystem service on an economic activity. In the second step, the impact of these changes is valued in terms of the corresponding change in marketed output of the traded activity.¹¹

1.2.1.2 Revealed Preference Approaches

(1) The Travel Cost Method (TCM)

The travel cost method is, in general, employed to estimate recreational values. This technique assumes that visitors to a particular site incur economic costs, in the form of outlays of time and travel expenses, to visit the site.¹² The TCM assumes that

⁸Luke Brander, Erik Gómez-Baggethun, Berta Martín-López, MadhuVerma et al, Chapter 5 The economics of valuing ecosystem services and biodiversity 17 (March2010), <http://www.teebweb.org/wp-content/uploads/2013/04/D0-Chapter-5-The-economics-of-valuing-ecosystem-services-and-biodiversity.pdf> (last visited Jun. 7, 2015).

⁹*Id.*

¹⁰ Dennis M. King & Marisa J. Mazzotta, Damage Cost Avoided, Replacement Cost and Substitute Cost Methods, http://www.ecosystemvaluation.org/cost_avoided.htm (last visited Jun. 7, 2015).

¹¹Brander, Gómez-Baggethun, Martín-López, Verma et al, *supra* note 8.

¹²Memorandum from the Department of Energy on Natural Resource Valuation: A Primer on Concepts and Techniques to EH-41 Web Site Users, Appendix A (Oct. 6,

the demand for trips to a specific site is dependent on travel costs, income, characteristics of the site, prices of substitutes, etc. In order to determine the willingness to pay of visitors from various distances, distance circles are drawn in the service area of a site. The percentage of inhabitants of each circle that will visit the site at a fixed amount of travel cost per circle is determined by means of a survey.¹³

(2) The Hedonic Pricing Method (HPM)

Hedonic pricing method tries to measure the value of a non-marketed natural resources and service as a measurable component ('attribute' or 'characteristic') of a marketed good. The most common applications of HPM try to exploit the relationship between property values - often, although not exclusively, residential property values - and environmental attributes of the neighbourhood (e.g. air quality, noise levels, access to recreational facilities, visual amenities).¹⁴ If data are readily available, it can be relatively inexpensive to apply. However, if data must be gathered and compiled, the cost of an application can increase substantially.¹⁵

1.2.1.3 Stated Preference Approaches

(1) Contingent Valuation Method (CVM)

The CVM is a survey or questionnaire-based approach to the valuation of non-market goods and services. The values obtained for the good or service are said to be contingent upon the nature of the constructed (hypothetical or simulated) market and the good or service described in the survey scenario. CVM has great flexibility, allowing valuation of a wider variety of non-market goods and services. It is, in fact, the only method currently available for estimating non-use values. In natural resources, contingent valuation studies generally derive values through the elicitation of respondents' willingness to pay to prevent injuries to natural resources or to restore injured natural resources, or alternatively, willingness to accept for loss or degradation of natural resources.¹⁶

(2) Choice Modeling (CM)

CM is a family of survey-based methodologies for modeling preferences for goods, where goods are described in terms of their attributes and of the levels that these take. Respondents are presented with various alternative descriptions of a good,

1997), available at http://www.environmentalmanager.org/wp-content/uploads/2008/04/valuation_primer_from_doe.pdf.

¹³Overview of Economic Valuation Methods,

https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAAahUKEwjmn9ucy4fHAhVBH44KHVTmCNM&url=http%3A%2F%2Fwww.fsd.nl%2Fdownloadattachment%2F73222%2F59929%2Feconomic%2520valuation%2520methods.pdf&ei=oJO8VebPCsG-uATUzKOYDQ&usg=AFQjCNHcLEH8TUxF0NCGSZI_TbxTJoO7Lw&sig2=ATNUKi_kHFMUasT2Hwl1vg (last visited June. 7, 2015).

¹⁴Cesare Dosi, Environment and Human Settlements Division, Santiago, Chile, *Environmental Values, Valuation Methods, and Natural Disaster Damage Assessment*, 6 (June 2001), available at http://repositorio.cepal.org/bitstream/handle/11362/5722/S01050460_en.pdf?sequence=1

¹⁵Dennis M. King & Marisa J. Mazzotta, Hedonic Pricing Method, http://www.ecosystemvaluation.org/hedonic_pricing.htm (last visited Jun. 7, 2015).

¹⁶National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, *Economic Valuation of Natural Resources: A Handbook for Coastal Resource Policymakers*, NOAA Coastal Ocean Program Decision Analysis Series No. 5, 50 (1995), available at http://docs.lib.noaa.gov/noaa_documents/NOS/NCCOS/COP/DAS/DAS_5.pdf

differentiated by their attributes and levels, and are asked to rank the various alternatives, to rate them or to choose their most preferred. By including price/cost as one of the attributes of the good, willing to pay can be indirectly recovered from people's rankings, ratings or choices. As with contingent valuation, CM can also measure all forms of value including non-use values.¹⁷

(3) Conjoint Analysis¹⁸

Conjoint analysis is the valuation method that is used to determine specific preferences between different levels of characteristics of an ecosystem attribute. It allows individuals to choose between two hypothetical environments based on a list of characteristics that distinguish them from each other based on a ranking system of each attribute. This method allows for the researchers to see which of the two choices each respondent prefers, and it shows which characteristics they value the most. The respondent would choose which choice he or she preferred along with a ranking of the attributes that led to the decision of preference.

1.2.1.4 Benefit Transfer Approach

Benefit transfer is the process of taking an existing value estimate and transferring it to a new application that is different from the original one.¹⁹ The basic goal of benefit transfer is to estimate benefits for one context by adapting an estimate of benefits from some other context. Benefit transfer is often used when it is too expensive and/or there is too little time available to conduct an original valuation study, yet some measure of benefits is needed. The benefit transfer method is most reliable when the original site and the study site are very similar in terms of factors such as quality, location, and population characteristics; when the environmental change is very similar for the two sites; and when the original valuation study was carefully conducted and used sound valuation techniques.²⁰

1.2.1.5 Habitat Equivalency Analysis (HEA)

Habitat equivalency analysis (HEA) is a methodology used to determine compensation for resource injuries such as discharges of oil. It is not the methodology directly valuing natural resources; instead it focuses on the replacement or the compensation for the affected or damaged habitat. The principal concept underlying the method is that the public can be compensated for past losses of habitat resources through habitat replacement projects providing additional resources of the same type. However, the HEA method is not appropriate for standard benefit-cost analysis, where the goal is to determine optimal (efficient) allocation of scarce resources.²¹

¹⁷ Nick Hanley, Susana Mourato & Robert E. Wright, *Choice Modeling Approaches: A Superior Alternative for Environmental Valuation?*, 15 **Journal of Economic Surveys** 435, 436 (2001), available at <http://onlinelibrary.wiley.com/doi/10.1111/1467-6419.00145/pdf>.

¹⁸ Rebecca M. Carson & John C. Bergstrom, *A Review of Ecosystem Valuation Techniques* (December 2003), <http://ageconsearch.umn.edu/bitstream/16651/1/fs0303.pdf> (last visited Jun. 7, 2015).

¹⁹ National Research Council of the National Academies, *Valuing Ecosystem Services: Toward Better Environmental Decision-Making* 124 (The National Academies Press 2005), available at http://download.nap.edu/cart/download.cgi?&record_id=11139.

²⁰ Dennis M. King, and Marisa J. Mazzotta, *Benefit Transfer Method*, http://www.ecosystemvaluation.org/benefit_transfer.htm (last visited Jun. 7, 2015).

²¹ Science Advisory Board of the U.S. Environmental Protection Agency, *Habitat Equivalency Analysis*, [http://yosemite.epa.gov/Sab/Sabproduct.nsf/WebFiles/HEA/\\$File/HEA-03-09-09.pdf](http://yosemite.epa.gov/Sab/Sabproduct.nsf/WebFiles/HEA/$File/HEA-03-09-09.pdf) (last visited Jun. 7, 2015).

2. Civil Liability and Compensation for Natural Resource Damages Caused by Oil Pollution from Offshore Oil Exploration and Exploitation in the US

In the US, civil liability and compensation regime for natural resource damages caused by oil pollution from offshore oil exploration and exploitation has been well established, as provided in Oil Pollution Act of 1990 (OPA). The goal of OPA is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident). This goal is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery. The purpose of NRDA regulations is therefore to promote expeditious and cost-effective restoration of natural resources and services injured as a result of an incident.

OPA provides three factors for measuring natural resource damages. The first allows for the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources. The second considers the diminution in value of those natural resources pending restoration. And the third allows for recovery of the reasonable costs incurred in assessing those damages. National Oceanic and Atmospheric Administration (NOAA) is assigned as a public trustee to assess natural resource damages, as well as to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

With regard to methodology for valuing natural resource damages, the current emphasis of NOAA is on restoration rather than a monetized estimate of lost value as the measure of damage. Technical feasibility and cost-effectiveness must be considered in the choice of restoration projects. The advantage of restoration is that, by definition, both lost use²² and non-use²³ value are eventually restored. However, monetization is not prohibited but is rarely favored.

3. Problems Concerning Compensation for Natural Resource Damages Caused by Oil Pollution from Offshore Oil Exploration and Exploitation in Thailand

From the study on civil liability and compensation for natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation under relevant Thai laws, problems concerning compensation for such damages are found below.

3.1 No Designation of Responsible Government Authority

From the study on Petroleum Act B.E. 2514 and Enhancement and Conservation of National Environmental Quality Act B.E. 2535, no government authority is designated as the responsible party in charge for marine natural resource damage assessment in case of oil pollution resulting from offshore oil exploration and exploitation.

As the government authority to claim for natural resource damages on behalf of State will play critical in assessing and valuing natural resource damages, lack of designation of such responsible government authority will impede the pursuit for compensation for natural resource damages. Further, it may result in overlapping duty

²²Use values are those associated with tangible uses of natural resources, both direct use and indirect use, such as recreational benefits.

²³Non-use value captures those elements of value that are unrelated to a current, future, or potential use.

among relevant government authorities and double recovery charged on the responsible party. Therefore, responsible government authority in charge for quantification of natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation and making a claim therefor against the responsible party is necessary.

In the US, under OPA, the function of the trustees is to assess natural resource damages, as well as to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship. Accordingly, they are charged with acting on behalf of the public. The National Oceanic and Atmosphere Administration (NOAA) is assigned to act as a public trustee for natural resource damages caused by oil pollution from offshore oil exploration and exploitation's facility.

3.2 Absence of Criteria and Methods Rule for Quantification of Natural Resource Damages

In order for successful compensation for natural resource damages caused by oil pollution from offshore exploration and exploitation, quantification for such damage is necessary. Accordingly, value of the damaged natural resources as well as natural resource damage assessment must be explored.

Section 97 of the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 of Thailand provides civil liability and compensation for natural resource damages in that any person who commits an unlawful act or omission by whatever means resulting in the destruction, loss or damage to natural resources owned by the State or belonging to the public domain shall be liable to make compensation to the State representing the total value of natural resources so destroyed, lost or damaged by such an unlawful act or omission. However, criteria and methods for valuation of the natural resource value and natural resource damage assessment have never been created in Thailand so far.

Natural resource damage assessment (NRDA) is a critical process to quantify damage and seek compensation for natural resource damages as it is the way to prove the loss to natural resources and the monetary damage. Without the NRDA, claim for natural resource damages caused by oil pollution from offshore exploration and exploitation cannot be established and compensation cannot be awarded. This is an obstacle for State to establish the claim for natural resource damages and for courts to award compensation for natural resource damages in practice.

Under the OPA, NRDA Regulations are developed by NOAA. The Regulations focus on remedy of natural resource damages by returning injured natural resources and services to the condition they would have been in if the incident had not occurred (baseline conditions), and compensating for interim losses from the date of the incident until recovery of such natural resources and services through the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and/or services. The Regulations provides various approaches and economic methods for scaling and choosing the most appropriate and cost-effective restoration actions. This brings about the advancement and easement of the US's NRDA and also present distinctive elements of US maritime pollution law that are most worthy of emulation by other countries.

3.3 Court's Difficulty in Quantification of Natural Resource Damages

Without criteria and methods for quantification of natural resource damages caused by oil pollution from offshore oil exploration and exploitation, court is likely to employ wrongful act provisions regarding compensation provided in Civil and Commercial Code for quantification of natural resource damages. Awarding compensation based on Civil and Commercial Code is not appropriate to natural resource damages case because wrongful act provisions focus on remediation for injury to private's life, body, health, liberty, property while compensation for natural resource

damages focuses on remediation for public and social's benefits or, in other words, it is to make the environment and public whole. Accordingly, quantification of damage for injured natural resources needs to take into account of their total economic value²⁴ which can be calculated by employing economic theory. Accordingly, remediation of natural resource damages is nearly impossible and the reasonable compensation for natural resource damages in corresponding to economic theory has never been awarded by the court.

Another obstacle for court to quantify reasonable natural resource damages is about introduction of relevant evidences. Introduction of evidences in civil court rather trends to adversarial system in that the court is normally neutral and let the introduction of evidences conducted mostly by litigants and lawyers. In case of natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation, expert witnesses for marine natural resources, oil pollution damage, economic value of natural resources and other related issues are necessarily required to present accountable and reliable facts before the court for court to reasonably quantify damage. Accordingly, court should have their own discretion to appoint the expert witnesses. Adversarial system may impede the court in seeking sufficient and unprejudiced facts for reasonable and fair quantification of natural resource damages.

Due to court's difficulty in quantification of natural resource damages as mentioned above, efficient remediation and restoration of the damaged natural resource is nearly impossible resulting in failure to achieve the purpose of environmental law in protection and conservation of environment.

3.4 Enforcement upon Compensation Payment

Damage to natural resources caused by oil pollution resulting from offshore oil exploration and exploitation is normally massive, thereby possibly causing the operator of offshore oil exploration and exploitation bankrupted or insolvent. Moreover, most offshore oil operators are transnational entities. Due to the bankruptcy, insolvency or sheltering of assets overseas of the offshore oil operator, compensation for natural resource damages is likely not to be collected by State and the restoration of damaged natural resources will not be accomplished.

According to Petroleum Act B.E. 2514 and the Enhancement and Conservation of National Environment Quality Act B.E. 2535, no any provision requires the offshore oil operator or the polluter to provide financial security to guarantee the compensation for natural resource damages. Although voluntary environmental insurance is available, it is likely unfavorable for offshore oil operator due to high amount of premium.

In connection with a fund, although the Environmental Fund is established under the Enhancement and Conservation of National Environmental Quality Act B.E. 2535, functions of such Fund do not deal with expenses for clean-up cost, remedial activities or compensation for natural resource damages, but to support activity which enhances and conserves environment.²⁵

Without financial security and a fund system established for compensation of natural resource damages, compensation for natural resource damages awarded by the court may be unenforceable in practice, particularly in case of defendant's bankruptcy, insolvency or prior dissolution.

²⁴Total economic value of natural resource comprises of three main elements which are use value, non-use value, and option value. Use values are those associated with tangible uses of natural resources, both direct use and indirect use, such as recreational benefits. Non-use value captures those elements of value that are unrelated to a current, future, or potential use. Natural resources may also be valued for their potential to be available in the future. These potential future benefits constitute an option value.

²⁵ Enhancement and Conservation of the National Environmental Quality Act B.E. 2535, Section 25.

Conclusion and Recommendations

From the study, natural resource damages caused by oil pollution from offshore exploration and exploitation cannot be compensated and restored effectively and efficiently, in practice, in Thailand due to the absence of criteria and methods for quantification of natural resource damages. The Ministry of Natural Resources and Environment should promulgate the ministerial regulation by virtue of Sections 96 and 97 of the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 to designate the Department of Marine and Coastal Resources as the primary government authorities and an NRDA committee in charge for natural resource damage assessment (NRDA) and establishment of a claim against the offshore oil operator. Further, the Department of Marine and Coastal Resources should promulgate the Department's NRDA regulations providing the NRDA process as well as the economic criteria and methods utilized to assess the natural resource damages caused by oil pollution resulting from offshore oil exploration and exploitation. With reference to court's difficulty in quantification of natural resource damages, the President of the Supreme Court should issue the guideline for the court to award compensation for the court's standard practices. Moreover, the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 should be amended to add financial security and a fund scheme against the offshore oil operator to ensure the payment of compensation for natural resources.

REFERENCES

Books and Book Articles

- Birnie, Patricia and Boyle, Alan. *International Law & The Environment*. 2nd ed. New York: Oxford University Press 2002.
- Kahn, James R. *The Economic Approach to Environmental and Natural Resources*. Fort Worth, Tex.: Harcourt Brace & Company, 1995.
- อุดมศักดิ์ สินธิพงษ์. “กฎหมายเกี่ยวกับสิ่งแวดล้อม.” พิมพ์ครั้งที่ 4. กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2556. (Udomsak Sinthipong. “*Environmental Law*.” 4th ed. Bangkok: Winyuchon Publication House, 2013).

Electronic Media

- “Economic Assessment of Natural Resource Damages”. http://www.exponent.com/economic_assessment_of_natural_resource_damages_3/ (accessed June 3, 2015).
- “Overview of Economic Valuation Methods”.
https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAAahUKEwjmn9ucy4fHAhVBH44KHVTmCNM&url=http%3A%2F%2Fwww.fsd.nl%2Fdownloadattachment%2F73222%2F59929%2Feconomic%2520valuation%2520methods.pdf&ei=oJO8VebPCsG-uATUzKOYDQ&usg=AFQjCNHcLEH8TUxF0NCGSZI_TbxTJoO7Lw&sig2=ATNUKi_kHFMUasT2Hwl1vg16651/1/fs0303.pdf (accessed June 7, 2015).
- Brander, Luke, Gómez-Baggethun, Erik, Martín-López, Berta, and Verma, Madhu et al. *Chapter 5 The economics of valuing ecosystem services and biodiversity* 17 (March 2010). <http://www.teebweb.org/wp-content/uploads/2013/04/D0-Chapter-5-The-economics-of-valuing-ecosystem-services-and-biodiversity.pdf> (accessed June 7, 2015).
- Brans, Edward H.P. and Uilhorn, Mark. “Liability for Damage to Natural Resources”. Background Paper for EU White Paper on Environmental Liability (September 17, 1997). <http://ec.europa.eu/environment/legal/liability/pdf/ecodamage.pdf> (accessed May 26, 2015).
- Carson, Rebecca M. and Bergstrom, John C. “A Review of Ecosystem Valuation Techniques” (December 2003). <http://ageconsearch.umn.edu/bitstream/>
- Dosi, Cesare. “Environmental Values, Valuation Methods, and Natural Disaster Damage Assessment” (June 2001). http://repositorio.cepal.org/bitstream/handle/11362/5722/S01050460_en.pdf?sequence=1 (accessed June 5, 2015).
- Dziegielewska, Dominika, and Tietenberg, Tom. “Total Economic Value” (October 13, 2013). <http://www.eoearth.org/view/article/51cbef167896bb431f69c4b5/> (accessed June 5, 2015).
- [economic_assessment_of_natural_resource_damages_3/](http://www.exponent.com/economic_assessment_of_natural_resource_damages_3/) (accessed June 3, 2015).
- Hanley, Nick, Mourato, Susana and Wright, Robert E. “Choice Modeling Approaches: A Superior Alternative for Environmental Valuation?” *Journal of Economic Surveys* 15, no. 3 (2001): 435-462. <http://onlinelibrary.wiley.com/doi/10.1111/1467-6419.00145/pdf> (accessed June 7, 2015).

- King, Dennis M., and Mazzotta, Marisa J. "Benefit Transfer Method".
http://www.ecosystemvaluation.org/benefit_transfer.htm (accessed June 7, 2015).
- King, Dennis M., and Mazzotta, Marisa J. "Damage Cost Avoided, Replacement Cost and Substitute Cost Methods".
http://www.ecosystemvaluation.org/cost_avoided.htm (accessed June 7, 2015).
- King, Dennis M., and Mazzotta, Marisa J. "Hedonic Pricing Method".
http://www.ecosystemvaluation.org/hedonic_pricing.htm (accessed June 7, 2015).
- Lawler, James J. and Parle, William M. "Expansion of the Public Trust Doctrine in Environmental Law: An Examination of Judicial Policy Making by State Courts" *Social Science Quarterly* 70, no. 1 (March 1989): 134-148.
<http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=a027d724-26ec-4369-9224-e4a2b5e8fa86%40sessionmgr4003&vid=0&hid=4102> (accessed June 4, 2015).
- Memorandum from the Department of Energy on Natural Resource Valuation: A Primer on Concepts and Techniques to EH-41 Web Site Users, Appendix A (October 6, 1997). http://www.environmentalmanager.org/wp-content/uploads/2008/04/valuation_primer_from_doe.pdf (accessed June 8, 2015).
- National Oceanic and Atmospheric Administration of the U.S. Department of Commerce. "Economic Valuation of Natural Resources: A Handbook for Coastal Resource Policymakers" *NOAA Coastal Ocean Program Decision Analysis Series No. 5* (1995). http://docs.lib.noaa.gov/noaa_documents/
- National Research Council of the National Academies. "Valuing Ecosystem Services: Toward Better Environmental Decision-Making" *The National Academies Press* (2005). http://download.nap.edu/cart/download.cgi?&record_id=11139 (accessed June 5, 2015).
 NOS/NCCOS/COP/DAS/DAS_5.pdf (accessed June 5, 2015).
- Science Advisory Board of the U.S. Environmental Protection Agency. "Habitat Equivalency Analysis".
[http://yosemite.epa.gov/Sab/Sabproduct.nsf/WebFiles/HEA/\\$File/HEA-03-09-09.pdf](http://yosemite.epa.gov/Sab/Sabproduct.nsf/WebFiles/HEA/$File/HEA-03-09-09.pdf) (accessed June 7, 2015).

Other Materials

The Petroleum Act B.E. 2514

The Enhancement and Conservation of the National Environmental Quality Act B.E. 2535

CONSUMER PROTECTION: THE RIGHT TO RETURN GOODS PURCHASED IN STORES IN THAILAND*

*Paphon Pariponpochanapisuti***

ABSTRACT

Consumer protection laws and regulations in Thailand impose no requirements on sellers to disclose information about their returns policy. It is consumer's own responsibility to enquire about their right to return the goods. Although some stores began to offer the right to return the goods to consumers when they are not satisfied with the goods purchased, other stores do not adopt the same policy. This article is aimed at exploring the right to return the goods purchased in stores based on consumers' satisfaction in Thailand within the scope of the consumer protection law. It also examines whether and how law concerning consumer protection in the United States, at both federal and state levels, protects consumers by giving them the right to return the goods purchased in store when they are not satisfied with them. This article discovers that although the law in the United States does not grant consumers the right to return the goods purchased in stores, it imposes the duty on sellers to inform consumers of the availability of the right to return. This effectively leads to the adoption of returns policy based on consumers' satisfaction by nearly every store in the United States. In comparison, the right to return goods seems to be alien to consumer protection law in Thailand. The study finds the absence of such right is inadequate for consumer protection. Therefore, the article proposes two possible approaches as the solutions. The first approach is to amend the existing statute on consumers' right, the Consumer Protection Act, B.E. 2522 (1979), by adding the right to return goods purchased in stores based on consumers' satisfaction. The second approach is to use the existing mechanism. By this, the Consumer Protection Board and its relevant ad hoc committees exercise their power given by the Act to regulate or impose the disclosure of information on returns policy on sellers and stores. Finally, whether the first or second approach is adopted, there should be a sanction imposed on sellers for failure to meet the requirement to disclose their returns policy or adhere to the mandatory disclosure of information on returns policy to reach an efficient enforcement of the consumer protection law and policy.

Keywords: Consumer Protection, Right to return goods, Returns policy

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บทคัดย่อ

กฎหมายและข้อบังคับในการคุ้มครองผู้บริโภคในประเทศไทยไม่ได้กำหนดความต้องการให้ผู้ขายต้องเปิดเผยข้อมูลเกี่ยวกับนโยบายการคืนสินค้า ผู้บริโภคมีหน้าที่ต้องสอบถามถึงสิทธิในการคืนสินค้าด้วยตนเอง ถึงแม้ว่าร้านค้าบางร้านได้เริ่มเสนอสิทธิในการคืนสินค้าให้แก่ผู้บริโภคเมื่อผู้บริโภคไม่พึงพอใจในสินค้าที่ซื้อไปแล้ว ร้านค้าบางร้านก็ไม่ได้เสนอนโยบายในรูปแบบเดียวกัน บทความนี้มุ่งที่จะสำรวจสิทธิในการคืนสินค้าที่ซื้อจากร้านค้าในประเทศไทยบนพื้นฐานของความพึงพอใจของผู้บริโภคภายใต้ขอบเขตของกฎหมายคุ้มครองผู้บริโภค บทความนี้ยังวิเคราะห์ด้วยว่าการคุ้มครองผู้บริโภคในประเทศสหรัฐอเมริกาทั้งในกฎหมายระดับสหพันธรัฐและมลรัฐมีการคุ้มครองผู้บริโภคโดยให้สิทธิในการคืนสินค้าแก่ผู้บริโภคที่ไม่พึงพอใจในสินค้าที่ซื้อจากร้านค้าอย่างไร บทความนี้พบว่า ถึงแม้ว่ากฎหมายในสหรัฐอเมริกาไม่ได้ให้สิทธิในการคืนสินค้าแก่ผู้บริโภคที่ซื้อสินค้าในร้านค้า แต่กฎหมายกำหนดหน้าที่ต่อผู้ขายที่ต้องแจ้งให้ผู้บริโภคทราบถึงการมีสิทธิในการคืนสินค้า การกำหนดหน้าที่แก่ผู้ขายเช่นนี้นำไปสู่การรับนโยบายการคืนสินค้าบนพื้นฐานของความพึงพอใจในสินค้าของผู้บริโภคของร้านค้าเกือบทุกร้านในประเทศสหรัฐอเมริกาอย่างมีประสิทธิภาพ ในทางเปรียบเทียบนั้น สิทธิในการคืนสินค้าดูเหมือนจะแตกต่างกันในกฎหมายคุ้มครองผู้บริโภคในประเทศไทย การศึกษาพบว่า การไม่มีสิทธิดังกล่าวนี้ไม่เพียงพอต่อการคุ้มครองผู้บริโภค ดังนั้น บทความนี้จึงเสนอแนะแนวทางที่เป็นไปได้สองแนวทางในการแก้ปัญหา แนวทางที่หนึ่งคือการแก้ไขเพิ่มเติมบทบัญญัติกฎหมายคุ้มครองผู้บริโภคที่มีอยู่แล้ว คือพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. ๒๕๖๒ โดยการเพิ่มสิทธิในการคืนสินค้าที่ซื้อในร้านค้าบนพื้นฐานของความพึงพอใจของผู้บริโภค ส่วนแนวทางที่สองคือการใช้กลไกของกฎหมายที่มีอยู่ โดยวิธีการนี้คณะกรรมการคุ้มครองผู้บริโภคและคณะกรรมการเฉพาะด้านที่เกี่ยวข้องใช้อำนาจที่พระราชบัญญัติคุ้มครองผู้บริโภคให้ไว้กำหนดการเปิดเผยข้อมูลเกี่ยวกับนโยบายการคืนสินค้าต่อผู้ขายและร้านค้า และสุดท้ายไม่ว่าจะใช้แนวทางใดก็ควรกำหนดมาตรการลงโทษต่อผู้ขายที่ไม่ทำตามความต้องการในการเปิดเผยข้อมูลเกี่ยวกับนโยบายการคืนสินค้าของตนหรือการบังคับให้เปิดเผยข้อมูลเกี่ยวกับนโยบายการคืนสินค้าด้วย เพื่อให้การบังคับใช้กฎหมายและนโยบายคุ้มครองผู้บริโภคเป็นไปอย่างมีประสิทธิภาพ

คำสำคัญ: การคุ้มครองผู้บริโภค, สิทธิในการคืนสินค้า, นโยบายการคืนสินค้า

Introduction

The propensity of today's businesses to use marketing and advertising techniques to promote the selling of goods and services to the public is liable to disadvantage consumers who have insufficient knowledge of the industry. Although there are some provisions in law that specify policies to remedy consumers' loss and injury, these procedures are usually time-consuming and costly; therefore, it is necessary to enact a law that provides protection for consumers in order to prevent and remedy them from being disadvantaged. Initially, the legislation in Thailand did not specifically consider consumer protection issues. At that time, the law only sought to maintain public safety and prevent damage caused by public consumption. The relevant Acts included, but not limited to, the Public Health Act B.E. 2484 (1941), the Food Control Act B.E. 2484 (1941), the Sale of Drugs Act of B.E. 2493 (1950), and the Cosmetics Act B.E. 2517 (1974). The government was mandated to establish and control the standards of businesses that involved public consumption, but not to remedy the damage caused by consumption.¹ Then, the Consumer Protection Act ("CPA") B.E.

¹ Susom Supanit, **Commentary on Consumer Protection Laws**, 2014, 24-25.

2522 was enacted in 1979, and this led to the reform of consumer protection in Thailand.

The CPA specifically focused on consumer protection matters. The Act established the role of the Consumer Protection Board as the primary organisation with the authority to control consumer protection policies rather than organisations pertaining to foods and drugs authorised by previous acts. Another objective of the CPA was to specify basic consumer rights. The Act divides them into five categories; (1) the right to receive correct and sufficient information and description as to the quality of goods or services,² which includes the right to receive correct advertisements or labels representing no harm to consumers, as well as the right to be made aware of sufficient correct information about a product or service to purchase such product or service without unfairness; (2) the right to enjoy freedom in selecting goods or services,³ which includes the right to select and purchase goods and services without unfair inducement; (3) the right to safety in using goods or services,⁴ which includes the right to receive products or service with the appropriate safety standards of use, not to be harmful to life, body, or property when following the instructions or being careful of the condition of such product or service; (4) the right to a fair contract,⁵ which includes the right to receive a provisional agreement without the businessman taking advantage; and (5) the right to have damage considered and compensated.⁶ The CPA was amended twice in 1998 (B.E. 2541) and 2013 (B.E. 2013), and it is still in force today.

A contract of sale is the most common contract in everyday life. It involves a consumer and a business and it clearly reflects the inequity of the bargaining power of these two actors. The terms and conditions in the contract are usually imposed by the sellers and consumers have no opportunity to negotiate; if they want the goods, they have to accept the terms. The general principle of freedom of contract and *caveat emptor* (let the buyer beware) is no longer adequate to ensure fairness to both parties in a contract of sale, especially the consumer; hence, many consumer protection laws and policies have been enacted to control the terms and conditions of a contract of sale. For example, consumers' right to return the goods they purchased is a right constituted by the contract of sale between the consumer and the seller. Whether consumers are allowed to return the goods or terminate the contract and on which grounds solely depends on the policies of the seller and the policies of different sellers may vary. They may also vary due to the focus of the protection, and consumer protection law plays a crucial role in this situation.

In the US, consumers' right to return goods is based on product warranties. Sellers have a duty to disclose information about the warranties they extend to consumers. Although sellers are not required to provide consumers with a returns policy, some states have expanded the disclosure principle to include such a policy so that sellers of goods are required to disclose the terms and conditions under which consumers who purchase goods from their stores can return unwanted or defective products. Furthermore, another rule called the Cooling-off rule permits consumers to return goods in some types of sales within an imposed period of time.

² Section 4(1) Consumer Protection Act, B.E. 2522 (1979)

³ Section 4(2) Consumer Protection Act, B.E. 2522 (1979)

⁴ Section 4(3) Consumer Protection Act, B.E. 2522 (1979)

⁵ Section 4(3 bis) Consumer Protection Act, B.E. 2522 (1979)

⁶ Section 4(4) Consumer Protection Act, B.E. 2522 (1979)

In Thailand, consumer protection laws and regulations do not require sellers to disclose their returns policy. Consumers themselves are solely responsible for discovering and being aware of such policies. Although some leading stores in Thailand began to offer their consumers the right to return the goods purchased, many do not adopt the same policy. Whilst, in comparison, almost every store in the US offers their customers the right to return the goods purchased. The main question is what is the legal basis of the right to return goods purchased in stores in Thailand and the US. Is this right recognized by customer protection law in Thailand and in the US? This article attempts to discover the legal basis of the returns policy in both Thailand and the US. It purports to explore the laws, regulations, and rules related to consumer protection in terms of the right to return goods purchased from stores in the US, where consumers receive more protection, as well as to analyse the inadequacy of the existing laws in Thailand to protect consumers in this respect. The results are expected to lead to some suitable solutions to the problem by comparing Thai law with the appropriate laws and policies of the US and considering the balance between consumers' rights and the burdens of businesses.

This article consists of four parts. The first part explores the consumers' right to return goods in the United States; how are consumers entitled to such rights? What is the requirement and limitation of their rights? The second part explores the consumers' right to return goods in Thailand; whether consumers have the right to return goods under the existing Thai laws? The third part is the comparative analysis of the right in the two countries. And, the final part is the proposal on whether Thailand should or should not entitle consumers to the right to return goods.

Consumers' Right to Return Goods in the United States

When consumers purchase goods, they enter into a contract of sale, which means that they are bound by the general principle of sales with the rights and duties of the buyer under the Uniform Commercial Code Article 2 related to sales. Sellers are generally not obliged to take back the goods unless they do not conform to the contract or there is an agreement with the consumers to do so, while consumers have the right to reject the goods and/or terminate or cancel the contract in certain circumstances, such as improper delivery⁷ or a breach of contract.⁸ Consumers who are merely unhappy with the goods when they have had a chance to inspect or use them have no remedy as long as the goods conform to the description and warranty;⁹ however, they are sometimes entitled to the right to return the goods they purchased from sellers without giving any reason. They are not obliged to explain why they want to terminate the contract; all they need to do is return the goods or send the seller a notice of termination within the pre-imposed period of time.¹⁰ Yet, consumers are not always given this right. Most of the time, whether or not the return is accepted depends on the policies of sellers or stores and they may or may not accept it. The law only requires them to always accept a return in some circumstances for a specific purpose.

Consumers' right to return is based on consumers' product warranty. A warranty may allow the purchased goods to be returned, replaced, or repaired. The

⁷ Section 2-601

⁸ Section 2-106

⁹ Ben-Shahar, Omri and Eric A. Posner. "The Right to Withdraw in Contract Law," 3-4.

¹⁰ Smith, Jan M. "Symposium Issue Consumer Protection: Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?" 2.

federal law that governs all tangible consumer product warranties in the United States is the Magnuson-Moss Warranty Act, which requires manufacturers and sellers of consumer products to provide consumers with detailed information about warranties. In addition, it affects both the rights of consumers and the obligations of warrantors in written warranties. The Federal Trade Commission (“FTC”), the consumer protection agencies at a federal level, with the authority to enforce a large number of federal acts related to products and practices, also participated in adopting the Act itself, regulating its rules, and providing guidelines for businesses and consumers.¹¹ It adopted three Rules under the Act, namely, the rule on Disclosure of Written Consumer Product Warranty Terms and Conditions (the Disclosure Rule), the Rule on Pre-Sale Availability of Written Warranty Terms (the Pre-Sale Availability Rule), and the Rule on Informal Dispute Settlement Procedures (the Dispute Resolution Rule). In addition, it has issued an interpretive rule that clarifies certain terms and explains some of the provisions of the Act. The Act and the Rules contain three basic requirements that may apply to sellers who provide warranties: (1) the seller, as a warrantor, must designate or entitle the written warranty as either “full” or “limited.”; (2) the seller, as a warrantor, must state certain specified information about the coverage of the warranty in a single, clear, and easy-to-read document; and (3) the seller, as a warrantor or a seller, must ensure that warranties are available where the warranted consumer products are sold so that consumers can read them before making a purchase.

Since diverse warranties are offered by different sellers and stores, consumers need to be aware of the terms and conditions when they are purchasing a specific product. It is important to understand just what is covered by the warranty and what limitations may apply. Although there are no laws or rules at the federal level that require sellers and stores to have a returns policy, some laws at the state level require them to inform consumers of their policy. The violation of this law could lead to a penalty or more financial burdens. As a result, almost all retail stores in the United States permit customers to return merchandise for a refund within a fixed period of time¹², but different stores specify different durations, from a few days to a very long time.¹³ However, some retailers do not post policies that reflect imposed conditions or limits on accepting returned merchandise, and some do not accept returns at all.¹⁴ As a result, some states impose their own laws on sellers’ application of returns policies to their citizens. Thirteen of the fifty US states have laws that cover sellers’ refund, return, and exchange policy to protect consumers who purchase goods in stores. The law usually requires returns policies to be prominently displayed at the place of purchase in order to be valid.¹⁵ The mandatory policy posting provided by each state are various. They are different in these aspects: The application of states’ policy; the requirements that sellers are obliged to follow; the exceptions for specific types of goods; and the remedy when sellers fail to meet the requirements. The table below shows the

¹¹ *Id.*

¹² Smith, Jan M. “Symposium Issue Consumer Protection: Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?” 2.

¹³ Ben-Shahar, Omri and Eric A. Posner. “The Right to Withdraw in Contract Law,” 3-4.

¹⁴ USLegal, “Mandatory Policy Posting,”

<http://consumerprotection.uslegal.com/purchases-and-returns/returning-consumer-purchases/mandatory-policy-posting/> (accessed August 4, 2015)

¹⁵ Findlaw, “Customer Returns and Refund Laws by State,”

<http://consumer.findlaw.com/consumer-transactions/customer-returns-and-refund-laws-by-state.html> (accessed August 4, 2015)

comparison of the applications and conditions of return policies among the mentioned thirteen states.

	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
California	All retailers who sells goods to the public in a state that has a policy of not giving full cash or credit refunds, or not allowing equal exchanges or any combination for at least 7 days after the date of purchase	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The retailers must conspicuously display that policy, either on signs posted at each cash register and sales counter, at each public entrance, on tags attached to each item sold under that policy, or on the retailer's order forms	The purchaser can return an item for a full refund within thirty days of purchase	The requirements do not apply to food, plants, flowers, perishable goods, goods marked "as is," "no returns accept," or with similar language, goods used or damaged after purchase, customised goods by ordered, goods not returned with their original package, and goods that cannot be resold due to health consideration.

	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Connecticut	Retailers in the state	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The policy must be disclosed to consumers when purchasing	Consumers may return any new, unused item to the store with a proof of purchase within seven calendar days, and get a cash refund on a cash sale, or a credit to consumers' account on a credit sale	The law does not apply to food, perishable items, plants, custom-made or custom-ordered goods, items that have been used, items that cannot be resold under state regulations, or items marked "as is" or "final sale," or consumers return the goods without a proof of purchase
Florida	Sellers who offer goods for sale to the general public and offer no cash refund,	It is mandatory to inform their policy to consumers, but	Sellers must post a sign indicating "no refunds" or	Sellers have the duty to grant consumers, upon request and	The law do not apply to the sale of food, perishable goods, personalised or
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Florida (continued)	credit refund, or exchange of merchandise	not mandatory to have a returns policy	"no exchange" at the point of sale	proof of purchase, a refund of the goods within seven days of the date of purchase	custom-made goods on the request of the consumer, or goods that cannot be resold by the

				on condition that they are unused and in the original package	seller
Hawaii	Sellers who sell goods in the state	It is mandatory to have the policy option provided by law. And, it is also mandatory to inform such policy to consumers	Sellers must choose policies from the options provided by law which are: (1) the seller accepts refunds only; (2) the seller accepts refunds OR merchandise credit only; (3) the seller accepts exchanges	Sellers must accept the return	Sellers do not have to accept the return; for example, when there is no proof of purchase, when consumers have retained the goods in excess of sixty days after the purchase, when the goods have been used or damaged
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Hawaii (continued)		not mandatory to have a returns policy	OR merchandise credits only; or (4) the seller DOES NOT accept any refunds, merchandise credits, or exchanges. Then they must post a clear sign to notify consumers of it		after sale, or altered by consumers at the time of or after the sale, and when the goods are of a type that is unsuitable for resale

Maryland	Merchants in any retail sale If they fail to do so, a merchant must accept the return within a reasonable time of the purchase.	It is mandatory to have the policy option provided by law. And, it is also mandatory to inform such policy to consumers	The merchants must disclose to all customers in writing, either on the sales form, by a clearly visible sign, or by conspicuous label on the consumer goods, the terms and	The merchants must accept the return made within a reasonable time of the purchase	The regulation does not apply to the sale of do not apply to the sale of food, perishable goods, goods which are custom made, or which are custom-altered at the request
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Maryland (continued)			conditions of the merchant's refund and exchange policies, or a policy of no refunds or exchanges		of the consumer; or goods which cannot be resold by the merchant because of any valid law or regulation promulgated by a governmental body
Massachusetts	Merchants of goods	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The merchants must clearly and conspicuously inform consumers of their refund, return, and cancellation policies	The merchants must accept the return of goods made within a reasonable period of time	The exceptions are as provided by merchants policy

			before the transaction is completed		
Minnesota	Sellers who regularly sells goods at retail to consumers	It is mandatory to inform their policy to consumers, but not	The sellers must clearly and conspicuously	The sellers must accept the return of goods if they are	The requirements do not apply to home solicitation sales,
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Minnesota (continued)		mandatory to have a returns policy	displayed and printed in boldface type of a minimum size of fourteen points in their shops	judged to be in an acceptable condition by the seller's reasonable and objective standard, and the consumers return them within a reasonable time from the date of purchase with the proof of purchase	custom or specialised goods ordered by consumers, or sales that are subject to a written agreement or contract under the Uniform Commercial Code
New Jersey	Every retail sellers in the state	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The sellers are required to disclose their refund policy by means provided by the law	Sellers who fail to post their policies are liable to the consumers, for up to 20 days from	No exception. The requirements apply to all manchadise sold in a store

				purchase, for a cash refund or a credit	
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
New York	Every retail store offering goods to public	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The stores must conspicuously post their refund policy related to all goods, wares or merchandise by the manners provided by law	The store is liable to the consumers for a cash refund or a credit for a period of up to 20 days from the date of purchase, at the buyer's option, provided that the merchandise has not been used or damaged by the buyer	The requirements do not apply to retail stores that have a policy of providing a cash refund for a cash purchase or providing a cash refund or issuing a credit for a credit purchase for a period of not less than 20 days after the date of purchase
Ohio	Sellers of goods in the state	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The sellers' must clearly and conspicuously post their policy where consumers can see before the purchase	Consumers are entitled to a refund on their request	The requirements do not apply to a consumer transaction in connection with a residential mortgage
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Rhode Island	Sellers of goods in the state	It is mandatory to inform their policy to	The seller must clearly informed consumers of	Consumers have right to return the	The requirements do not apply to the sale of

		consumers, but not mandatory to have a returns policy	their policy by placing a poster or other appropriate notice at the point of display or at the cash register or at the store entrance indicating that all sales are final and that goods are not returnable	goods within ten business days from the date of purchase	books, magazines, or any publications, food, perishable items, merchandise that is substantially custom-made or custom-finished, items for internal consumption, items sold "as is", or any items presently prohibited for refund, return, or exchange by a retailer by federal or state law or governmental agency regulations
	Scope of Application	Mandatory/Optional	Requirements	Effects	Exceptions
Utah	Sellers of goods in the state	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The policy must be clearly and conspicuously posted at the time of sale at the point of display, point of sale, or store entrance. It	Consumers can return non-used, non-damaged or non-defective goods with reasonable	The requirements do not apply to food, perishable items, merchandise which is substantially custom made or custom

			may be verbal or written, depending on the type of sale	proof of purchase	finished
Virginia	Sellers of goods in the state	It is mandatory to inform their policy to consumers, but not mandatory to have a returns policy	The sellers must disclose all conditions, charges, or fees related to the return of goods for refund, exchange or credit	Consumers are entitled to return the goods within a reasonable time from the date of purchase	The requirements do not apply to a merchant who offer a cash refund or credit-card refund within 20 days or more of purchase

Consumers' Right to Return Goods in Thailand

As mentioned above, the CPA specifies and categorises the basic consumer rights that are protected under the law into the following five kinds;

1) The right to receive correct and sufficient information and description as to the quality of goods or services¹⁶

This right includes consumers' right to receive correct advertisements or labels indicating that the product will not harm them, as well as the right to be aware that the information about a product or service is sufficiently correct to enable them to purchase such a product or service without being treated unfairly.¹⁷

2) The right to enjoy freedom when selecting goods or services¹⁸

This is consumers' right to choose, select, and purchase goods and services without unfair inducement.

3) The right to safety when using goods or services¹⁹

This right includes consumers' right to receive safe products or services with an appropriate standard of use, not harmful to life, body, or property when following the instructions or being careful with the conditions of such products or services

4) The right to a fair contract²⁰

This is consumers' right to make a provisional agreement without advantage being taken by the businessman.

5) The right to have injury considered and compensated²¹

This is consumers' right to be protected and compensated for infringement in accordance with clauses 1, 2, 3, and 4 as mentioned.²²

Although the Act guarantees to protect these basic consumer rights by law, consumers also have a duty to protect themselves. The Consumer Protection Board encourages consumers to protect themselves as a preliminary measure by following its instructions.²³

¹⁶ Section 4(1) Consumer Protection Act, B.E. 2522 (1979)

¹⁷ The Office of Consumer Protection Board. **OCPB and Consumer Protection**, Bangkok, 2553, 6.

¹⁸ Section 4(2) Consumer Protection Act, B.E. 2522 (1979)

¹⁹ Section 4(3) Consumer Protection Act, B.E. 2522 (1979)

²⁰ Section 4(3 bis) Consumer Protection Act, B.E. 2522 (1979)

²¹ Section 4(4) Consumer Protection Act, B.E. 2522 (1979)

²² Office of the Consumer Protection Board. "*5 Consumer's Rights*," http://www.ocpb.go.th/ewtadmin/ewt/ocpb_eng/ewt_news.php?nid=10 (accessed August 4, 2015)

²³ Office of Consumer Protection Board, **OCPB and Consumer Protection**, Bangkok, 2553, 6.

Firstly, consumers should use reasonable caution when purchasing goods or services, which means they should examine the label, the quantity, and the price to determine if it is fair and reasonable. They should not believe the text of the advertisement without thoroughly considering it and gathering further information about the goods and services.

Secondly, consumers should examine the language, terms and conditions of the contract thoroughly before entering into it. If there is any doubt about the terms and conditions, they should consult experts or ask for more information until the doubt is cleared.

Thirdly, the terms and conditions that affect consumers' rights and duties should be made in writing and signed by the manufacturer, or the businessman, or the retailer, or the seller.

Fourthly, consumers should collect the documents or any relevant evidence to prove the rights and duties of the parties to the contract. The evidence could be the goods themselves, indicating that the quantity or condition is not as it appears on the label or in the advertisement, or could be harmful to consumers. More importantly, consumers should remember where they bought the goods and services in order to be able to take legal action, if necessary.

Finally, consumers should keep the contract and any written documents if they need to make a claim under the procedures provided by law in cases where there is an infringement of any consumers' rights.

The right to return goods is generally constituted by the contract terms and provisions of the law of contract in the Civil and Commercial Code ("CCC"). Since consumers are accorded their rights and protection by means of consumer protection laws, they are usually buyers in a contract of sale with businessmen and retailers. Therefore, they simultaneously have rights under the general and specific provisions of contract law as they have rights under the specific laws of consumer protection. However, since there are no specific provisions that directly give consumers the right to return goods, it is necessary to determine if there are any laws with provisions that implicitly entitle consumers to return the goods they have purchased.

Consumers are considered to be buyers in a contract of sale; therefore, buyers' rights also apply to them under sale provisions. According to the CCC, buyers and sellers both have duties and liabilities as follows: (1) Sellers have a duty to deliver the goods to buyers,²⁴ including the duty to transfer the ownership of such goods to them; (2) Liability for defect;²⁵ (3) Liability for Eviction;²⁶ and buyers have an implied duty to accept the goods delivered by sellers. If buyers refuse to accept the goods, they are in default of the contract.²⁷ The only duty of the buyer is to pay the price for the ownership of the goods transferred.²⁸

It could also be implied that consumers' right as buyers that entitles them to return the goods they have purchased is the right to terminate the contract. However, the

²⁴ Section 461 Civil and Commercial Code

²⁵ Section 472 Civil and Commercial Code

²⁶ Section 475 Civil and Commercial Code

²⁷ Section 210 Civil and Commercial Code

²⁸ Section 453 Civil and Commercial Code

CCC only allows the party to the contract to terminate the contract on four grounds provided by the provisions in general obligations, contract, and sales, as shown below.

(1) Termination of contract by agreement

According to Section 386, a contract can be terminated by parties' agreement. The parties to the contract are free to agree or make a clause in the contract to allow them to terminate the contract, or make a new agreement to terminate the contract²⁹ as long as the agreement does not violate the public good and morals.³⁰

(2) Termination of contract by legal provisions

The causes of cancelling a contract stipulated by the CCC are non-performance, breach of contract, and impossible performance.

(2.1) Termination of contract because of non-performance

If the party to the contract does not perform his obligations, the other party is generally entitled to demand a specific performance, as well as claiming for damages; moreover, the other party is also entitled to terminate the contract if the breaching party still does not perform his obligations within a fixed period of time,³¹ unless the non-performance was caused by *force majeure*.³² However, if the nature of the object of the contract or the intention declared by the parties mean that it can only be accomplished by a performance at a fixed time or within a fixed period, and such time or period has passed without one of the parties having performed, the other party is entitled to terminate the contract without the notification mentioned above.³³ In other words, the contract is terminated by a breach of contract by the seller.

(2.2) Termination of contract by *force majeure*

If the performance becomes wholly or partly impossible by a cause of the debtor, the other party, the creditor, is entitled to terminate the contract.³⁴ This cause does not apply if it is impossible to complete the performance because of *force majeure* rather than the fault of the debtor.³⁵

(2.3) Termination of contract by other specific causes

Other than those provided by the general provisions of contract, there are more causes provided by specific provisions of sales that also entitle buyers to terminate the contract. These are different depending on the specific criteria of such contracts. Sometimes the party is entitled to terminate the contract without a breach by the other party. In cases of sale by sample and sale by description, the seller has the duty to deliver the same goods as the sample or as described.³⁶ If the seller fails to do so, the buyer may take action for liability on account of non-correspondence to the sample or description

²⁹ Sanunkorn Sotthibandhu, **Commentary on Juristic Act and Contract**. 2013, 33

³⁰ Akrawit Sumawong, **Commentary on Civil and Commercial Code: Juristic Act and Contract**. 2012, 350

³¹ Section 387 Civil and Commercial Code

³² Sanunkorn Sotthibandhu, *Supra* note 35, at 336-337

³³ Section 388 Civil and Commercial Code

³⁴ Section 389 Civil and Commercial Code

³⁵ Akrawit Sumawong, *Supra* note 35, at 461

³⁶ Section 503 Civil and Commercial Code

within a period of 1 year after delivery.³⁷ A sale on approval is a sale made on condition that the buyer has the opportunity to examine the goods before accepting them.³⁸ The seller can fix a reasonable time for the examination and notify the buyer to answer within that time if he will accept the goods or not.³⁹ If the buyer does not examine the goods and accept them within the time fixed, the seller is no longer bound by the condition of approval.⁴⁰ If the buyer does not wish to enter into the contract of sale after examining the goods, he will either (1) notify the refusal to the seller within the time fixed by the contract, or (2) return the goods within the time, and (3) refuse to pay the price.⁴¹

When the entitled party declares the intention to terminate the contract, the contract is suspended, which means that there has been no contract from the beginning. Each party is bound to restore the other party to his former condition.⁴² The parties must return to their original position as they were before entering into the contract. If any party has received anything from the contract, that party has to return it to the other party.⁴³ In cases where the money has to be repaid, interest is to be added from the time it was received.⁴⁴

The analysis of the CCC shows that the law does not mention or provide sufficient protection for consumers who purchase goods in stores. The CCC provides only general provisions of contract which do not cover the right of the consumers to return the goods, nor the duty of sellers to disclose their returns policy. Likewise, the analysis above demonstrates that neither the CPA, which is the primary law in consumer protection issue, grants consumers the right to return goods nor impose mandatory policy posting requirement on sellers. As a result, return policies solely depend on the stores. The situation in Thailand, therefore, is that while some stores inform consumers about their return policies, some do not, and some do not accept return at all. Consumers bear the burden of making themselves aware of their right to return the goods they purchase in every shop.

Comparative Analysis

Consumer protection in the United States and Thailand are different, especially in terms of consumers' right to return goods they purchased. This chapter contains a comparative analysis of the different issues between the two countries, which are as follows;

(1) Consumer protection law and policy on the protection of consumers' right to return goods purchased in stores

The study of the policy on consumers' right to return goods reveals that US and Thai law appear to be not very different because they both base it on an agreement between consumers and sellers, a difference, however, is significant. The US's warranties Act requires sellers to disclose their policies on product warranties to consumers. The FTC also adopts the principle which thirteen states have expanded and applied it to

³⁷ Section 504 Civil and Commercial Code

³⁸ Section 505 Civil and Commercial Code

³⁹ Section 506 Civil and Commercial Code

⁴⁰ Section 507 Civil and Commercial Code

⁴¹ Section 508 Civil and Commercial Code

⁴² Section 391 Civil and Commercial Code

⁴³ Sanunkorn Sotthibandhu, *Supra* note 35, at 35

⁴⁴ *Id.*

returns policy of goods purchased in stores. In some US states, sellers and stores are required to post their policy publicly or advise consumers of it. This is to make consumers aware of the terms and conditions of each seller and store before they make a decision to purchase goods to avoid confusion and damage that could occur when consumers have unclear and insufficient information before entering into a contract. This mandatory posting of policies does not exist under Thai law. Consumers have to bear the entire burden to explore and become aware of sellers' policies themselves. The question arises as to whether by giving consumers the right to return goods, the consumers are protected at the expense of sellers' interest. On the aspect of the balance between consumer protection and the burden of sellers or stores, the mandatory posting of policies does not disadvantage sellers and stores in any way. Since the law does not require sellers to have a returns policy, they can specify any policy they like. They can either have a returns policy with or without conditions or have no returns policy at all. The law only requires them to inform consumers about it so that they do not have to find out about it themselves. Also, consumers have the right to be informed of the information they need to make a decision to purchase goods and services and the returns policy is considered to be part of that necessary information. This policy efficiently protects consumers without imposing too much burden on the sellers; hence, it achieves a good balance between public and private interests.

(2) Remedy for the violation of consumers' right to return goods

The remedy for the violation of consumers' right to return goods under state law in the US is quite clear. The violation of consumer protection imposes liability or a greater burden on sellers, such as they have to accept the return or the period of time to accept it is extended. Meanwhile, since Thailand has no law or policy regarding the right to return goods purchased in stores, consumers can only find a remedy from the general provisions in the CCC and only in some specific laws. Moreover, the remedies available mainly focus on damage rather than on consumers' right to return the goods. Therefore, unlike their US counterparts, consumers in Thailand do not have legal protection when returning goods. They are only protected in certain circumstances established by law, which is not the same as the disclosure rule or mandatory policy posting rule of the US.

(3) Scope of consumers' protection on the right to return goods

Consumers' right to return goods and the mandatory policy posting rule in the US apply to goods consumers have purchased in stores, but not to every type of goods. Most of the states that enact this rule provide an exception for some goods, such as food, plants, flowers, perishable goods, goods with a mark with similar language to "as is" or "final", goods used or damaged after purchase, customised goods received as ordered, goods not returned with their original packaging, and goods that cannot be resold due to health considerations. In Thailand, the CCC, as a general principle of contract and sales, applies to all goods. The CPA solely apply to specific cases. It mainly apply to contracts involving goods, consumers, and businessmen. According to the Consumer Protection Act: (1) Goods are articles produced or possessed for sale; (2) Consumers are people purchase goods or obtain services and this includes people who duly use goods or those who duly obtain services from a businessman, even if they are not the ones who pay the remuneration; and (3) a businessman is a seller, manufacturer or importer of goods for sale, or a purchaser of goods for re-sale, a person who renders a service, and this includes a person who operates an advertising business. The Act only defines goods roughly and broadly, focusing more on the contract between a consumer and a businessman. Therefore, consumer protection laws generally apply to contracts between consumers and businessmen, regardless of the type of goods.

(4) Purpose of the law and policy on the right to return goods

The US's consumer protection law does not directly allow consumers to return goods in every situations. In fact, the right to return the goods is generally established by agreement. Federal law only requires sellers to disclose the terms and conditions of warranty in the contract, but it is not mandatory to include a clause stating their returns policy. Although sellers are not required to have a returns policy, some states enact a law that requires them to display a poster or verbally inform consumers of this fact, so that consumers know their rights before making a decision to purchase goods from the store. The returns policy also depends on an agreement between the seller and the buyer in Thai law. Neither the general principles of contract nor the consumer protection provisions refer to a returns policy for consumers; therefore, sellers can have any kind of policy they like as long as it does not constitute unfair contract terms. There is no requirement to post a policy or inform consumers if one exists. Consumer protection laws focus more on compensation for consumers who are injured or damaged when using defective goods. Both legal systems leave it to sellers to decide whether or not to have a returns policy; however, the law in the US insists that sellers inform consumers or publicly post their policy, while sellers in Thailand are not required to do so. This may be because the US consumer protection law on this issue tends to focus on the protection of consumers' right to be informed so that they have all the necessary information about their right to choose before purchasing goods, whereas Thailand's consumer protection law is different. It focuses on remedying the damage caused to consumers than preventing it.

(5) The right to return goods purchased in reality

The study of consumers' right to return goods purchased in stores in the US and Thailand shows that the process to return goods in these two countries is different. In the US, every store offers consumers a returns policy, which is clearly displayed so that consumers are aware of it. Sometimes, the policy is printed on receipts, on electronic mail receipts sent to customers, or on store websites where it is displayed in detail. This complete information about the returns policy is a result of a mandatory requirement of stores to publicly post their returns policy that is enacted in some US states, for example, California, New York, and Virginia. It can be perceived that the right to return goods in the US is well protected in practice, which is a good example of the application and enforcement of law in the protection of individuals' rights. On the contrary, the right to return goods purchased in stores in Thailand is problematic and inapplicable. In practice, there are no laws stipulating that sellers or stores have a duty to publicly their returns policy or verbally inform customers of it. As a result, only a few sellers or stores inform or post such a policy. Although some stores, especially those of multi-national companies, post their policy on the receipt, the text is relatively small compared to other details of the receipts; therefore, customers may not clearly recognise their right to return or the fact that the goods are non-refundable. Hence, consumers' right to return goods purchased in stores in Thailand is inadequately protected in practice, and this is not an ideal representation of the intention of consumer protection law, or even fundamental civil law.

Proposals

According to the above comparative analysis, Thai law does not provide sufficient protection for consumers who purchase goods in stores with regard to the right to return goods, unlike US law. Firstly, either expressly or impliedly, there are no specific Acts granting consumers or any individuals the right to return goods. Also, neither the general law, the CCC, nor the specific law, the CPA or other consumer protection Acts mentioned include the right to return goods as one of the rights of buyers or consumers.

The law leaves this matter dependent on a contract between sellers and consumers, and it is this freedom of contract that enables sellers to decide whether or not to offer customers a returns policy. Since there is no law to protect individuals in this area, it is common that most sellers, especially big companies, do not provide consumers with the right to return goods. Inspired by the advantages derived from this study of US law, this thesis primarily argues that the right to return goods should be added to the Thai legal system. It can be done in the two possible approaches described below.

The first approach is to add consumers' right to return goods by enhancing the rights under the existing law. The existing right to terminate the contract provided in the CCC only allows consumers to terminate the contract with sellers when the goods do not conform to the contract or sellers are in breach of contract, or the goods are defective. For the specific provisions on sales, the right to return goods or terminate the contract on the grounds of consumers' dissatisfaction or other grounds besides breach of contract or defect should be added as one of the buyers' rights. However, the CCC is a general law that applies to all types of contracts. Adding the right to return goods by amending the CCC would have too far reaching effects on other contracts involving sale of goods rather than the ones concerning specifically on consumers. Additionally, imposing consumer right to return goods and sellers duty to inform their policy is a very specific issue, which is not the nature of the CCC. Hence, the alternative proposal is amend a specific Act regarding consumer protection. Since the CPA is the primary consumer protection Act that guarantees basic consumer rights, it is the best choice to add another consumer right to be protected. It is also easier to add the right by amending this specific Act rather than amending the CCC, which is the general provision. The right added could be consumers' right to satisfaction, which is defined as "a consumer's right to have access to basic, essential goods and services, such as, food, clothing, shelter, health care, education, public utilities, water, sanitation." This is similar to the right to satisfaction of basic needs cited in the Consumer International Organisation, but it should be expanded to "include, but not be limited to, the right to be satisfied with goods and services purchased" in order to provide protection for consumers when purchasing goods in stores on a returns policy so that they have the right to return goods on the grounds of dissatisfaction.

Apart from amending the code or the Act, the second approach to resolve this matter is to apply and interpret the existing law to cover it. If the provisions of the existing law are open to interpretation or the authorities can include various consumer protection issues, it is less costly and less time-consuming to make the most of it rather than amending the law. As consumers' right to return goods would benefit consumers and protect them from unfair contract terms with sellers, the right to return goods could be expanded by a broader interpretation of the existing basic consumers' right to fair contract. Also, a duty to inform returns policy to sellers could be imposed by the interpretation of consumers' right to be informed. Furthermore, the CPA has established an ad hoc committee on advertising, labelling, and contract to control specific issues. The committee is authorised to standardise regulations or issue announcements in order to achieve the goal of consumer protection. This ad hoc committee could regulate or announce a consumer protection policy on consumers' right to return goods purchased in store. This approach is easier and faster to apply than the first and second solutions. Another issue of consumer protection of consumers' right to return goods purchased in stores is that sellers have no duty to disclose their returns policy to consumers. Consumers have to bear the entire burden to explore and become aware of sellers' policies themselves. It is unfair to impose such a burden on them, since they already have less bargaining power in the contract. The duty to disclose their returns policy should not be too onerous for sellers compared to the advantages consumers will derive from the protection. Therefore, another suggestion from the results of this study is that the returns policy should be mandatory. Sellers should be required to inform or remind consumers

about their policies; moreover, they should be required to post their policy at a notable point in the store where consumers can clearly see it, so that they can know their rights and have sufficient information before making a decision to purchase the goods. In terms of this issue, since advertisements, brochures, or any documents used to promote products are considered to be part of the contract made between consumers and sellers under consumer protection laws, it is not necessary to amend or pass a new law. As mentioned, the CPA has already appointed ad hoc committees on specific issues regarding consumer protection, and they could regulate or announce the mandatory policy posting of consumers' right to return goods requiring sellers to inform or remind consumers of their policy and/or post their policy at notable points in the store where consumers can clearly see it to their advantage. Returns policy is the statement to be seen or known by consumers, it is considered as an advertisement of the stores. Therefore, imposing a mandatory policy posting to the stores should be the responsibility of ad hoc committee on advertisement. Alternatively, an ad hoc committee on contract has the power to prescribe the business in connection with the sale of goods to be a controlled business with respect to receipt of payment. Then, the committee could regulate that the returns policy has to be informed to the consumers in the receipts or at notable points in the store. The Committee could also impose that sellers post their returns policy in the receipt.

Finally, whether the first or second approach is adopted, there should be a sanction imposed on sellers for failure to meet the requirement to disclose their returns policy or adhere to the mandatory posting of such policy to reach an efficient enforcement of the laws, rules, and regulations on this matter. Firstly, it could be imposed that "if sellers or stores violates the mandatory policy posting requirement by failing to inform or remind consumers of their policy, or to post their policy at notable points in the store where consumers can clearly see it, it shall be assumed, regardless of the actual policy the seller or store has, that consumers are entitled to return the goods they purchased within thirty days from the date of purchase." Furthermore, if the violation causes any loss or damage to consumers, sellers or stores who violate the requirement shall also be responsible for such loss or damage. With regard to the penalty, the thesis suggests that there should be further study in the field of Criminal Law regarding the justification and reason of punishment in this kind of business transaction. It might be researched compared to other cases in the field such as the product liability law or the competition law.

To close, these proposed approaches requiring the sellers and stores to post their policy do not put excessive burden on them because the law does not require them to have a returns policy. Either a returns policy with or without conditions or have no returns policy at all can be set by the sellers. Only the duty to inform policy to consumers is imposed. As a result, the thesis argues that these approaches not only grant more protection to consumers, but also achieve a good balance between public and private interests.

REFERENCES

1. Books

1.1 English books

- Bridge, Michael. *The Sale of Goods*. 2nd ed. Oxford: Oxford University Press, 2000.
- Epstein, David G. and Steve H. Nickles. *Consumer Law in a Nutshell*. United States of America: West Publishing Co., 1981.
- Macleod, John. *Consumer Sales Law*. London: Cavendish Publishing Limited, 2002.
- Oughton, David. *Text Book on Consumer Law*. 2nd ed. Blackstone Press Limited, 2000.
- Morganstern, Stanley. *Legal Protection for the Consumer*. United States of America: Oceana Publications, Inc., 1973.
- Stockton, John M. *Sales in a Nutshell*. 2nd ed. United States of America: West Publishing Co., 1981.

1.2 Thai books

- จิต เศรษฐบุตร, และ ดาราวพร ธีระวัฒน์. *หลักกฎหมายแห่งลักษณะนิติกรรมและสัญญา*. พิมพ์ครั้งที่ 7. กรุงเทพฯ: คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556. (Jid Setrabut, and Daraporn Thirawat, Principle of Civil Law: Juristic Act and Contract. Bangkok: Faculty of Law Thammasat University, 2014).
- ไพฑิต เอกจริยกร. *คำอธิบายซื้อขาย แลกเปลี่ยน ให้*. พิมพ์ครั้งที่ 7. กรุงเทพฯ: วิญญูชน, 2556. (Pathaichit Eagjariyakorn. *Commentary on Sale, Exchange, Gift*. 7th ed. 2014. Bangkok: Winyuchon).
- ไพฑิต ปุณฺณพันธ์, และ ประพนธ์ ศาตะมาน. *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะซื้อขาย*. พิมพ์ครั้งที่ 15. กรุงเทพฯ: นิติบรรณการ, 2551. (Paijit Punyapant, and Prapont Sataman, *Commentary on Civil and Commercial Code: Sales*. 7th ed. Bangkok: Nitibunnakan, 2008).
- วิชญ์ เครืองาม, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ซื้อขาย แลกเปลี่ยน ให้*. พิมพ์ครั้งที่ 10. กรุงเทพฯ: นิติบรรณการ, 2549 (Wissanu Krea-ngam, *Commentary on Civil and Commercial Code: Sales, Exchange, Gift*, 10th ed. Bangkok: Nitibunnakan, 2006).
- ศันท์กรณ์ สอดิพันธ์, *คำอธิบายซื้อขาย แลกเปลี่ยน ให้*. พิมพ์ครั้งที่ 5. กรุงเทพฯ: วิญญูชน, 2552. (Sanunkorn Sotthibandhu. *Commentary on Sale, Exchange, Gift*. 5th ed. Bangkok: Winyuchon, 2009).
- ศันท์กรณ์ สอดิพันธ์, *คำอธิบายนิติกรรม-สัญญา*. พิมพ์ครั้งที่ 17. กรุงเทพฯ: วิญญูชน, 2555. (Sanunkorn Sotthibandhu. *Commentary on Juristic Act and Contract*. 17th ed. Bangkok: Winyuchon, 2013).
- สมยศ เชื้อไทย. *หลักกฎหมายซื้อขาย แลกเปลี่ยน ให้*. พิมพ์ครั้งที่ 6. กรุงเทพฯ: วิญญูชน, 2552. (Somyot Chuathai, *Principle of Law (Sale, Exchange, Gift)*, 6th ed. Bangkok: Winyuchon, 2009).
- สุจินตนา ชุมวิสูตร. *หลักกฎหมายซื้อขาย แลกเปลี่ยน ให้*. พิมพ์ครั้งที่ 6. กรุงเทพฯ: วิญญูชน, 2553. (Sujintana Chumvisut. *Principle of Law (Sale, Exchange, Gift)*, 6th ed. Bangkok: Winyuchon, 2010).
- สุชม์ สุภณิตย์. *คำอธิบายกฎหมายคุ้มครองผู้บริโภค*. พิมพ์ครั้งที่ 8. กรุงเทพฯ: จุฬาลงกรณ์มหาวิทยาลัย, 2556. (Susom Supanit, *Commentary on Consumer Protection Laws*, 8th ed. Bangkok: Chulalongkorn University, 2014).

สุขุม ศุภนิติย์. *คำอธิบายพัฒนาการของกฎหมายคุ้มครองผู้บริโภคของไทย*. กรุงเทพฯ: จุฬาลงกรณ์มหาวิทยาลัย, 2554. (Susom Supanit, **Commentary on the Development of Consumer Protection Laws in Thailand**. Bangkok: Chulalongkorn University, 2012).

สำนักงานคณะกรรมการคุ้มครองผู้บริโภค. *สคบ.กับการคุ้มครองผู้บริโภค*. พิมพ์ครั้งที่ 14. กรุงเทพฯ: สำนักงานพระพุทธศาสนาแห่งชาติ, 2553. (Office of Consumer Protection Board, **The Office of Consumer Protection Board and Consumer Protection**. 14th ed. Bangkok: The Office of National Buddhism Press, 2010).

อัครวิทย์ สุมาวงศ์. *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมสัญญา*. พิมพ์ครั้งที่ 8. กรุงเทพฯ: สำนักอบรมกฎหมายแห่งเนติบัณฑิตยสภา, 2555. (Akrawit Sumawong, **Commentary on Civil and Commercial Code: Juristic Act and Contract**. 8th ed. Bangkok: The Institute of Thai Bar Association, 2012.).

Ben-Shahar, Omri and Eric A. Posner. “The Right to Withdraw in Contract Law.” **Journal of Legal Study**, 115 (January 2011).

Smith, Jan M. “Symposium Issue Consumer Protection: Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?” **Penn State International Law Review**, 671 (Winter 2011).

Spencer Weber Waller, Jillian G Brady, R.J. Acosta. “Consumer Protection in the United States: An Overview,” **Loyola University Chicago School of Law**

2. Electronic Media

Consumer International Organisation, “Consumer rights,” <http://www.consumersinternational.org/who-we-are/consumer-rights/> (accessed August 4, 2015)

Consumer International Organisation, “Consumer Bill of Rights,” <http://www.mass.gov/ocabr/government/oca-agencies/dpl-lp/consumer-fact-sheets/consumer-bill-of-rights.html> (accessed August 4, 2015)

Federal Trade Commission. “Businessperson’s Guide to Federal Warranty Law,” <https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law> (accessed August 4, 2015)

Office of the Consumer Protection Board. “5 Consumer rights,” http://www.ocpb.go.th/ewtadmin/ewt/ocpb_eng/ewt_news.php?nid=10 (accessed August 4, 2015)

USLegal, “Mandatory Policy Posting,” <http://consumerprotection.uslegal.com/purchases-and-returns/returning-consumer-purchases/mandatory-policy-posting/#sthash.VXGT3tPl.dpuf> (accessed August 4, 2015)

3. Laws and Regulations

Civil and Commercial Code of Thailand

Consumer Case Procedure Act B.E. 2551 (2008)

Consumer Protection Act, B.E. 2522 (1979)

Magnuson-Moss Warranty Act

Uniform Commercial Code of the United State

LEGAL PROBLEMS ON DRUG QUALITY CONTROL IN THE DRUG LOGISTICS IN THAILAND*

*Pattanapa Jarunsathianchai****

ABSTRACT

Assuring the quality of drugs throughout the drug supply chain, from the point of manufacture to the point of delivery to the patients is of extreme importance. There are many factors affecting the stability of drugs, ranging from the manufacturing process, the environmental conditions, such as, temperature, light, and humidity encountered during transportation to distribution, storage and other activities in the logistics process.

In Thailand, the problems of drug degradation, drug contamination and other drug quality problems are continuously raised by the hospitals, drugstores and patients because some drugs were not properly transported, distributed and stored in accordance with the conditions required on the label of each drug during the logistics process, despite the fact that the drugs are sensitive products and required special conditions, e.g. control over temperature, humidity, light, cleanness, sanitation, prevention of contamination and other factors encountered during transportation, distribution and storage.

This thesis, thus, aims to study the problems of Thai law on drug quality control, comparing them with foreign legislations, such as those of the United Kingdom and Singapore, as well as the guidelines of the World Health Organization and the European Union on the various stages of activities in the drug logistic chain, in order to propose an appropriate legislative solution in the Thai context.

Keywords: Drug Logistics, Drug Quality Control

บทคัดย่อ

ในกระบวนการโลจิสติกส์ยา การประกันคุณภาพของยามีความสำคัญเป็นอย่างยิ่ง เพื่อให้มั่นใจได้ว่าคุณภาพของยาจะได้รับการรักษาไว้ตลอดโซ่ปทานยาซึ่งเริ่มต้นตั้งแต่โรงงานผลิตยาจนถูกส่งถึงผู้ป่วย มีปัจจัยหลายประการที่มีผลกระทบต่อความคงสภาพของยา อาทิ กระบวนการผลิต สภาวะแวดล้อม ได้แก่ อุณหภูมิ แสง และความชื้น ที่ต้องเผชิญในระหว่างการขนส่ง การจัดจำหน่าย การเก็บรักษา และการดำเนินการอื่นๆ ในกระบวนการโลจิสติกส์ยา

ในประเทศไทย ปัญหาเกี่ยวกับการเสื่อมสภาพของยา การปนเปื้อนของยา และปัญหาคุณภาพยาอื่น ๆ นั้นได้มีการร้องเรียนจากโรงพยาบาล ร้านขายยา และผู้ป่วยอย่างต่อเนื่องตลอดมา เนื่องจากยาบางตัวถูกขนส่ง จัดจำหน่าย และจัดเก็บอย่างไม่เหมาะสม ไม่ถูกต้องตามเงื่อนไขที่กำหนดไว้ในฉลากยาแต่ละตัวถึงแม้ว่าในความเป็นจริงแล้ว ยาเป็นผลิตภัณฑ์ที่ไวต่อสภาวะที่สัมผัสซึ่งต้องปฏิบัติตามสภาวะที่กำหนด ตัวอย่างเช่น ต้องมี

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การควบคุมอุณหภูมิ ความชื้น แสง ความสะอาด สุขอนามัย ป้องกันการปนเปื้อน และปัจจัยอื่น ๆ ที่อาจต้องเผชิญในระหว่างการขนส่ง การจัดจำหน่าย และการจัดเก็บ

ดังนั้น วิทยานิพนธ์ฉบับนี้ จึงมุ่งศึกษาถึงปัญหาของกฎหมายไทยในการควบคุมคุณภาพของยา และศึกษาเปรียบเทียบกับหลักของกฎหมายต่างประเทศ อาทิ อังกฤษ สิงคโปร์ และหลักเกณฑ์ขององค์การอนามัยโลก และสหภาพยุโรป ในกิจกรรมต่าง ๆ ของผู้ที่เกี่ยวข้องกับกระบวนการโลจิสติกส์ยา เพื่อทำการวิเคราะห์และเสนอแนวทางแก้ปัญหากฎหมายไทย

Introduction

There is a growing concern regarding the drug quality in Thailand. The problems of drug quality such as drug degradation, drug contamination and drug instability might have been caused by any party involved in the drug supply chain , from the point of manufacturing through the marketing channels.. Therefore, all parties involved in the drug logistics have the responsibility to guarantee the quality and integrity of the drugs. There are many factors affecting the stability of drugs, e.g. the manufacturing process, the environmental conditions such as temperature, light, and humidity encountered during transportation, distribution and storage of drugs and other activities in the logistics process. To ensure the drug stability and efficacious use, the drugs must be transported, distributed and stored in proper conditions in accordance with the conditions required on the label of each drug.

However, many problems affecting the quality of drugs have been reported to the Bureau of Drug and Narcotic, Department of Medical Sciences, Ministry of Public Health in Thailand, by hospitals, clinics and individuals. Between 2009 and 2011, there were 2,424 reports of drug quality problems filed with the drug quality problems reporting center. 28% of the total reports concerned drug degradation, 18% caused by loss of package integrity, 17% was attributable to problems of standards of manufacture and transportation, and 8% involved drug contamination.¹ In 2012, there were 559 reports of drug quality problems filed with the center. Among the incidents reported, 30% were drug degradation, 19% loss of package integrity, 19% concerned standards of manufacture and transportation, and 10% involved drug contamination.² In 2013, a total of 814 complaints were filed with the center and the most common problem among them was drug degradation which attributed to 26%. Apart from that, 23% of the complaints concerned loss of package integrity, 14% was attributable to standards of manufacture and transportation, and 7% concerned drug contamination.³ These

¹ สำนักยาและวัตถุเสพติด , การเฝ้าระวังปัญหาทางกายภาพของผลิตภัณฑ์ยาที่ใช้ในสถานบริการสาธารณสุขปี พ.ศ.

2552-2554, (Bureau of Drug and Narcotic, **Monitoring Physical Problems of Drugs Used**

in Health Centers in the Year 2009 – 2013), at 19, available at

<http://dmcs2.dmcs.moph.go.th/webroot/drug/>

qa30/problem/หนังสือปัญหาคุณภาพยา52-54.pdf (last visited Jan. 18, 2015).

² สำนักยาและวัตถุเสพติด, *ปัญหาคุณภาพยาที่ได้รับรายงานปี พ.ศ. 2555*, *จดหมายข่าวศูนย์รวบรวมข้อมูลปัญหาคุณภาพยา*, มกราคม – เมษายน 2556, (Bureau of Drug and Narcotic, *Drug Quality Problems Reported in the Year 2012, Drug Quality Problems Reporting Center Newsletter*, January – April 2013), at 3-4, available at

<http://dmcs2.dmcs.moph.go.th/webroot/drug/surveillance/newsletter/Newsletter16-1-2556.pdf> (last visited Jan. 18, 2015).

³ สำนักยาและวัตถุเสพติด, *ปัญหาคุณภาพยาที่ได้รับรายงานปี พ.ศ. 2556*, *จดหมายข่าวศูนย์รวบรวมข้อมูลปัญหาคุณภาพยา*, มกราคม – เมษายน 2557, (Bureau of Drug and Narcotic, *Drug Quality Problems Reported in the Year 2013, Drug Quality Problems Reporting Center Newsletter*, January – April 2014), at 1-

complaints showed that the drug quality problems have been increasing steadily and there is no solution in sight. These drug quality problems such as drug contamination, drug degradation and drug instability may cause not only ineffective treatment, but also pose as a potential harm to the patient's life.

In this regard, World Health Organization (WHO) recommends that "To maintain the original quality of pharmaceutical products, every party active in the distribution chain has to comply with the applicable legislation and regulations. Every activity in the distribution of pharmaceutical products should be carried out according to the principles of good manufacturing practices (GMP), good storage practice (GSP) and good distribution practice (GDP) as applicable."⁴ WHO also recommends that the principles of GDP should be included in national legislation and guidelines in a country as applicable as a means of establishing minimum standards⁵ and GSP should be applicable in all circumstances where pharmaceutical products are stored and throughout the distribution process⁶. The Ministry of Public Health of Thailand has adopted GMP based on the principles of WHO good manufacturing practices for pharmaceutical products (GMP).⁷

In Thailand, the Drug Act, B.E. 2510 (1967) regulates that any manufacturers, importers and distributors of pharmaceutical products must obtain a license. All licensees must comply with the rules, measures and conditions prescribed in the Ministerial Regulations issued in accordance with the provisions of the Drug Act, B.E. 2510 (1967)⁸. The Drug Act, B.E. 2510 (1967) regulates the standard of manufacturing that the manufacturers must comply with the notifications of the Ministry of Public Health regarding GMP which are the notification of the Ministry of Public Health on good manufacturing practices for modern drugs according to the law on drugs B.E. 2554 (2011) and the notification of the Ministry of Public Health on good manufacturing practices for traditional drugs according to the law on drugs B.E. 2557 (2014). However, the Drug Act, B.E. 2510 (1967) does not regulate or provide guideline on how to properly transport, distribute and store the drugs so that it will not affect the quality and integrity of drugs or contaminate the drugs.

Drug and Drug Stability

A drug is defined as a chemical substance intended for use in the diagnosis, treatment, or prevention of disease in human or other animals.⁹ Drugs are widely used to treat the illness, both physically and mental. According to the Drug Act, B.E. 2510 (1967), drugs are classified into two major groups namely modern drugs and traditional

4, *available at*

<http://dmsc2.dmsc.moph.go.th/webroot/drug/surveillance/newsletter/newsletter17-1-2557.pdf> (last visited Jun. 2, 2015).

⁴ World Health Organization, **WHO Good Distribution Practices for Pharmaceutical Products** 237, *available at*

http://www.who.int/medicines/areas/quality_safety/quality_assurance/GoodDistributionPracticesTRS957Annex5.pdf (last visited Jun. 2, 2015).

⁵ *Id.* at 243.

⁶ *Id.* at 248.

⁷ Government Pharmaceutical Organization, **Good Manufacturing Practice:GMP**, *available at* <https://www.gpo.or.th/Default.aspx?PageContentMode=1&tabid=107> (last visited Jun. 2, 2015).

⁸ The Drug Act, B.E. 2510 (1967) Section 12.

⁹ The American Heritage, **Medical Dictionary**, *available at* <http://medical-dictionary.thefreedictionary.com/drug> (last visited Jun. 2, 2015).

drugs.¹⁰ Modern drugs mean “drugs intended for use in the practice of medical profession, the practice of modern science of healing or the treatment of animal diseases” and traditional drugs mean “drugs intended for use in the practice of the traditional science of healing or the treatment of animal diseases included in the pharmacopoeias of traditional drugs notified by the Minister, or drugs notified by the Minister to be traditional drugs, or drugs having been permitted for drug formula registration as traditional drugs” as defined in Section 4 of the Drug Act, B.E. 2510 (1967) as amended by the Drug Act (No. 3), B.E. 2522 (1979).

Each particular drug is a formulation unique into itself. To ensure the stability of drug in a formulation and the continued effectiveness of the drug throughout its usual shelf life, the formulation must be preserved against decomposition due to chemical degradation and protected from microbial contamination and the destructive influences of excessive heat, light and moisture. In addition, the drug product must be effectively packaged and clearly and completely labeled according to legal regulations. Once the drug product is prepared, it must be properly administered in order to ensure the stability of drug for the patient’s maximum benefit.¹¹

Labelling is the process of identifying a product including the following information: name of the product, active ingredients (type and amount), batch number, expiry date, special storage conditions or handling precautions, directions for use, warnings and precautions, names and addresses of the manufacturer and/or the supplier.¹² If the drug product is not handling in accordance with the instructions or not stored under recommended conditions shown on the label, then, the drug product may be expected to degrade more rapidly and may not be fitness for use because its stability may be affected. There are many factors affecting the stability of a drug product, namely the active ingredients stability; the potential interaction between active and inactive ingredients; the manufacturing process; the dosage form; the container/closure system; the environmental conditions encountered during shipment, storage, and handling; and the length of time between manufacture and usage.¹³ In addition, other factors such as the cleanness, sanitation and prevention of contamination should also be considered while the drugs are distributed and stored before delivering to the patients.

Storage conditions to maintain the drug stability can be divided into 3 factors, i.e. temperature, humidity and light based on environmental factors affecting drug stability.¹⁴ If the drugs lost its stability, then effects are loss of active, increase in concentration of active ingredients, alteration in bioavailability, loss of content uniformity, loss of pharmaceutical elegance and patient acceptability, formation of toxic degradation products, loss of package integrity, and reduction of label quality.¹⁵

¹⁰ The Drug Act, B.E. 2510 (1967) Section 4.

¹¹ Loyd V. Allen, Jr. & Howard C. Ansel, **Ansel’s Pharmaceutical Dosage Forms and Drug Delivery Systems** 97 (Sirkka Howes ed., Wolters Kluwer 10th ed. 2014).

¹² World Health Organization, *supra* note 4 at 235.

¹³ Brahmaiah Kommanaboyina & C.T. Rhodes, **Trends in Stability Testing, with Emphasis on Stability During Distribution and Storage** (Drug Development and Industrial Pharmacy, Marcel Dekker) 859, 858 (1999), *available at* <http://www.informahealthcare.com> (last visited Dec. 17, 2014).

¹⁴ สมชัยยา สุริฉินท์, การเก็บรักษากับความคงตัวของยาและเภสัชภัณฑ์ (Somchaiya Surichan, **Storage and stability of a drug product**), *available at* <http://www.gpo.or.th/rdi/html/stability.html> (last visited Jun. 2, 2015).

¹⁵ *Id.*

Drug Supply Chain and Drug Logistics

The drug supply chain process is the process which all involving parties working together to source, manufacture and distribute the drug products to the entity responsible for dispensing or providing the drug products to the patients.¹⁶ A basic drug supply chain comprises sourcing of raw materials to manufacture the finished drug products or importing of finished drug products and distributing to the market channels to the patients.

Logistics is the process of planning, implementing, and controlling procedures for the efficient and effective transportation and storage of goods including services, and related information from the point of origin to the point of consumption for the purpose of conforming to customer requirement. Logistics management is that part of supply chain management that plans, implements, and controls the efficient, effective forward and reverses flow and storage of goods, services, and related information between the point of origin and the point of consumption in order to meet customers' requirements.¹⁷ In general, logistics is involved in order-processing, purchases, inbound transport, production plans and schedules, inventory management, distribution and delivery transport, warehouse management, and several information systems such as customer response management, materials requirements planning and distribution requirements planning.¹⁸ There is a risk that the inventory management, the distribution and delivery transport, and the warehouse management will impact on the quality of drugs, apart from the manufacturing process.

The fact that the drugs are sensitive products and must be handled in accordance with instructions and storage conditions in order to maintain the drug quality and avoid the drug contamination and drug degradation, the parties active in the drug logistics have to strictly comply with the drug legislation and guidelines for manufacturing, transportation, distribution and storage of drugs.

Overview of International Standards of Practices

1. World Health Organization (WHO)

According to WHO, the quality assurance can be divided into four major areas: quality control, production, distribution, and inspections.¹⁹ For pharmaceutical products, WHO has developed and laid down guidelines for Good Manufacturing Practices (GMP), Good Distribution Practices (GDP) and Good Storage Practices (GSP) to provide globally accepted standards.

¹⁶ Healthcare Supply Chain Excellence Centre (LogHealth) Mahidol University, **Healthcare Logistics & Supply Chain – Status in Thailand**, available at http://www.nrct.go.th/th/Portals/0/data/ภค/2556/06/3รศ_ตร_ดวงพรรณ_คุณโสภณ.pdf (last visited Jun. 2, 2015).

¹⁷ Kate Vitasek, **Supply Chain Management Terms and Glossary** 117 (2013), available at http://cscmp.org/sites/default/files/user_uploads/resources/downloads/glossary-2013.pdf (last visited Jun. 2, 2015).

¹⁸ Ian Sadler, **Logistics and Supply Chain Integration** (Sage Publications) (2007).

¹⁹ World Health Organization, **About Quality Assurance**, available at http://www.who.int/medicines/areas/quality_safety/quality_assurance/about/en/ (last visited Jan. 18, 2015).

GMP is that part of quality management which ensures that pharmaceutical products are consistently produced and controlled according to the quality standards appropriate to their intended use and as required by the marketing authorization, clinical trial authorization or product specification. It is aimed primarily at managing and minimizing the risks inherent in pharmaceutical manufacture to ensure the quality, safety and efficacy of products.²⁰ GDP is that part of quality assurance that ensures that the quality of a pharmaceutical product is maintained by means of adequate control of the numerous activities which occur during the distribution process as well as providing a tool to secure the distribution system from counterfeits, unapproved, illegally imported, stolen, counterfeit, substandard, adulterated, and/or misbranded pharmaceutical products.²¹ GSP is that part of quality assurance that ensures that the quality of pharmaceutical products is maintained by means of adequate control throughout the storage thereof.²²

2. The Pharmaceutical Inspection Convention and Pharmaceutical Inspection Co-operation Scheme (PIC/S)

PIC/S consists of the Pharmaceutical Inspection Convention (PIC) and the Pharmaceutical Inspection Co-operation Scheme (PIC Scheme), which operate together in parallel in the field of GMP. PIC/S mission is “to lead the international development, implementation and maintenance of harmonized GMP standards and quality systems of inspectorates in the field of medicinal products”.²³ PIC/S provides PIC/S Guide to GMP for Medicinal Products and PIC/S Guide to GDP for Medicinal Products.

Although Food and Drug Administration of Thailand (Thai FDA) is not a member of PIC/S, Thai FDA applied the PIC/S Guide to GMP for Medicinal Products to Thai GMP. Because Thailand has to comply with the ASEAN Sectorial Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products which was signed on April 10, 2009 by 10 Member States of the Association of Southeast Asian Nations (ASEAN).²⁴ As a result, Thailand has to standardize GMP to be in line with those Member States of ASEAN and has to comply with the PIC/S Guide to GMP for Medicinal Products.

PIC/S Guide to GMP for Medicinal Products is that part of quality management which ensures that the holder of a manufacturing authorization must manufacture medicinal products so as to ensure that the medicinal products are fit for their intended use, comply with the requirements of the Marketing Authorization and do not place

²⁰ World Health Organization, **WHO Good Manufacturing Practices for Pharmaceutical Products**, available at http://www.who.int/medicines/areas/quality_safety/quality_assurance/TRS986annex2.pdf (last visited Jun. 14, 2015).

²¹ World Health Organization, *supra* note 4 at 240.

²² *Id.*

²³ Pharmaceutical Inspection Co-operation Scheme, available at <http://www.picscheme.org/> (last visited Jun. 14, 2015).

²⁴ ASEAN Secretariat, **The ASEAN Sectorial Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products**, available at <http://www.asean.org/archive/documents/Agreement%20on%20MRA%20for%20GMP%20Pharmaceutical.pdf> (last visited May 29, 2015).

patients at risk due to inadequate safety, quality or efficacy.²⁵ PIC/S Guide to GDP for Medicinal Products lay down appropriate tools to assist wholesale distributors in conducting their activities and to prevent falsified medicines from entering the legal supply chain. Compliance with these guidelines will ensure control of the distribution chain and consequently maintain the quality and the integrity of medicinal products. Manufacturers performing any distribution activities with their own products must comply with GDP. In addition, relevant sections of these guidelines should also be adhered to by other actors involved in the distribution of medicinal products.²⁶

3. European Union (EU)

European Commission provides Guidelines on GMP and GDP of medicinal products for human use. EU Guidelines for GMP for Medicinal Products for Human and Veterinary Use provides that the holder of a Manufacturing Authorization must manufacture medicinal products so as to ensure that medicinal products are fit for their intended use, comply with the requirements of the Marketing Authorization or Clinical Trial Authorization, as appropriate and do not place patients at risk due to inadequate safety, quality or efficacy.²⁷ EU Guidelines on GDP of medicinal products for human use stated that the wholesale distribution of medicinal products is an important activity in integrated supply chain management. These Guidelines lay down appropriate tools to assist wholesale distributors in conducting their activities and to prevent falsified medicines from entering the legal supply chain. Manufacturers performing any distribution activities with their own products must comply with GDP. Compliance with these Guidelines will ensure control of the distribution chain and consequently maintain the quality and integrity of medicinal products.²⁸

Foreign Laws and Legislations of Standards of Practices

1. Singapore

Singapore is a member of ASEAN, WHO and PIC/S. Singapore is also one of the 10 ASEAN Member States signing the ASEAN Sectorial Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products. Currently, the Singapore law regulating the medicinal products is the Medicines Act. Under the Medicines Act, the law empowers the minister to issue the regulations prescribe the requirements as the minister may consider necessary to the sanitation, cleanliness, temperature, humidity or other factors relating to the risks of drugs deterioration or drug contamination in connection with the manufacture, storage,

²⁵ Pharmaceutical Inspection Co-operation Scheme, **PIC/S Guide to Good Manufacturing Practice for Medicinal Products Part I 1**, available at <http://www.picscheme.org/publication.php> (last visited Jun. 2, 2015).

²⁶ *Id.*

²⁷ European Commission, **EU Guidelines for Good Manufacturing Practice for Medicinal Products for Human and Veterinary Use 2**, available at http://ec.europa.eu/health/files/eudralex/vol-4/vol4-chap1_2013-01_en.pdf (last visited Jun. 2, 2015).

²⁸ European Commission, **EU Guidelines of 5 November 2013 on Good Distribution Practice of Medicinal Products for Human Use**, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:343:0001:0014:EN:PDF> (last visited Jun. 2, 2015).

transportation, sale or supply of medicinal products and violation of the regulation shall be convicted under the penalty prescribed in the Medicines Act.²⁹

For manufacturing of drugs, the Medicines Act controls licensing of manufacturers and wholesale dealer that no person shall manufacture or sell any medicinal product except in accordance with the license granted by this law. The law required that all manufacturers and assemblers of medicinal products for both Western medicines and Chinese Proprietary Medicine must comply with GMP. For the storage, transportation and distribution of drugs, the Medicines Act controls licensing of importers and wholesale dealer of both Western medicines and Chinese Proprietary Medicine. According to Singapore Health Sciences Authority (HSA), before the granting of the license, importers and wholesale dealers must comply with GDP standard and prove to the authority.³⁰

2. United Kingdom (UK)

The regulation of medicines on the UK market is under taken by the Medicines and Healthcare Products Regulatory Agency (MHRA). According to MHRA, before a medicine for human use can be sold in the UK, the medicine product must have a license called a ‘marketing authorisation’ and the companies involved in all stages of the manufacture and distribution of the product must have the relevant license for the activity in question i.e. Manufacturer’s license (MIA) and/or Wholesale Dealer’s license (WDA(H)) as required by the Human Medicines Regulations 2012.³¹

The holder of MIA must comply with the provisions set out in the Regulations including EU GMP and is required to comply with EU GDP if the holder of MIA distributes the medicinal product too. If there is a violation of legislation, there is a legal sanction that the licensing authority is authorized to take regulatory action in form of adverse licensing action and/or the instigation of criminal proceedings. The holder of WDA(H) must comply with the provisions set out in the Regulations including EU GDP. If there is a violation of legislation, there is a legal sanction that the licensing authority is authorized to take regulatory action in form of adverse licensing action and/or the instigation of criminal proceedings. In compliance with EU GDP, if any activity covered by the GDP is outsourced to the third party such as a transportation provider, it is required that a written contract must be made by and between the contract giver and the contract acceptor with the terms clearly establishes the duties of each party. As stated in EU GDP, the contract giver is responsible for the activities contracted out and for ensuring that the principles and guidelines of GDP are followed.³²

²⁹ Health Sciences Authority of Singapore, **Medicines Act (Chapter 176)**, available at http://www.hsa.gov.sg/content/dam/HSA/HPRG/Useful_Information_for_Applicants/Legislation/MEDICINES%20ACT.pdf (last visited Jun. 2, 2015).

³⁰ Health Sciences Authority of Singapore, **Guidance Notes on Good Distribution Practice (2010)**, available at http://www.hsa.gov.sg/content/dam/HSA/HPRG/Manufacturing_Importation_Distribution/Guidelines-on-Good-Manufacturing-Practice-Standard-and-Good-Distribution-Practice-Standard/GUIDE-MQA-013-009.pdf (last visited Jun. 2, 2015).

³¹ Medicines and Healthcare Products Regulatory Agency, available at <http://www.mhra.gov.uk/Howweregulate/Medicines/Licensingofmedicines/> (last visited Jun. 2, 2015).

³² European Commission, *supra* note 28.

Conclusion and Recommendation

The problems of drug degradation, drug contamination, and other drug quality problems incurred in the drug logistics happened for several years and until now those problems have not been resolved. The existing drug law in Thailand is the Drug Act, B.E. 2510 (1967) applied the principles of GMP based on the principles of WHO good manufacturing practices for pharmaceutical products and the PIC/S Guide to GMP for Medicinal Products. The existing law is controlling the manufacturing process, but not covering the drug quality assurance during the transportation, distribution and storage of drugs in the drug logistics. Therefore, it is necessary to have adequate legal control measures or drug legislation to ensure that the quality of drugs will be maintained in the logistics activities of transportation, distribution and storage throughout the drug supply chain from the point of origin to the point of consumption. The handling of drugs shall meet the requirement on the label of each drug at all times throughout the logistics of drugs. All parties involved in the activities in the drug supply chain have to comply with the principles of GMP, GDP and GSP. However, the Drug Act, B.E. 2510 (1967) applied only the principles of GMP by issuance of the Notifications of the Ministry of Public Health for both modern drugs and traditional drugs.

The Drug Act, B.E. 2510 (1967) shall be amended by regulating that the licensees under the Drug Act have to comply with the principles of GDP and GSP to be issued by the drug committees when carrying out the activities of transportation, distribution and storage of drugs. Any violation shall be subject to the legal sanction under the Drug Act. The licensees shall be suspended for the license to operate and penalized with the penalty as prescribed by law. If the drugs are degraded or instability to the extent that it harms the patient who consumed such drugs, the licensees under the Drug Act shall be jointly liable to the injured party for damages incurred from the drug usage.

The principles of GDP and GSP shall be issued by the drug committees of the MOPH for both modern drugs and traditional drugs as the notification of drug committee. The issuance of the principles of GDP and GSP require technical knowledge, skill and special expertise. Besides the principles of GDP and GSP need to be revised and updated regularly to ensure that those principles are appropriate and up-to-date. So it will be more flexible to empower the drug committee to draft, revise and update the principles of GDP and GSP instead of incorporating all principles of GDP and GSP as law in the Drug Act.

The principles of GDP and GSP shall cover the outsourcing activities in case the licensees outsource any activity to a third party. It shall be required that a written contract must be made by the licensee who is the contract giver and the third party who is the contract acceptor with the terms clearly established the duties of each party and stated that the contract acceptor have to follow GDP and GSP in carrying out his duty under the contract. However, the licensees are responsible for the activities contracted out and for ensuring that the GDP and GSP are followed. The licensees have to liable for violation of GDP and GSP even though they hire the third party to handle that. This will make the licensees to be more careful.

Accordingly, it is recommended that the principles of GDP and GSP should be applied in addition to the principles of GMP in the legislation and binding all persons to comply with when carrying out the drug logistics activities in order to solve the drug quality problems arising from the transportation, distribution and storage of drugs in the drug logistics in the drug supply chain.

REFERENCES

Books

- Allen, Loyd V. Jr., and Ansel, Howard C. *Ansel's Pharmaceutical Dosage Forms and Drug Delivery Systems*. 10th ed. N.p.: Wolters Kluwer, 2014.
- Sadler, Ian. *Logistics and Supply Chain Integration*. N.p.: Sage Publications, 2007.

Electronic Media

- ASEAN Secretariat. "The ASEAN Sectorial Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products." ASEAN.
<http://www.asean.org/archive/documents/Agreement%20on%20MRA%20for%20GMP%20Pharmaceutical.pdf> (accessed May 29, 2015).
- European Commission. "EU Guidelines for Good Manufacturing Practice for Medicinal Products for Human and Veterinary Use."
http://ec.europa.eu/health/files/eudralex/vol-4/vol4-chap1_2013-01_en.pdf (accessed June 2, 2015).
- European Commission. "Guidelines of 5 November 2013 on Good Distribution Practice of Medicinal Products for Human Use (Text with EEA relevance) (2013/C 343/01)." <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:343:0001:0014:EN:PDF> (accessed June 2, 2015).
- Government Pharmaceutical Organization. "Good Manufacturing Practice:GMP."
<https://www.gpo.or.th/Default.aspx?PageContentMode=1&tabid=107> (accessed June 2, 2015).
- Health Sciences Authority of Singapore. "Guidance Notes on Good Distribution Practice 2010." http://www.hsa.gov.sg/content/dam/HSA/HPRG/Manufacturing_Importation_Distribution/Guidelines-on-Good-Manufacturing-Practice-Standard-and-Good-Distribution-Practice-Standard/GUIDE-MQA-013-009.pdf (accessed June 2, 2015).
- Health Sciences Authority of Singapore. *Medicines Act (Chapter 176)*.
http://www.hsa.gov.sg/content/dam/HSA/HPRG/Useful_Information_for_Applicants/Legislation/MEDICINES%20ACT.pdf (accessed June 2, 2015).
- Healthcare Supply Chain Excellence Centre (LogHealth) Mahidol University. "Healthcare Logistics & Supply Chain – Status in Thailand."
http://www.nrct.go.th/th/Portals/0/data/ภาค/2556/06/3รศ_ดร_ดวงพรรณ_คุณโสภณ.pdf (accessed June 2, 2015).
- Kommanaboyina, Brahmaiah, and Rhodes, C. T.. "Trends in Stability Testing, with Emphasis on Stability During Distribution and Storage." *Drug Development and Industrial Pharmacy*,(1999): 858. <http://www.informahealthcare.com> (accessed December 17, 2014).
- Medical Dictionary*. <http://medical-dictionary.thefreedictionary.com/drug> (accessed June 2, 2015).
- Medicines and Healthcare Products Regulatory Agency. <http://www.mhra.gov.uk/Howweregulate/Medicines/Licensingofmedicines/> (accessed June 2, 2015).
- Pharmaceutical Inspection Co-operation Scheme. "PIC/S Guide to Good Manufacturing Practice for Medicinal Products." Picscheme.
<http://www.picscheme.org/publication.php> (accessed June 2, 2015).

- Vitasek, Kate. "Supply Chain Management Terms and Glossary." (2013): 117.
http://cscmp.org/sites/default/files/user_uploads/resources/downloads/glossary-2013.pdf (accessed June 2, 2015).
- World Health Organization. "About Quality Assurance." http://www.who.int/medicines/areas/quality_safety/quality_assurance/about/en/ (accessed January 18, 2015).
- World Health Organization. "WHO Good Distribution Practices for Pharmaceutical Products." *WHO Technical Report Series*, No. 957." (2010); 235-264.
http://www.who.int/medicines/areas/quality_safety/quality_assurance/GoodDistributionPracticesTRS957Annex5.pdf (accessed June 2, 2015).
- World Health Organization. "WHO Good Manufacturing Practices for Pharmaceutical Products." *WHO Technical Report Series*, No. 961." (2011); 77-135.
http://apps.who.int/prequal/info_general/documents/TRS908/WHO_TRS_908-Annex9.pdf (accessed June 14, 2015).
- สมชัยยา สุริฉินท์. "การเก็บรักษาด้วยความคงตัวของยาและเภสัชภัณฑ์." [Somchaiya Surichan. "Storage and Stability of a Drug Product"] <http://www.gpo.or.th/rdi/html/stability.html> (accessed June 2, 2015).
- สำนักงานและวัตถุเสพติด. "การเฝ้าระวังปัญหาทางกายภาพของผลิตภัณฑ์ยาที่มีใช้ในสถานบริการสาธารณสุขปี พ.ศ. 2552-2554." [Bureau of Drug and Narcotic. "Monitoring Physical Problems of Drugs Used in Health Centers in the Year 2009 – 2013."] <http://dmsc2.dmsc.moph.go.th/webroot/drug/qa30/problem/หนังสือปัญหาคุณภาพยา52-54.pdf> (accessed January 18, 2015).
- สำนักงานและวัตถุเสพติด. "ปัญหาคุณภาพยาที่ได้รับรายงานปี พ.ศ. 2555." *จดหมายข่าวศูนย์รวบรวมข้อมูลปัญหาคุณภาพยา* 16, ฉบับที่ 1 (มกราคม – เมษายน 2556) [Bureau of Drug and Narcotic, Drug Quality Problems Reported in the Year 2012." *Drug Quality Problems Reporting Center Newsletter* 16, no. 1 (January - April 2013)] <http://dmsc2.dmsc.moph.go.th/webroot/drug/surveillance/newsletter/Newsletter16-1-2556.pdf> (accessed January 18, 2015).
- สำนักงานและวัตถุเสพติด. "ปัญหาคุณภาพยาที่ได้รับรายงานปี พ.ศ. 2556." *จดหมายข่าวศูนย์รวบรวมข้อมูลปัญหาคุณภาพยา* 17, ฉบับที่ 1 (มกราคม – เมษายน 2557) [Bureau of Drug and Narcotic, Drug Quality Problems Reported in the Year 2013." *Drug Quality Problems Reporting Center Newsletter* 17, no. 1 (January - April 2014)] <http://dmsc2.dmsc.moph.go.th/webroot/drug/surveillance/newsletter/newsletter17-1-2557.pdf> (accessed June 2, 2015).

THE RIGHTS OVER WORKS ON SOCIAL NETWORKS AND UNFAIR LICENSING PRACTICES*

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ABSTRACT

The exclusive right over the works of a creator under Thai Law has been specified in Section 15 of the Copyright Act. However, the problem of unfairness in licensing agreements impacts the creators of such works on social networks under the terms and conditions of Facebook and Instagram containing unfair terms and conditions for two issues.

- (1) Licensing agreements
- (2) Conditions after the termination of the agreement.

For a creator of works in Thailand, the problem of unfairness in a licensing agreement extremely affects creators who did not know the terms and conditions before. After reviewing all the relevant Thai laws, there is no Thai law which sufficiently contains the substantive provisions to deal with the unfair licensing agreement issue. The definition of ‘customers’ under Section 3 of the Unfair Contract Terms Act does not cover customers who do not pay the remuneration to the service provider. Even in the Customer Protection Act, the definition of the word ‘customers’ and ‘service’ do not include a service agreement without remuneration.

Thus, there are certain unsolved legal and practical problems relating to the unfair licensing agreement which can affect users. The amendment of such laws are required to resolve the problems and establish a committee to govern and control licensing agreements provided by service providers to be fair for both parties.

The new and amended sections should be included in the (i) Copyright Act, (ii) the Consumer Protection Act, and (iii) the Unfair Contract Terms Act which are not able to properly protect the creators’ rights of their works. Since claims against the service provider take a long time in court, the government needs to amend the sections in the mentioned Acts to be able to copy with this problem. Therefore, the Thai Government should enact an explicit legislation to control the terms and conditions in licensing agreements and to protect users by increasing the bargaining power of the creators of works.

Keywords: Exclusive Rights, Social Networks, Unfair Licensing, Unfair Contract Terms

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บทคัดย่อ

ธรรมสิทธิเห็นงานอันมีลิขสิทธิ์กำหนดในมาตรา 15 ของพระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537 อย่างไรก็ตาม ปัญหาเกี่ยวกับความไม่เป็นธรรมของสัญญาอนุญาตให้ใช้สิทธิมีผลกระทบต่อผู้สร้างสรรค์ผลงานในสื่อโซเชียล เน็ตเวิร์ค ข้อตกลงและเงื่อนไขของเฟสบุ๊ค และอินสตราแกรมมีข้อสัญญาซึ่งไม่เป็นธรรมต่อผู้สร้างสรรค์ใน 2 ประเด็น กล่าวคือ

- (1) สัญญาอนุญาตให้ใช้สิทธิ และ
- (2) เงื่อนไขภายหลังเลิกสัญญา

ประเด็นปัญหาความไม่เป็นธรรมจากสัญญาอนุญาตให้ใช้สิทธิของผู้สร้างสรรค์งานในประเทศไทยส่งผลกระทบต่ออย่างรุนแรงแก่ผู้สร้างสรรค์ซึ่งไม่เคยทราบถึงเงื่อนไขและข้อตกลงก่อนใช้งาน จากการศึกษากฎหมายไทยที่เกี่ยวข้องนั้นพบว่าประเทศไทยไม่มีมาตรการทางกฎหมายที่เพียงพอในการแก้ปัญหาความไม่เป็นธรรมของสัญญาอนุญาตให้ใช้สิทธิ อย่างไรก็ตาม บทนิยามของคำว่าผู้บริโภครายใดมาตรา 3 ของพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรมมิได้รวมถึงผู้บริโภคที่ได้เสียค่าตอบแทนให้แก่ผู้ให้บริการภายใต้มาตรา 3 แห่งพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม รวมไปถึงความหมายของผู้บริโภคและการบริการก็มิได้รวมถึงสัญญาที่ไม่มีค่าตอบแทน

ดังนั้น ปัญหากฎหมายซึ่งเกี่ยวข้องกับสัญญาอนุญาตให้ใช้สิทธิจึงกระทบผู้สมัครบริการ จึงต้องมีการแก้ไขกฎหมายและแต่งตั้งคณะกรรมการเฉพาะเพื่อกำหนดหลักเกณฑ์และควบคุมสัญญาอนุญาตให้ใช้สิทธิซึ่งร่างโดยผู้ให้บริการเพื่อความเป็นธรรมของสัญญาทั้งสองฝ่าย

มาตราที่นำเสนอใหม่และมาตราที่เสนอแก้ไขควรกำหนดไว้ใน (ก) พระราชบัญญัติลิขสิทธิ์ (ข) พระราชบัญญัติคุ้มครองผู้บริโภค และ (ค) พระราชบัญญัติว่าด้วยข้อสัญญาไม่เป็นธรรม ซึ่งยังมีได้คุ้มครองธรรมสิทธิของผู้สร้างสรรค์ผลงาน อีกทั้งการโต้แย้งสิทธิผู้ให้บริการในชั้นศาลมีระยะเวลานาน หากรัฐบาลแก้ไขมาตราที่เกี่ยวข้องในกฎหมายที่เกี่ยวข้องเพื่อแก้ไขปัญหาดังกล่าว รัฐบาลควรกำหนดมาตรการทางกฎหมายเพื่อควบคุมเงื่อนไขและข้อตกลงซึ่งเกี่ยวข้องกับสัญญาอนุญาตให้ใช้สิทธิเพื่อปกป้องธรรมสิทธิและเพิ่มอำนาจต่อรองให้ผู้สร้างสรรค์ผลงานต่อไป

คำสำคัญ: ธรรมสิทธิ, โซเชียล เน็ตเวิร์ค, สัญญาใช้สิทธิอันไม่เป็นธรรม, ข้อสัญญาอันไม่เป็นธรรม

Introduction

In the age of prompt communication, communication between people has become more convenient and cheaper. In this article, we will confer the attractive methods of communication, namely, social networks such as Instagram and Facebook.

Facebook was the number one ranking social network in March 2015, as determined by the number of active accounts according to statistic of Statista Inc². Users can share their photos, self-videos, feelings, quotes and experiences on their own timeline. As such, there are complicated issues occurring after users share their own works and grant partial or whole exclusive rights in respect to the works created by themselves to service providers like Facebook in-line with the agreement between themselves and the service providers. Definitely, a balance of interest must be made to ensure that the rights of a creator over works that have not been infringed upon. Retention of works in a server of service providers

²Statista, *the Statistic Portal*, <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Aug. 4, 2015).

should be removed after termination of the agreement. This issue relates to intellectual property law, the electronic commerce agreement and unfair contract terms.

As of 30 January 2015, Statement of Rights and Responsibilities of the Facebook site has been adopted thereof:

“For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us ***a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)***. This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may ***persist in backup copies for a reasonable period of time (but will not be available to others)***....”³

Lets have a look through some parts of terms and conditions for using Instagram as of 19 January 2013 stated below.

“If we terminate your access to the Service or you use the form detailed above to deactivate your account, your photos, comments, likes, friendships, and all other data will no longer be accessible through your account (e.g., users will not be able to navigate to your username and view your photos), but those materials and data may persist and appear within the Service (e.g. if your Content has been re-shared by others).

Upon termination, all licenses and other rights granted to you in these Terms of Use will immediately cease.”⁴

We refer to the above mentioned problems. There is a governing law regarding works on social networks stipulated by the European Commission, namely, “EU General Data Protection Regulation” which broadens protection on some parts of copyright works to be processed in third countries, i.e. pictures which have copyright. This law is stipulated to protect users who produce any copyrighted works and then post their works on variety of social networks, but have limited their rights on their works since they had entered into the licensing agreement after applying for social network services and they most likely overlooked what they have agreed upon. In the United States of America (the “USA”), the law tends to support big companies operating their businesses in USA. As well, Facebook applies USA laws and Canadian laws for ‘website’ terms and conditions which are more relaxed for the company compared to the laws of Europe. In Europe, its laws have started to protect the creator of works’ right and help to deal with unfair licensing terms. We will study laws of other countries and choose interested principals which are proper with Thai users which are further suggested in the last chapter.

1. Definitions of Social Networks

Social network means (i) a platform for connecting people across different places to connect and share their interests between each other through computers, mobile phones, tablets or other means of electronic communication, (ii) the way to learn about a different culture, ideas, and inspiration of others and adapt ourselves to living, or realize a new

³Statement of Rights and Responsibilities Facebook, <https://www.facebook.com/legal/terms/update> (last visited Aug. 4, 2015).

⁴ Terms and conditions for using Instagram, <https://help.instagram.com/478745558852511> (last visited Aug. 4, 2015).

journey or way of thinking, and (iii) a place to share or promote our works, collect feedback from other users, and sell respective works (picture, video, music, and collection of journal) or get a new job.

By this, there are a lot of steps before we apply as a user on Facebook or Instagram. They request us to share our personal data, which we provide to them during the registration process including private data and works on our timeline without any bargaining power⁵ on our part to refuse or delete some choices. Otherwise, we could not use certain applications. Therefore, we still allow them to do so.

2. European Law

According to the European Commission, "personal data under the EU General Data Protection Regulation, is any information relating to an individual, whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address, bank details, posts on social networking websites, medical information, or a computer's IP address."⁶ We cannot refuse photos, which service providers have collected, that have no copyrights. Therefore, works by creators are also protected under the EU General Data Protection Regulation.

The author further analyzes the definitions with the terms and conditions of Facebook, summarized below:

(1) "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use."

Under the concept of exclusive rights, every creator of works has an economic interest over the works. Even if the service provider allows a user to use its system for free, it does not mean that its terms and conditions are acceptable as fair use to seek an interest over the works by the creators without paying any royalty fee.

(2) "you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others)...."⁷

According to the definition of unfair terms, it is not fair for the creator of works who uses his endeavor to create the works; but, could not protect his interest after deletion of an account with the service provider. It is not clear how long service providers take to delete works on backup servers. It mentions in the terms and conditions that it cannot be used for others only. The service provider probably approaches that data without any inspection of the creator of works. It seems like the service provider performs its rights over the agreement for an unlimited period of time. The creators cannot estimate how long their works will be kept in the backup server after terminating the agreement.

In addition, amendments of Data Protection Law, recital 51 and 55, propose that any person should have the right of access data which has been collected concerning them, and to

⁵ Bargaining power is the relative ability of parties in a situation to exert influence over each other. If both parties are on an equal footing in a debate, then they will have equal bargaining power, such as in a perfectly competitive market, or between an evenly matched monopoly and monopony.

⁶ Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses, http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en (last visited Aug. 10, 2015).

⁷ Terms and conditions of Facebook, <https://www.facebook.com/legal/terms> (last visited Aug. 4, 2015).

exercise this right easily, in order to be aware and verify the lawfulness of the processing. Every data subject should therefore have the right to know and obtain communication in particular for what purpose the data is processed, and for how long a period, which recipients will receive the data, what is the general logic of the data that is undergoing the processing and what might be the consequences of such processing. Recital 55 further stated that to further strengthen control over their own data and right of access, data subjects should have the right, where personal data is processed by electronic means and in a structured and commonly used format, to obtain a copy of the data concerning them commonly used in an electronic format. The data subject should also be allowed to transmit data, which they have provided, from one automated application, such as a social network, onto another. ***Data controllers should be encouraged to develop inter-operable formats that enable data portability.*** This should apply where the data subject provided the data to the automated processing system, based on their consent or in the performance of a contract. ***Providers of information society services should not make the transfer of those data mandatory for the provision of their services.***⁸

According to the terms of Facebook, they are allowed to collect the data including any posts of the users under its standard terms and conditions. If they collect the following works in their server in the USA, the Directive⁹ clearly states that the third country must ensure acceptable protection. European Member States would be obliged to prevent any personal data from being placed on the internet.

In the case of *Europe v. Facebook* is on review of a higher court, we understand that a group of Europeans are trying to take action against the service provider. Programme known as PRISM is one technology of the service provider utilized to recognize faces of people from their photo. The photo is one kind of copyright works which has been posted on a social network. The photos taken by a creator have been transferred to a third country to process without permission from the active creator of works (single permission). Since the terms and conditions have been specified that a service provider is allowed to use the copyright works, this action remains unacceptable and unfair to the creators of works who have collected his work in a server and processed his works without his permission. He does not know where the works have been processed, how long it takes and how the service provider processes or applies his works.

Moreover, in case of termination of agreement, the creator of work cannot ensure that his works have been completely deleted. The reasons are as follows:-

(1) Recycle bin system works as back-up server. We could not be assured whether the service provider will definitely retrieve a work back up to the server or not.

(2) There is no inspection channel for the creator of works to check on the deletion of works with the service provider.

(3) The service provider does not provide the creator of works with any specific period of time.

⁸European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-20140212+0+DOC+XML+V0// EN> (last visited Aug. 4, 2015).

⁹“Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data”

3. Copyright Act B.E. 2537

Under section 15 (5), “The owner of the exclusive rights can license the rights mentioned in (1), (2) or (3) with or without conditions provided that the said conditions shall not unfairly restrict the competition. Whether the conditions as mentioned in sub-section (5) of paragraph one are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.”

The Act is not up-to-date to handle the current situation, due to the dynamic technology of the internet nowadays. Due to the digital economy, the law should be amended to fit current situations. If not, the exclusive right of the creator’s work will not be protected by law. The service provider, as the licensee, does not make any payment to the creator of work. Section 15 Copyright Act should be applied to the licensing agreement which has a royalty fee. Normally, a substantial licensing agreement must specify how the licensee uses a copyrighted work and the duration of the agreement with a royalty fee. Unlike the licensing agreement between the creator of works and the service provider, that provides an agreement which has no duration, non-transferable and no royalty fee, the service provider does not require any permission from the creator of work. The service provider can process the works of creator as they feel appropriate. The Copyright Act must be amended to protect the creator of works in digital age.

Authorities of the Copyright Committee under section 60 of the Copyright Act B.E. 2537, are imposed to:

(1) to give advice or consultation to the Minister for the issuance of Ministerial Regulations under Copyright Act B.E. 2537;

(2) to decide appeals against orders of the Director General according to Section 45 and Section 55;

(3) to support or facilitate the association or organization of authors or performers with respect to the collection of royalties from users of the copyright work or the performer’s rights and the protection or safeguard of the rights or any other benefits under Copyright Act B.E. 2537;

(4) to consider other matters as assigned by the Minister.

Therefore, if we compare the authority of the Copyright Committee under Copyright Act B.E. 2537 and the European Commission, the Copyright Committee has less power than the European Commission since the specific law of Thailand does not mention rights over works on social networks which are more complicated than other infringements. It would be better if the Copyright Committee had more power to assist the creators of works who post their works on social networks.

4. The Unfair Contract Term Act B.E. 2540

The agreement breaches Section 150 of the Civil and Commercial Code. Since the Act was issued to protect customers from unfair terms and conditions, the court will consider each of the terms, conditions and orders, and void some of the clauses to maintain fairness in society.

Under Section 3, the word “customer” means a person who enters the agreement to use a service provided by the service provider with payment of service. However, the creator of works who posts his work on social networks is not protected under this Copyright Act because the creator of works does not make any payment to the service provider in accordance with Section 3 of the Act.

There are various reasons why the terms and conditions of Facebook and Instagram are unfair, as follows:-

(1) The creator of works has no opportunity to adjust the standard service agreement and licensing agreement prepared by a service provider before entering the agreement.

(2) The agreement does not specify the liability to the service provider clearly and there is a clause for the service provider to amend its terms and conditions without prior consent of users.

(3) Thai law has no power to protect users in Thailand who agree with the choice of law clause without knowing that the service provider has more advantages when choosing the American law.

(4) If the users wish to file a case with the court claiming unfair treatment under this agreement, the user would have the burden of proof. Therefore, the user is entitled to prove that an agreement is a standard form contract which was prepared by the service provider and unfair for the users. The users would then have rights according to the Unfair Contract Terms Act.

The creator of works is not in the scope of the meaning of ‘customer’ under this Act, since there is no remuneration paid to the service provider. However, the terms and conditions of Facebook are considered unfair contract terms according to the criteria of the Act. Therefore, we could not apply Section 4 (1)¹⁰ of Consumer Case Procedure Act B.E. 2551 to solve the problem between creator of works and the service provider.

5. Consumer Protection Act B.E. 2522 (2nd revision, B.E. 2541)

The meaning of ‘service’ and ‘customers’, under Section 3 of this Act does not cover service without compensation. The creators of works who use social networks are not under the meaning of consumer pursuant to Section 3 of the Act. The creator of works is the direct party who enters the service agreement with the service provider without any compensation. Therefore, we could not apply this Act to solve the problem between the creator of works and the service provider.

6. Personal Data Protection Act

Personal Data, under Section 5 of this Act, means “any data pertaining to a person, who enables the identification of such person, whether directly or indirectly.”

This law was imposed to protect personal information. All personal information can no longer be collected without consent of the owner and the holder of personal data is forbidden from using or disclosing it to a third party. Transferring data abroad is not allowed except for limited circumstances. The Personal data Protection Commission will subsequently be established for the purpose of implementing and enforcing the law.

However, this law does not include the intellectual property works like European laws in which the photo of the creator’s works is also protected and is not allowed to be processed in third party countries. Therefore, we could not apply this law to the unfair licensing agreement between the creator of works and service provider.

7. Analysis

After considering Thai laws, there is the Copyright Act, the Unfair Contract Terms Act, Consumer Protection Act and the Personal Data Protection Act. Compared with European Laws, there are new regulations and some interesting laws that deal with unfair licensing agreements of a service provider. The provisions to control unfair licensing of social networking in Thailand are explicitly insufficient since they are stipulated to cover the case of unfair contract terms and conditions related to the exclusive rights over the works posted on social networks., The meaning specified by law does cover the creator of works who does not pay any remuneration to the service provider. Thai laws have just enacted the liability to a service provider for the infringement of third parties only, not the infringement by the service provider. Moreover, Section 15 (5) of the Copyright Act should apply to the licensing agreements with remuneration only. For the terms and conditions of Facebook, there is no remuneration to use the service. It does not mean that the service provider can use the copyright work with unlimited time without an inspection channel for the creators of works who own the exclusive right.

The Thai government can empower a sub-committee to cope with this issue and control service providers in the long term using the same practices as the European Committee. For example, the law should broaden the definition of customers and services in the Unfair Contract Term Act and the Consumer Protection Act to cope with the creator of works who has not paid remuneration to the service provider.

Last but not least, the creators of works should be aware of their exclusive rights and the law should allow the creators of works to file a complaint to the Copyright Committee or any other designated Committee by law concerning the unfairness of agreement provided by the service provider, or claim against the service provider directly. When violations are discovered, the Committee or the court should have the authority to order the service providers to settle and to pay for damages to the creator of works.

Conclusions

For the creator of works in Thailand, the problem of unfairness in licensing agreements affects creators who do not know the terms and conditions. Not many creators in Thailand know their basic exclusive rights of their works under Section 15 of the Copyright Act.

Recommendations

The new sections should provide details as shown in the following topics:

(1) Definitions

(i) The terms of customer and service of Section 3 of the Consumer Protection Act should include the customer and service which have no remuneration.

(ii) The term of licensing agreement using in social networks is not defined explicitly by any law. It should be indicated as meaning of licensing agreement in Section 4 of the Unfair Contract Term Act so that the creator of works' exclusive rights will be protected by the law.

(iii) In Europe, a new law was developed focusing on social networks and cloud service providers. *They define intellectual property works on social networks in a broader way as "posts on social networking website".* As we mentioned earlier, problems

occurred since the data subject were produced by creators of works and have been kept at the server of service provider in third countries such as the United States of America. Even if the European Commission has enacted this protection in the New Data Protection Regulation, the writer is of the opinion that for Thai laws, it should be added to a new section in the Copyright Act. Therefore, the definition of intellectual property in Section 4 shall include posts on social networking websites or other applications which contain any works granted copyright under Thai law.

(iv) In case it is not clear what service should be social networks, the new law must define the meaning of social networks as well. Social networks may have a development in the near future. The definition should be broadened to cover all related services in the internet which the users post their works on. For example, the social networks means:

“a platform connecting people across from different places to connect and share their connection and interesting things through computer, mobile phone, tablet or other means of electronic communication”

(2) Amendments to the laws

In order to amend the section related to licensing agreement directly, we should consider adding paragraph 2 of Section 15(5) as follows:-

“Any lessee is not allowed to restrict exclusive rights of lessor in the licensing agreement, even though the remuneration has not been paid to the lessor.”

(3) Implementation of the in practice:

The implementation of the new sections will require comprehensive changes of a service provider that does not implement comparable levels of intellectual property until now. It should have a period before the effectiveness of implementation of 1-2 years. As we have seen in the amendment of terms and conditions of Facebook for German users, which has limited the terms and conditions to an acceptable level starting in early 2015.

(4) Sanction

Based on the sanction of Data Protection of the European Union, the following sanctions can be imposed or adjusted as deemed appropriate:

If the service provider remains breaching the law, the following actions must be taken, respectively.

- (i) Regular periodic data protection audits; and
- (ii) a fine up to 1,000,000 Baht or up to 2% of the annual worldwide turnover in case of an enterprise, whichever is greater

Other liabilities may be applied depending on the damages occurring to the users in this case if there is no any other specific law. The principle of the wrongful act will be applied to this case by case.

REFERENCES

1. Electronic Media

- A guide to the unfair contract terms law, Commonwealth Copyright Administration of the Attorney-General's Department in 2010, <http://www.consumerlaw.gov.au/content/the_acl/downloads/unfair_contract_terms_guide.pdf> (accessed August 10, 2015)
- Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses, <http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en> (accessed August 10, 2015)
- European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P7-TA-20140212+0+DOC+XML+V0//EN>> (accessed August 4, 2015)
- Facebook policy, <<https://www.facebook.com/policy.php>> (accessed July 1, 2015)
- HeiniJarvinen, Irish High Court refers the Facebook/Prism case to the CJEU, <<https://edri.org/irish-high-court-refers-facebook-prism-case-to-cjeu/>> (accessed July 2, 2014)
- Inc Website, Licensing AgreementsLThe Basics, <<http://www.inc.com/encyclopedia/licensing-agreements.html>> (accessed August 4, 2015)
- Privacy Policy, <<http://instagram.com/about/legal/privacy/>> (accessed August 4, 2015)
- Statement of Rights and Responsibilities Facebook, <<https://www.facebook.com/legal/terms/update>> (accessed August 4, 2015)
- Statista, the Statistic Portal, <<http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>> (accessed August 4, 2015)
- Terms and conditions for using Instagram, <<https://help.instagram.com/478745558852511>> (accessed August 4, 2015)
- Terms and conditions of Facebook, <<https://www.facebook.com/legal/terms>> (accessed August 4, 2015).

ARREST OF ASSOCIATED SHIP: THE POSSIBILITY TO APPLY SOUTH AFRICAN APPROACH TO THAI LAW*

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ABSTRACT

The character of maritime business concerns the movement of ships which are the main asset of the debtor, the recoverability of maritime debt becomes a major problem for people engaged in maritime trade. In addition, over half of shipowning companies around the world are incorporated as “one ship company” (or “single-ship company”) by the way of spitting up the ships in fleet into each different company; this allows the shipowner to limit the liability to the value of each ship. Thai law and International Conventions regarding the arrest of ships only permit the ships under common ownership to be susceptible to arrest, thus, fail to provide insufficient measure to cope with the problem of single-ship companies.

South Africa introduced a new approach vesting the maritime creditor to apply for the arrest of the ship under the common control of the debtor notwithstanding she is registered in the name of different legal owners. This thesis, therefore, aims to study the approach of South Africa to the arrest of ship so-called associated ship as provided in the Admiralty Jurisdiction Regulation Act 105 of 1983.

This thesis will study how the associated ship arrest approach operates in order to find out the proper solutions to solve the problems of recoverability of maritime debt from the single-ship companies in Thailand.

From the study, it is found that the approach of South African successfully strikes on the said problem arising from operation of single ship companies. By allowing arrest of the ships under control of the debtor, the creditors are granted an opportunity to obtain alternative security for future litigation which is an effective tool to enforce the judgment. It also helps reducing the proliferation of single ship companies. Thus, the writer suggests that the provision of the Arrest of Ship Act B.E. 2534 be amended by adopting this associated ship approach of South African law to enable the maritime creditor in Thailand to obtain security that serve the maritime business nowadays

Keywords: arrest of ship, associated ship

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บทคัดย่อ

ลักษณะของประกอบธุรกิจพาณิชย์นาวีเกี่ยวกับการเคลื่อนย้ายของเรือซึ่งเป็นทรัพย์สินหลักของลูกหนี้ การได้รับخذใช้หนี้จึงเป็นปัญหาประการสำคัญสำหรับเจ้าหนี้ในกิจการประเภทนี้ อีกทั้ง ในปัจจุบันกว่าครึ่งหนึ่งของบริษัทเจ้าของเรือทั่วโลกนิยมจัดตั้งบริษัทในรูปแบบที่มีเรือเป็นทรัพย์สินหลักเพียงชิ้นเดียว โดยแยกจดทะเบียนเรือลำต่างๆ ภายในกองเรือเดียวกันภายใต้บริษัทต่างๆ ซึ่งเป็นนิติบุคคลแยกต่างหากจากกัน วิธีการดังกล่าวส่งผลให้เจ้าของเรือสามารถจำกัดความรับผิดชอบของตนตามมูลค่าของเรือลำที่ได้จดทะเบียนภายใต้ชื่อนิติบุคคลนั้น กฎหมายไทยและอนุสัญญาระหว่างประเทศเกี่ยวกับการกักเรือในปัจจุบันกำหนดให้เรือลำอื่นซึ่งเป็นกรรมสิทธิ์ของลูกหนี้อาจถูกกักได้เท่านั้น จึงยังไม่เพียงพอต่อสภาพปัญหาของการประกอบกิจการของบริษัทซึ่งมีเรือลำเดียวดังที่กล่าวมาข้างต้น

ประเทศสาธารณรัฐแอฟริกาได้เสนอวิธีการใหม่โดยอนุญาตให้เจ้าหนี้ยื่นขอ กักเรือลำอื่นซึ่งอยู่ภายใต้การควบคุมของลูกหนี้รายเดียวกัน แม้จะปรากฏว่าเรือลำที่ขอกักดังกล่าวนั้นจดทะเบียนเป็นกรรมสิทธิ์ของนิติบุคคลรายอื่น ผู้เขียนจึงมุ่งเน้นที่จะศึกษาหลักการกักเรือดังกล่าวซึ่งกำหนดในพระราชบัญญัติกำหนดเขตอำนาจในการพิจารณาพิพากษานาวีที่ 105 ค.ศ. 1983 ของประเทศสาธารณรัฐแอฟริกาใต้

วิทยานิพนธ์ฉบับนี้จึงศึกษาถึงแนวคิดและวิธีการกักเรือภายใต้การควบคุมของลูกหนี้ดังกล่าวเพื่อค้นหาแนวทางแก้ปัญหาที่เหมาะสมอันเนื่องมาจากการดำเนินงานของบริษัทเจ้าของเรือซึ่งมีเรือลำเดียวเพื่อแก้ปัญหาการได้รับخذใช้หนี้ที่เกิดขึ้นจากการประกอบธุรกิจพาณิชย์นาวีของเจ้าหนี้ในประเทศไทย

ผลการศึกษาพบว่าหลักการกักเรือของประเทศสาธารณรัฐแอฟริกาใต้สามารถแก้ไขปัญหาลูกหนี้ที่เกิดขึ้นจากการประกอบกิจการของบริษัทเจ้าของเรือได้อย่างมีประสิทธิภาพ การกำหนดให้เรือซึ่งอยู่ภายใต้การควบคุมของลูกหนี้ อาจถูกกักได้นั้นส่งผลให้เจ้าหนี้มีทางเลือกที่จะได้รับหลักประกันการชำระหนี้ในการฟ้องร้องคดีในอนาคตซึ่งเป็นเครื่องมืออันมีประสิทธิภาพในการบังคับคดีตามคำพิพากษา อีกทั้งยังช่วยลดการขยายตัวของจัดตั้งบริษัทในรูปแบบที่มีเรือเพียงลำเดียว ดังนั้น ผู้เขียนจึงมีความเห็นว่าประเทศไทยควรแก้ไขบทบัญญัติของพระราชบัญญัติการกักเรือ พ.ศ. 2534 โดยนำหลักการของประเทศสาธารณรัฐแอฟริกาใต้มาบรรจุไว้ในพระราชบัญญัติด้วย ทั้งนี้เพื่อให้เจ้าหนี้ในประเทศไทยมีหลักประกันในการชำระหนี้ที่สอดคล้องกับลักษณะการประกอบธุรกิจพาณิชย์นาวีในปัจจุบัน

คำสำคัญ: กักเรือ เรือภายใต้การควบคุมของลูกหนี้

Introduction

Collecting money from a debtor operating maritime trade is a creditor's nightmare.¹ This statement is not exaggerated considering the character of maritime business itself, which concerns the movement of ships, the main asset of the debtor, continually from one jurisdiction to another. The debtor usually has a different nationality and the principal office is located abroad; even if the creditor is allowed by local law to file the case in his home country, the chance of any monetary recovery is still very low. The floating characteristics of a maritime debtor's main asset (ship) facilitate them to escape liability, therefore, the law

¹ John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* 100 (1999), <http://www.uctshiplaw.com/booknew/Chapter%202.pdf>.

regarding the arrest of ship becomes an important tool for the creditor to obtain pre-judgment security.

The law regarding arrest of ships became uniform after the enforcement of the International Convention Relating to Arrest of Sea-Going Ships 1952. (herein after referred to as “the 1952 Convention”) The liberal approach was adopted by allowing the particular ship and those having the same ownership,² so-called “sister ships”³ to be arrested. However, the shipowners struck back at this sister ships approach by forming an owning company for each and every ship in the same fleet, later called “single-ship company”⁴ or “one-ship company”, so as to limit the possibility of arresting other ships, but only the particular ship; which is the ship in respect of which the maritime claim arose.

This phenomenon attracted the attention of the law commission of South Africa, leading to a new approach to cope with the proliferation of single ship companies by introducing the new regime of “associated ship” arrest in the Admiralty Jurisdiction Regulation Act 105 of 1983 (hereinafter referred to as “the AJRA”). Associated ship is a ship other than the ship in respect of which the maritime claim arose⁵ that is owned by the same person or by a person or company who controlled the company or person who owned the ship in respect of which the maritime claim arose.⁶ This disregards the separate legal status of companies in a group, by permitting the ship under the common control of the debtor susceptible for arrest, notwithstanding any sham or fraudulent operation thereby. This regime allows the claimant more options, and possible pre-trial security which is a powerful tool to enforce future maritime judgment. By this new regime, South Africa acquired the reputation for being the most convenient forum to arrest the ship.

For Thailand, the law regarding arrest of ships is prescribed in the Arrest of Ship Act B.E. 2534 which adopted the main principles of the 1952 Convention. Section 5 of the Act allows the claimant to pursue security from the ship in possession of the debtor at the time the claim arose and the arrest proceeding is submitted to the court provided that the maritime claim arose out of such ship. This condition explicitly impedes the claimant to file for arrest of associated ship. After two decades of enforcement, the question arises as to whether Thailand should amend the provision in the Arrest of Ship Act B.E. 2534 by

² The 1952 Convention Article 3 (3)

³ The term sister ship has other meaning in ship construction context. The International Maritime Organization resolution MSC/Circ.1158 provides unified interpretation of the sister ship according to Charter II-1 of International Convention for the Safety of Life at Sea as to may refer to the ship which is built by the same yard from the same plans.

⁴ José M. Alcántara, *Some Reflections Over the Brussels Convention 1952 Relating to Arrest of Sea-Going Vessels and Its Amending Process*, 26 GA. J. Int'l & Comp. L. 551,551 (1997).

⁵ The AJRA, Article 3(6)

⁶ Francesco Berlingieri & Karl-Johan Gombrii, **Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Convention** 100 (5th ed., Informa Law & Finance 2011)(1992).

adopting the South African approach to fulfil the intention of the drafter that is to protect the interest of the creditor domiciled in Thailand.

1. Overview of law on Arrest of Ships of South Africa

The maritime laws of South Africa are regulated by the Admiralty Jurisdiction Regulation Act 105 of 1983. Before the enactment, South Africa had two courts concurrently exercising maritime jurisdiction, these courts applied different laws inherited from both Civil and Common law systems. The dual proceedings inevitably caused confusion to litigants and restricted the South African Courts to hear cases between South African cargo owners and foreign carriers, contrasting with the density of maritime trade in South Africa. The AJRA currently removes those difficulty and provides over 32 types of maritime claims that give rise to enforcement by action *in rem* or *in personam* including the arrest of ships.

The creditor who desires to apply for arrest of ships must has a maritime lien on the property to be arrested;⁷ or the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.⁸ Other than particular ship, the creditor is empowered to apply for arrest of associated ship.⁹ Application for arrest is *ex parte* request of the claimant; the power to order arrest is delegated to the Registrar of the High Court.¹⁰ Registrar's arrest is an extraordinary measure designed to meet the extraordinary demands of maritime debt collecting to give immediate effect for arrest.¹¹ No application to the court is required unless the Registrar refer thereto.¹²

2. Definition of associated ship

Associated ship is a term only used in South African maritime law. It encompasses the notion of sister ship provided in the 1952 Convention and the true association developed thereby. The underlying principle of associated ship is a ship under common control with the particular ship, substituting the ownership link with arrested property which is required by the 1952 and 1999 Convention. Thus, there are two ships involved, one is the ship in respect of which the maritime claim arose, and another ship which is either owned or controlled by the same person owning the former ship.

The definition of associated ship is given in Section 3(7). The first requirement is that associated ship must not be the ship that caused the maritime claim. Subsection (a) provides and then describes the forms of association that ship may be arrested; paragraph (ii)

⁷ The AJRA Section 3(4)(a)

⁸ The AJRA Section 3(4)(b)

⁹ The AJRA Section 3(6)

¹⁰ The Admiralty Rules 4(2)(a)

¹¹ Hare, *Supra.* note 1, at 81

¹² The Admiralty Rules 4(2)(b)

and (iii) contemplate the true novel of associated ship. This is supplemented by subsection (b) which provides mandatory provisions so as to form association jurisdiction.

1) Section 3(7)(a)(i): the first form of association is defined as a ship that is *"owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose."*

The particular ship and the associated ship must belong to the same person at the time of commencing the maritime claim. This section preserved the notion of sister ship arrest contemplated by the 1952 Convention. The ship is deemed to have same ownership if the majority in number of, or of voting rights in respect of, or the greater part in value of the shares in the ships is owned by the same persons.¹³ Also, such majority in two companies is not needed to be in the same proportion. South Africa follows the notion of UK by dividing property in the ship in case that the ship was owned by part-owners into 64 shares.¹⁴ Thus if the person owned majority shares in the ship i.e. more than 32 shares or higher voting rights or value of shares or should the 64 shares be of unequal value or voting power, that person is considered to be the owner of the ship, and thus any other ship similarly owned by him would be susceptible to arrest as associated ship.

2) Section 3(7)(a)(ii): associated ship is defined as a ship that is *"owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose."*

This provision deals with the situation where the particular ship is owned by a company, but the associated ship is privately owned by an individual person. The basis of association is where the associated ship is owned by a beneficial owner and that owner controls the company to which the particular ship belongs.

3) Section 3(7)(a)(iii): associated ship is a ship that is *"owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose."*

This provision is company-owned associated ship basis; there are two forms of association under this section. The first scenario is when the associated ship is owned by the company, and that company is controlled by the beneficial owner who owned the particular ship. The second scenario is when the associated ship is owned by the company that is controlled by the beneficial owner, and that owner controls the company that owns the particular ship.

¹³ Section 3(7)(b)(i)

¹⁴ The Ship Registration Act 58 of 1988 Section 15(a)

Reference of the company according to Section 3(7)(a)(ii) and 3(7)(a) (iii) is not restricted to the form of corporation permitted under South African law. The term covers any other juristic person and any group of people irrespective of whether any interest therein consists of shares according to Section 3(7)(b)(iii). Consequently, any juristic entity that may not be recognized by South African law e.g. trust, if it is in the name of the juristic person in other jurisdiction, the property of such entity can also be subjected to the associated ship regime.

3. Time of Association

The question of control is both a ‘then’ and a ‘now’ inquiry.¹⁵ There are two critical times required to be proved; in term of the particular ship, the ownership or control must exist at the time that the maritime claim arose, which means the time that the maritime claim originated, not the time when the cause of action was completed,¹⁶ notwithstanding that the claimant has not yet suffered from such claim. It is not necessary that the particular ship still belongs to the debtor at the time when the lawsuit is commenced. The associated ship must be owned at the time lawsuit is commenced, but not prior. Consequently, common control of the particular ship and associated ship is not required to be simultaneous. This justified the permission of associated ship arrest, and made it easier for the claimant to obtain security for the subsequent lawsuit against the debtor. The associated ship was subjected to arrest because it was the property of the prospective ultimately liable party for that maritime claim. Under this theory the proliferation of the single-ship company can be prohibited, because the ship was bought after the claim arose, irrespective whether it was registered under the same company and could be arrested as the associated ship.

4. Concept of Control

The central principal of associated ship arrest is the operation of shipping fleets under the ultimate person. Merely an ownership test does not suffice to qualify an associated ship; the claimant is required to identify the person who has ultimately benefited from the operation of ships in the fleet owned by the different single-ship companies. By virtue of Section 3(7)(b)(ii), the concept of control with regard to the company is elaborated to the term of power. If the person has power directly or indirectly to control the company, that person is deemed to control the company. The AJRA merely provides a broad concept of control, leaving room for interpretation by the practitioner. In terms of a company, control may comprise three forms as follows:

1) Legal control: it is the formal control as designated by the law of the country of incorporation. In South Africa, the registered shareholder can exercise the vote attached to the company; the majority shareholder holds the legal control of the company. To illustrate this concept, Mr. S is a shareholder of company A and B. Both companies have subsidiaries

¹⁵ Hare, *Supra*. note 1, at 105

¹⁶ The Cape Courage [2010] (1) SA 53 (SCA) (S. Afri.)

named AA and BB which are the registered owners of two ships, namely, X and Y respectively. Company A and B are not regarded as associated ships because the people holding legal control of ship X and Y are company AA and BB. This concept however is against the intention of the law commission which introduced the associated ship regime to overcome the proliferation of single-ship companies. This is also reflected in the wording of Section 3(7)(b)(ii) which covers both direct and indirect power.

2) Managerial control refers to the management of day to day affairs of the company. The control in this sense may not be exercised by the shareholders, but carried out by the board of directors or other executive officers who are employees or agents, to implement the policy given by the shareholders. These people may have input to important decisions, but they are not authorized to make the ultimate decision.

Another person that may count in this group is the ship manager. It is common for the maritime business of ships to be operated by independent professionals managing the ships on behalf of different and unconnected owners. There are a wide range of activities undertaken by ship managers depending on the agreement between the parties but the nature of operation involves with control over the ship and is done as an agent for and on behalf of the shipowner, which does not account to control for the purpose of the AJRA.

3) Actual control or ultimate control refer to the control of activities of the company, irrespective of the controller's economic stake in the company. Under general circumstances, ultimate control of the company is given to the shareholders by voting right at the shareholder's meeting, but this is not always the case. A simple example is where the companies are established in a pyramid structure as mentioned in 1), Mr. S, who holds 51 percent of shares in company A, will be able to control the whole chain of the company. This concept fits the intention of the AJRA which purports to make the loss fall where it belongs, by reason of common ownership of the two vessels, or by reason of common control of the companies that own the two vessels.¹⁷ Proper interpretation of control, as a consequence, is the control ship-owning company which is broader than the ownership of the ship or shares.

Section 3(7)(b) referred to the person who has power directly and indirectly to control the company, and reveals that control may be from both within and without the company structure. Differences of direct and indirect power were given by the Supreme Court of Appeal in *the Heavy Metal*.¹⁸ Direct power refers to the *de jure* authority of a person who controls the shareholding and direction of a company, according to the register of the company as seen by the outside world. On the other hand, indirect power refers to the person whom *de facto* wields power through and over the person who possesses *de jure* authority. If these powers are vested in different people, the latter is the one who controls the

¹⁷ Malcolm John David Wallis, *The Associated Ship and South African Admiralty Jurisdiction* (2010) (unpublished Ph.D. thesis, KwaZulu-Natal University) (on file with KwaZulu-Natal University)

¹⁸ [1999] (3) SA 1083 (SCA) (S. Afri.)

company by the wording of the Act. It casts aside that *de jure* and *de facto* power can exist at the same time. The existence of either of which suffices to establish an association of two ships.

The court considered the following facts to determine whether the association between a particular ship and the ship sought for arrest was established:

- the prospect of the various companies owned by the alleged beneficial owner involved, which described its background and way of conducting business;
- the *modus operandi* of the corporate structure in general, and specifically how it went about acquiring vessels and apportioning management;
- the oral evidence of an individual previously employed by the corporate structure to inspect ships before purchase;
- in-house publications of the various companies involved;
- the registration and control of the various trusts and companies making up the corporate structure;
- cross-mortgages between vessels;
- common addresses, directors, etc. of one-ship companies may point toward common control;
- similar funnel markings, similarity in the names of ships apparently being run as a “fleet”;
- the entry of “fleet” in the documents of a P&I Club;
- the substitution of one ship for another and a charter party; etc.¹⁹

5. Onus and standard of proof of arrest application

To apply for the arrest of a ship, the arresting creditor bears the onus of justifying the arrest including the associated ship. The burden remains on the creditor even though the arrest writ may later be challenged by the shipowner. The evidence furnished by the arresting creditor must meet the standard of proof as set out by law.

The standard of proof is twofold. The first is for the underlying maritime claim; the grounds for arrest. The claimant has only to place before the court facts which, if proved, will establish the cause of action. It only requires *prima facie* evidence, the court will not judge on merit, creditability or the prospect of success of the underlying claim. The second fold relates to the arrest and existence of the association. The applicant for associated ship arrest must establish on the balance of probabilities that the ship sought for arrest is an associated ship of the particular ship.

¹⁹ Charnock, Graham Niven, Arrest of Vessels in South Africa, **Maritime Law Handbook** I-11, Suppl. 25 (2005) (quote in Vincent Michael Mayerhofer, *Arrest of Ships in Germany and South Africa - Comparison* (2007) (unpublished M.D. thesis, University of Cape Town))

6. The Arrest of Ship Act B.E. 2534 of Thailand

For Thailand, the law regarding arrest of ships is stated in the Arrest of Ship Act B.E. 2534. Thai arrest rule is based on personal liability theory; the ships that may be subject to arrest are specified in Section 4 to 7. The unique character of the Thai arrest rule is that the legislature is intended to provide protection for the creditor who has a domicile in Thailand. This reflects in Section 4 of the Act that requires domicile in Thailand of the arresting creditor, irrespective of the nationality of the creditor and the ship's flag. The creditor can apply for arrest of ship on 2 bases;

1) Ownership base: Section 4 of the Act empowers the claimant to apply for arrest of "any ship owned by the debtor". On this basis, the Act considers the ship as a property of the debtor. It is immaterial whether the ship has a connection with the underlying claim, but the ownership must exist at the time the arrest is applied to the court. The ship is susceptible to arrest even if the debtor acquires it after the claim arose. On the contrary, if the particular ship belonged to the debtor during the time that the claim arose but was sold to a third party when the arrest action was initiated, then the creditor can no longer arrest this ship, despite the fact that the claim arose directly from her.

The Act does not confine the claimant to arrest the ship on which the claim lies. The term "any" signifies that Thai law accepts the sister-ship regime, allowing the claimant to arrest an alternative ship on the condition that it belongs to the debtor.

2) Possession base: this section allows the creditor to arrest the ship of another person on the basis that the debtor has possession over the ship. The drafter intended to provide a broader concept than possession of the demise charterer, reasoning that the claimant is permitted to arrest the ship in possession of the debtor, but not owned thereby provided that the ship directly relates to the maritime claim according to Section 3. The definition of "possession" is not given by the Act once has it been tested in the Thai Court. The right of possession according to the Civil and Commercial Code Section 1367 comprises two components viz;

- Control over property: a person may have control over property if he has the ability to direct physical movement of property to the extent that he is not refrained by another person to exercising such right.
- Intention to possess that property: the ability to control the property does not award the person possession of the property, that person must have intention to possess such property. This requires an intention to possess the property for the benefit of the possessor i.e. to use the property; the degree of intention of the possessor is, therefore, lower than ownership.

A person may have possession over property although they do not have physical control of such property; possession may be taken by another person on behalf of the possessor. Control for the purpose of this section means the ability to control physical movement of the property in question, which differs from control that establishes association

according to the AJRA that is the control over the overall operation or direction of the company not the property of the company.

Since the second type of ship relies on possession not ownership over property to be arrested, the creditor must meet all the requirements under Section 5 as follows;

- The ship sought for arrest must have a direct connection with the claim i.e. the claim has arisen out of a ship or its business activities.
- The possession of the debtor must exist both when the maritime claim arose and the arrest is applied to the court.

Section 6 provides a restriction on certain claims to be pursued by arrest of a sister ship and ship in possession of the debtor i.e. disputes as to the title to or ownership of any ship, disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship, and the mortgage or hypothecation of any ship. In this case, the claimant is permitted to apply for the arrest of a particular ship only, not a sister ship or ship in possession of the debtor.

Conclusions and Recommendations

The condition stipulated in Section 5 confines arrest of ship in possession of the debtor to a particular ship. The limited application of this possession criterion does not provide sufficient measure to arrest a ship registered under a single-ship company. The South African law approach under Section 3(6) to 3(7) of the Admiralty Jurisdiction Regulation Act 108 of 1983 is an appropriate measure which uses a control test to identify the true debtor liable for arrest. Therefore, the writer opines that the Arrest of Ship Act B.E. 2534 should be amended to cope with maritime business in reality, by adopting the associated ship regime in Thai law. The proposals are as follow;

- 1) To amend Section 4 to cover the arrest of a ship in control of the debtor, by which the debtor benefited from operation thereof.
- 2) To add deeming provision according to Section 3(7)(b)(i) and (ii) of the AJRA in Section 4 to the full effect of interpretation of the arrest of associated ship.
- 3) To add a provision regarding onus of proof and standard to proof of the creditor in respect of arrest of ship in control of the debtor in Section 8 paragraph 2.

By allowing associated ship arrest under Thai law, Thai creditors will revive the protection to enforce maritime claims. The shipowner who is used to circumvent the possibility to provide security other than the particular ship will not easily escape the liability and leave the injured person unable to recover their claim. This measure serves the purpose of the legislature of the Arrest of Ship Act and provides protection for the maritime creditor domiciled in Thailand. The writer found that it is appropriate for Thailand to amend the Arrest of Ship Act B.E. 2534 to better legislate for modern business reality.

REFERENCES

Books

- Berlingieri, Francesco and Karl-Johan Gombrii. *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Convention*. 5th ed. London: Informa Law, 2011.
- Charnock, Graham Niven. "Arrest of Vessels in South Africa." In *Maritime Law Handbook: Supplement 25*, edited by Christian Breitzke, Jonathan Lux, and Philomene Verlaan, by Peter Gad Naschitz. Netherlands: Kluwer Law International BV, 2005. (quote in Vincent Michael Mayerhofer, *Arrest of Ships in Germany and South Africa - Comparison* (2007) (unpublished M.D. thesis, University of Cape Town))
- ไพฑูริย์ เอกจริยกร. คำอธิบายกฎหมายพาณิชย์นาวี กักเรือคาพระราชบัญญัติการกักเรือ พ.ศ. 2534 อนุสัญญาระหว่างประเทศและกฎหมายของบางประเทศพร้อมวิธีปฏิบัติบางประการ. พิมพ์ครั้งที่ 1 กรุงเทพฯ: โรงพิมพ์เดือนตุลา, 2552. (Pathaichit Eakjariyakorn. *Maritime Law on arrest of Seagoing Ships, International Convention and Practice*. 1st ed. Bangkok: October Publishing, 2009).
- ไพฑูริย์ เอกจริยกร. กฎหมายพาณิชย์นาวี ตอน 2. พิมพ์ครั้งที่ 6 กรุงเทพฯ: วิญญูชน, 2552. (Pathaichit Eakjariyakorn. *Maritime Law Part 2*. 6th ed. Bangkok: Winyuchon, 2009)

Articles

- Alcántara, José M. "Some Reflections over the Brussels Convention of 1952 Relating to Arrest of Sea-Going Vessels and Its Amending Process." *Georgia Journal of International and Comparative Law* 26, no. 3 (1997): 551-570.

Electronic Media

- Hare, John, "Shipping Law & Admiralty Jurisdiction in South Africa." <<http://www.uctshiplaw.com/booknew/Chapter%202.pdf>> (accessed April 20, 2015).

Thesis

- Wallis, Malcolm John David. "The Associated Ship and South African Admiralty Jurisdiction." Ph.D. thesis, KwaZulu-Natal University, 2010.

LEGAL CONTROL OF FOOD ADVERTISING ON CHILDREN PROGRAM*

*Pimkamol Sermnara***

ABSTRACT

The incidence of child overweight and obesity has been increasing dramatically all over the world. Children with overweight and obesity are subsequently at risk of developing a number of diseases. Overweight and obesity during the childhood will result in the same conditions during adulthood, and suffering from other chronic diseases and death at early age. One among factors that causes overweight and obesity is food marketing aimed at children especially foods producing high energy but less nutritional values. One of the best marketing approaches is to advertise foods on children programs and programs with children as the target group. Today advertising is a key marketing strategy in business. In the opinion of marketing professionals, children is a major group as potential consumers despite without their own purchasing power but have influence over those with actual purchasing power like parents and guardian. According to the investigation on advertisement and children behavior, it was found that television advertisements affect children's consumption behavior.

Relevant laws on food advertising in Thailand concern with prescribed rules for advertising in general while none of them is specific to food advertising targeted at children. Given this condition, advertisers employ various strategies in food advertisement aiming to simulate and raise the purchasing demand. However, children are less mature to distinguish between food that is and is not beneficial to their health and hence believe in the advertisement messages without considering about nutritional values.

This thesis mainly focuses on legal measures and self-regulation measures for the control of food advertising on children program particularly in the United Kingdom, Australia, and Singapore. These 3 countries made available the code of food advertising on children program that encompasses both the contents and formats of advertisement, including the restriction on advertising regarding types of program, types

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of food, and advertising time. Moreover, they prohibited the use of particular advertising strategies in children programs. In comparison, food advertising laws and measures in Thailand failed to protect children from food marketing on television through children program. Revision of Thai laws should thus be taken into consideration

Keywords: Advertising, food, children

บทคัดย่อ

อัตราการมีน้ำหนักเกินและโรคอ้วนในวัยเด็กในปัจจุบันกำลังเพิ่มอย่างรวดเร็วทั่วโลก เด็กที่มีน้ำหนักเกินและเป็นโรคอ้วนยังเสี่ยงต่อการเป็นโรคต่างๆ ตามมา ถ้ามีภาวะน้ำหนักเกินและโรคอ้วนตั้งแต่เด็กจะส่งผลถึงการเป็นผู้ใหญ่ที่เป็นโรคอ้วน เป็นโรคเรื้อรังและเสียชีวิตตั้งแต่อายุยังน้อย อย่างไรก็ตาม มีปัจจัยหลายอย่างที่สามารถทำให้เกิดภาวะน้ำหนักเกินและโรคอ้วน ซึ่งหนึ่งในนั้นคือการทำการตลาดในอาหารที่มุ่งเป้ากับเด็ก โดยเฉพาะอาหารที่ให้พลังงานสูงแต่ด้อยคุณค่าทางอาหาร และการทำการตลาดที่ดีที่สุดวิธีหนึ่งก็คือการโฆษณาอาหารในรายการเด็กและรายการที่มีกลุ่มเป้าหมายเป็นเด็ก ซึ่งในปัจจุบันการโฆษณา ถือเป็นกลยุทธ์ทางการตลาดที่สำคัญในทางธุรกิจ ซึ่งเด็กถือเป็นกลุ่มผู้บริโภคที่สำคัญ แม้ไม่มีกำลังซื้อเป็นของตนเอง แต่ก็มียุทธวิธีเพื่อผู้ที่มีกำลังซื้อจริง ๆ อย่างพ่อแม่และผู้ปกครอง ทั้งนี้ จากการศึกษาเรื่องการโฆษณากับพฤติกรรมของเด็ก พบว่าการทำการโฆษณาทางโทรทัศน์ต่อเด็กมีผลต่อการบริโภคของเด็ก

กฎหมายที่เกี่ยวข้องด้านการโฆษณาอาหารในประเทศไทย ประกอบด้วยพระราชบัญญัติอาหาร พ.ศ. 2522 พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ.2522 พระราชบัญญัติการประกอบกิจการกระจายเสียงและกิจการโทรทัศน์ พ.ศ. 2551 และประกาศสำนักงานคณะกรรมการอาหารและยา เรื่อง หลักเกณฑ์การโฆษณาอาหาร พ.ศ. 2551 พบว่า เป็นกฎหมายที่เกี่ยวข้องกับการกำหนดหลักเกณฑ์ในการโฆษณาสินค้า โดยทั่วไปซึ่งไม่ได้เจาะจงการโฆษณาอาหารที่มีกลุ่มเป้าหมายเป็นเด็ก ด้วยเหตุนี้ นักโฆษณาจึงใช้กลยุทธ์ต่างๆ ในการโฆษณาอาหารเพื่อกระตุ้นความต้องการซื้อสินค้า และด้วยความเป็นเด็กไม่มีวุฒิภาวะพอที่แยกแยะว่าสิ่งไหนเป็นประโยชน์หรือไม่เป็นประโยชน์ หลงเชื่อตามโฆษณา โดยไม่คำนึงถึงคุณค่าทางโภชนาการแต่อย่างใด

วิทยานิพนธ์ฉบับนี้ศึกษากฎหมายและมาตรการในการควบคุมการโฆษณาอาหารในรายการเด็ก ในประเทศอังกฤษ ประเทศออสเตรเลีย และประเทศสิงคโปร์ ซึ่งมีการกำหนดหลักเกณฑ์ในการโฆษณาอาหารในรายการเด็กครอบคลุมทั้งรูปแบบและเนื้อหา โดยมีการกำหนดประเภทรายการที่ห้ามโฆษณา มีการกำหนดประเภทอาหารที่ห้ามโฆษณา มีการกำหนดระยะเวลาในการโฆษณา รวมถึงห้ามมีการใช้กลยุทธ์ต่างๆ ในการโฆษณาอาหารในรายการเด็ก เมื่อเปรียบเทียบกับกฎหมายและมาตรการในการควบคุมการโฆษณาอาหารของประเทศไทยนั้น พบว่าไม่เพียงพอต่อการคุ้มครองผู้บริโภคที่เป็นเด็กจากการทำการตลาดอาหารผ่านทางโฆษณาในรายการเด็ก

คำสำคัญ: โฆษณา, อาหาร, เด็ก

Introduction

In Thailand, a number of studies indicated increasing trends in overnutrition among Thai children. There are 50,000 children more reported with overnutrition each year. During 2008 – 2009, about 11 – 12 % of children aged 1 – 5 and 6 – 9 years display their body weight in a range of overweight and obesity, and the figures rise to 14.9 % between ages 10–14 years.¹ Including in early childhood children aged 1-5 years, overweight and obesity was 5.8 % in 1995 and increased to 8.5 % in 2009. Similarly, this trend was also found in school age children between 6-14 years; that is, 5.8 % in 1995 and 9.7 % in 2009.² According to the facts, it can conclude that the ages of Thai obesity child are between 1-14 years old. Moreover, Assoc.Prof. Dr. Ladda Mosuwan, a pediatrician, pointed out that obesity now become a severe threat of Thai children as the prevalence of overweight and obesity has constantly increased.³ Overweight during childhood is associated not only with an increased risk of adult obesity, but also with a number of immediate health-related problems.⁴

One among factors that causes overweight and obesity in children is food advertising on children program. According many researchers found that more increased television viewing time to the food advertisements, more increasing the children's attempts to influence their parents' purchases, particularly towards those food items for which they had seen an advertisement, and showed that the more advertisements a child could remember, the more they subsequently ate.⁵ As children are less cognitive mature to distinguish between what is and is not beneficial but only think about what they like or want, they believe in what is presented in the advertisement without any concern with nutritional value.

However, relevant laws on food advertising in Thailand include the Food Act B.E.2522, the Consumer Protection Act B.E.2522, the Broadcasting Business Act B.E.2551, and the Notification of the Food and Drug Administration on Rules for food

¹ Office of the National Economic and Social Development Board, Ministry of Public Health, Mahidol University, Thailand Healthy Lifestyle strategic Plan B.E.2554-2563 8 (2554)

² สถาบันวิจัยประชากรและสังคม มหาวิทยาลัยมหิดล, สำนักงานกองทุนสนับสนุนการสร้างเสริมสุขภาพ, สำนักงานคณะกรรมการสุขภาพแห่งชาติ, สุขภาพคนไทย 2557 11 (พิมพ์ครั้งที่ 1.นครปฐม: บริษัทอมรินทร์พริ้นติ้งแอนด์พับลิชชิ่ง จำกัด (มหาชน) 2557) (Institute for Population and Social Research, Mahidol University, Thai Health Promotion Foundation, National Health Commission Office, Thailand 11 (1st ed.2014).

³ *Id.*

⁴ World Health Organization, Set of recommendations on the marketing of foods and non – alcoholic beverages to children 4 (2010).

⁵ REBECCA SIXSMITH and ADRIAN FURNHAM, A content analysis of British food advertisements aimed at children and adults 25 (2009).

Advertising B.E.2551. The review of these laws suggested that they concern with prescribed rules for advertising in general but not specifically include those foods advertising targeted at children. Thailand has only Guideline for Practice on Foods and Snacks Advertising targeting at Children by the Advertising Association of Thailand (AAT).

This article aims to study legal measures and self-regulation measures on food advertising on children program in foreign countries, especially in The United Kingdom, Australia and Singapore where different measures to handle the problem are available. It seeks regulations for improving the current legal measures in Thailand to be comparable to other countries. The goal is to protect children consumers and enhance their quality of life.

1.The associated outcome of childhood obesity

Obesity during the childhood may lead to developing noncommunicable diseases (NCDs) such as hypertension (high blood pressure), breathing difficulties, dyslipidaemia (imbalance of fatty substances in the blood), hyperinsulinaemia (abnormally high levels of insulin in the blood), metabolic syndrome refers to a cluster of risk factors related to a state of insulin resistance, in which the body gradually becomes less able to respond to the metabolic hormone insulin. People with the metabolic syndrome have an increased risk of developing coronary heart disease, stroke and type 2 diabetes, exacerbation of asthma, type 2 diabetes, chronic liver disease. Including childhood obesity is associated with a higher chance of obesity, premature death and disability in adulthood.⁶

Moreover, psychological problems such as poor self-esteem, being perceived as unattractive, depression, disordered eating and bulimia, in addition, almost all obese children have experiences of teasing, social exclusion, discrimination and prejudice.⁷

2.International organization's guidelines regarding marketing of food to children

In 2006, the WHO's Technical Meeting on Marketing of Food and Non-Alcoholic Beverages to Children concluded that advertising has an adverse effect on

⁶ WHO Obesity and overweight, <http://www.who.int/mediacentre/factsheets/fs311/en/> (last visited May 12, 2015).

⁷ Overweight and obesity: the public health problem, http://www.fph.org.uk/uploads/HealthyWeight_SectA.pdf (last visited June 4,2015)

children's understanding of food knowledge, attitude, purchase behaviour and consumption.⁸

In March 2008, Consumer International (CI) and the International Obesity Taskforce (IOTF) launched Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children, which target the marketing of energy dense, nutrient poor foods that are high in fat, sugar and salt to children up to 16 years old. Its demands include:⁹

(1) A ban on radio or television adverts promoting unhealthy food between 06.00 and 21.00.

(2) No marketing of unhealthy food to children using new media (such as websites, social networking sites and text messaging).

(3) No promotion of unhealthy food in schools.

(4) No inclusion of free gifts, toys or collectible items, which appeal to children to promote unhealthy foods.

(5) No use of celebrities, cartoon characters, competitions or free gifts to market unhealthy food.

In May 2010, the World Health Assembly (WHA), through resolution WHA63.14, endorsed a set of recommendations on the marketing of foods and non-alcoholic beverages to children. The main purpose of the recommendations was to guide efforts by Member States in designing new policies, or strengthening existing policies, on food marketing communications to children in order to reduce the impact of marketing foods high in saturated fats, trans-fatty acids, free sugars, or salt.¹⁰ The World Health Organization has four recommended policy as follows.¹¹

⁸ Consumer International, **The junk food trap marketing unhealthy food to children in Asia Pacific** 11 (2008).

⁹ *Id.*, at 29.

¹⁰ World Health Organization, A FRAMEWORK FOR IMPLEMENTING THE SET OF RECOMMENDATIONS on the marketing of foods and non-alcoholic beverages to children 6 (2012).

¹¹ Oommen, V.G., Anderson, P.J., **Policies on Restriction of Food Advertising during Children's Television Viewing Times: An International Perspective** 3 (2008).

(1) Prohibiting advertising of energy-dense, micronutrient-poor food products at particular settings using specific methods or targeting a particular age group;

(2) Prohibiting advertising of energy-dense, micronutrient-poor foods and beverages to children;

(3) Prohibiting advertising of all food or drinks to children;

(4) Prohibiting all commercial promotion of any products to children

3.The controlling of food advertising on children program in foreign countries

3.1 The United Kingdom

3.1.1 The controlling of food advertising on children program under legal measures

The United Kingdom specified a type of food and a kind of program prohibited for advertisements; that is, banning high in fat, sodium or sugar food in children program and program with children as the target group.¹² Including, banning on sponsorship high in fat or sodium or sugar food in such program.¹³ Moreover, product placement in children program is also prohibited.¹⁴ It control either the contents and format of advertisement targeting at children, for example, any advertisement must not encourage excessive consumption¹⁵, must not encourage children to make a request from their parents¹⁶ and it must not imply that children will be inferior to others if they do not purchase particular product.¹⁷

3.1.2 The controlling of food advertising on children program under self-regulation measures

Television Advertising Standard Code provided that the advertised messages must not mislead the children¹⁸, advertising must avoid anything likely to encourage

¹² Ofcom, HFSS advertising restrictions Final review

¹³ *Id.*

¹⁴ Ofcom, *Product Placement Summary of responses to consultation on issues relating to product placement*, <http://stakeholders.ofcom.org.uk/> (last visited Apr. 21, 2015).

¹⁵ Advertising Standards Code, cl. 8.3.2.

¹⁶ *Id.* cl. 7.2.1.

¹⁷ *Id.* cl. 7.2.2.

¹⁸ Television Advertising Standard Code, sec.5(5.1.2).

poor nutritional habits or an unhealthy lifestyle in children¹⁹, The advertised messages should not guide or persuade children to buy or to request their parents or other adults to buy the product²⁰, The advertised messages must support adverse effect in children's dental health²¹, promotional offers in HFSS product targeted directly at pre-school or primary school children are prohibited²², promotional offers should be used with a due sense of responsibility²³, and characters and celebrities well-known to children may not be used in HFSS product advertising directed at pre-school and primary school children.²⁴

3.2 Australia

3.2.1 The controlling of food advertising on children program under legal measures

Children Television Standard 2009 determined the contents and formats of food advertisement on children program. It is banned to broadcast advertisements targeting at preschool children.²⁵ Any advertisement must not be misleading or deceptive in relation to nutritional claims of food²⁶, and must not put pressure to purchase the food being advertised.²⁷ The use of words "only" or "just" are restricted²⁸, and it is banned to have celebrities or persons known to children in food advertisement before, during, and after children program.²⁹ The length of time and repetition of advertisement in children programs are also specified.³⁰

3.2.2 The controlling of food advertising on children program under self-regulation measures

The Australian Association of National Advertisers Code provided that advertising directed to children for food and beverages should not encourage or promote an inactive lifestyle, should not encourage or promote unhealthy eating or drinking habits, must not contain any misleading or incorrect information about the nutritional

¹⁹ *Id.* sec.7(7.2.1).

²⁰ *Id.* sec.7(7.7.2).

²¹ *Id.* sec.8(8.3.1).

²² *Id.* sec.7(7.2.3).

²³ *Id.* sec.7(7.2.3).

²⁴ *Id.* sec.7(7.2.4).

²⁵ Children Television Standard 2009, CTS 24.

²⁶ *Id.*, CTS 32(7).

²⁷ *Id.*, CTS 31.

²⁸ *Id.*, CTS 32(6).

²⁹ *Id.*, CTS 35.

³⁰ *Id.*, CTS 27, 29.

value of the product, must not mislead or deceive, shall not include any appeal to children to urge parents or other adults responsible for a child's welfare to buy particular children's food or beverage products for them, must not state or imply that a product makes children who own or enjoy it superior to other children, must not be minimised by words such as "only" or "just", must not encourage children's excessive consumption of any food or beverage products, must not be placed in media where editorial comment or program content and must not use popular personalities or celebrities (live or animated) to endorse, recommend, promote or advertise.

3.3 Singapore

3.3.1 The controlling of food advertising on children program under legal measures

Singapore made available the law to control food advertising to general consumer, but not to those advertising targeting at children in specific.

3.3.2 The controlling of food advertising on children program under self-regulation measures

The Guidelines for Food Advertising to Children³¹ provided that all food and beverage products promoted in marketing communications that are primarily addressed to children 12 years old or younger in any media must meet the common nutrition criteria endorsed by the Health Promotion Board, should not encourage or promote unhealthy eating or drinking habits, should feature quantities of food or portion sizes that are responsible and relevant to the scene depicted, should not imply that children are likely to be inferior to others, should not show prices with words such as "only" or "just", should not urge children to eat or drink a product only to take advantage of a promotional offer and the premium and must not use popular personalities or celebrities (live or animated) primarily well known to children in advertising and marketing communications to promote or endorse the product, or premium unless they may present factual and relevant statements about nutrition and health.

4. Legal measure of food advertising on children program in Thailand

Relevant laws on food advertising in Thailand include the Food Act B.E.2522, the Consumer Protection Act B.E.2522, the Broadcasting Business Act B.E.2551, and the Notification of the Food and Drug Administration on Rules for food Advertising

³¹ The new guidelines will be incorporated into the Singapore Code of Advertising Practice 2008

B.E.2551. The review of these laws suggested that they concern with prescribed rules for goods advertising in general but not specifically include those foods advertising targeting at children. Only the Food and Drug Administration's Notification on Rules for food Advertising B.E.2551 that identified the age of models featuring in advertisement must be over 3 years for finished gelatin and jelly, and over 12 years for finished gelatin and jelly containing glucomannan or starch of konjac plant. Including, there are only few of such provisions to regulate advertising food for children and they apply to specific foods only food for infants and young children, supplementary food for infants and young children, milk and milk products, a finished gelatin and jelly and a finished gelatin and jelly containing glucomannan or starch of konjac plant, which are considered very few comparing to a wide range of food sold today.

However, the Broadcasting Business Act B.E.2551 does not have any stipulation to monitor a substance of an advertisement. It provided only period of advertising.

Given the absence of regulatory laws to control the contents and formats of food advertisements on children program, food marketing on television aimed at children is thus possible at all times. Advertisings can even apply different strategies which can stimulate children's appetite and lead to excessive consumption. Children are less mature to distinguish between what is and is not beneficial but only think about what is delicious and it is easy for them to believe what is presented in the advertisements without any knowledge on nutritional values. As a consequence, children are more likely to develop a health condition and a disease especially overweight or obesity. It is important to note that overweight during childhood is associated not only with an increased risk of adult obesity, but also with a number of immediate health-related problems.

As stated above, Thailand should have related laws to control food advertising on children program.

5.The development for Thai Laws

5.1 Prohibited product to advertising on children program

Although the snacks often cause the problems of obesity or overweight and Thai children consume them a lot; however, there is no clear definition what kind or type of food is considered as snacks. It thus suggests that food high in fat, sodium or sugar should be prohibited to advertise in children program, following the United

Kingdom's restriction. Because high fat, sodium or sugar food is nutrition that consists of fat or sodium or sugar. Over consuming of these nutritions will lead to be obese. And some kinds of HFSS food provide high energy but low nutrition value.

In this way, the Food and Drug Administration should examine and determine what kind of food contains high fat, sodium or sugar as the United Kingdom where the Food Standards Agency's nutrient profiling model is used. Therefore, FDA may use the UK model or formulate a new methodology which suits for Thai childhood. All Foods, therefore, are advertised in children programs required the certification of Food and Drug Administration as a non-HFSS food.

5.2 Children Program

Besides the fact shown the ages of Thai obesity child are between 1-14 years old and childhood is the person whose age not 14 years in medical regime. Therefore, the definition of "Children program" is a program with children aged 1-14 as the target group in order to serve the fact and medical regime.

5.3 Show time of children program

The Notification of National Broadcasting and telecommunications Commission on Criteria for Scheduling of Broadcasting or Television Service B.E. 2556 provides that between 06.00 pm – 10.00 pm is prime time during which children may also view television. In addition to the restriction of advertising of HFSS food during children programs, such practice should also apply to the prime time as well.

5.4 Other prohibitions on advertising in children program

The use of actor, singer, cartoon character, celebrity or persons known by children in advertisements on children programs, including sale promotion by giving rewards, free toys, and using the words "only" or "just", are strategies which affect children's purchasing and consumption behavior. Therefore, these strategies should be prohibited.

5.5 Advertising time during children program

Regarding the advertising time, the Broadcasting Business Act B.E.2551 allowed for 12.5 minutes per hour or an average of 10 minute per day. Therefore, it is unnecessary to specifically define the advertising time on children program. The government sector by the National Broadcasting and Telecommunications Commission;

however, need to strictly regulate, supervise, and inspect for the advertising not to exceed the length of time prescribed by the Act.

5.6 The regulator to control food advertising on children program

5.6.1 Food and Drug Administration

Food and Drug Administration, Other than inspecting the benefits, quality, and properties of foods to comply with section 41 in the Food Act B.E.2522, the Food and Drug Administration should also perform testing of food composition whether it is high in fat, sodium or sugar, and issue the advertiser a non-HFSS food certificate. In the testing, it may apply the FSA's nutrient profiling model of the United Kingdom or formulate a new methodology which suits for Thai childhood.

In brief, advertising of food in children program required both FDA's approval to advertise benefits, quality, and properties of foods, and FDA's certificate of non-HFSS food.

5.6.2 The Broadcasting Commission

The Broadcasting Commission shall be comprised of chairman from vice chairman of the National Broadcasting and Telecommunications Commission (NBTC) while other shall be from the NBTC which is not chairman or vice chairman of the NBTC,³² which have the power to act on behalf of the NBTC to license and regulate the operations of television broadcasting and prescribe licensing criteria and procedures or conditions.³³ Therefore, the Broadcasting Commission should also act to control food advertisements on children program with the following details.

(1) The author views that it should launch new notification under the authority of Act on Organization to Assign Radio and to Regulate the Broadcasting and Telecommunications Services B.E.2553 concerning on Advertising control for children program and prime time period which shall be mentioned the rules as follows:

(1.1) Advertisements shall not encourage excessive consumption.

(1.2) Advertisements shall not encourage eating desserts to substitute regular meals.

³² Act on Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E.2553, sec. 35.

³³ *Id.* sec. 37.

(1.3) Advertisements shall not encourage inactive lifestyle.

(1.4) Advertisements must not directly recommend or ask children to purchase or to ask their parents or others to make a request and must not imply that children will be inferior to others if they or their family do not take a particular food

(1.5) Advertisements shall not have actor, singer, cartoon character, celebrity or persons known by children to present the product.

(1.6) Advertisements shall not contain sale promotion such as giveaway or free toy, etc.

(1.7) Advertisements shall not offer discount using the words “just” or “only”.

(2) Screening the contents in food advertisement on children program in conformity to (1) as prescribed above.

(3) Define a definition of “children program” as a program with children aged 1-14 as the target group.

(4) Prohibit the advertising of high in fat, sodium or sugar food on children program and during the prime time between 06.00 pm. – 10.00 pm.

In summary, food advertising in children program is subject to an approval by 2 regulators. Initially, it requires FDA’s approval to advertise benefits, quality, and properties of foods, and FDA’s certificate of non-HFSS food. Later, it requires a content inspected by the Broadcasting Commission whether it is contrary to the rules of food advertising in children program, if not, it can be advertised.

Conclusion and Recommendations

Having examined Thai laws, the controlling of food advertising is under the Consumer Protection Act B.E.2522, the Food Act B.E.2522, the Notification of Food and Drug Administration on Rules for Food Advertising B.E. 2551 and the Broadcasting Business Act B.E.2551 which the enforcement of these laws aims to protect consumers in general. None of any specific details is provided to protect children from food advertising. Given the absence of regulatory laws to control the contents and formats of food advertisements on children program, food marketing on television aimed at children is thus possible at all times by applying different strategies which can

encourage children's appetite and lead to excessive consumption and finally become obesity children.

Food Act B.E.2522 should be amended by adding the second paragraph of Section 41 as "Any persons who want to advertise within children program or prime time period shall be passed the approval of FDA concerning on nutrition of food composition whether it is high in fat, sodium, or sugar." Including, launch new notification under the authority of Act on Organization to Assign Radio and to Regulate the Broadcasting and Telecommunications Services B.E.2553 concerning on Advertising control for children program and prime time period.

REFERENCES

1.Books and Articles

1.1 English Books

Consumer International (CI). **The junk food trap marketing unhealthy food to children in Asia Pacific.** Consumer International (CI), 2008.

Office of the National Economic and Social Development Board. **Thailand Healthy Lifestyle strategic Plan B.E.2554-2563.** Ministry of Public Health, Mahidol University, 2554.

World Health Organization. **A framework for implementing the set of recommendations on the marketing of foods and non-alcoholic beverages to children.** World Health Organization, 2012.

World Health Organization. **Set of recommendations on the marketing of foods and non - alcoholic beverages to children.** World Health Organization, 2010.

1.2 Thai Books

สถาบันวิจัยประชากรและสังคม มหาวิทยาลัยมหิดล, สำนักงานกองทุนสนับสนุนการสร้างเสริมสุขภาพ, สำนักงานคณะกรรมการสุขภาพแห่งชาติ. **สุขภาพคนไทย.** พิมพ์ครั้งที่ 1, นครปฐม: บริษัทอมรินทร์พริ้นติ้งแอนด์พับลิชชิ่ง จำกัด (มหาชน) 2557 (Institute for Population and Social Research, Mahidol University, Thai Health Promotion Foundation, National Health Commission Office. **Thai health.** 1st ed. Nakhon Pathom: Amarin printing and publishing public co. ltd, 2014).

2.Articles

2.1 English Articles

Oommen, V.G, Anderson, P.J. “Policies on Restriction of Food Advertising during Children’s Television Viewing Times: An International Perspective.” **Australian College of Health Service Executives** (2008).

Rebecca Sixsmith, Adrian Furnham. “A content analysis of British food advertisements aimed at children and adults.” **Oxford journals** (2009).

3. Electronic Media

Ofcom. *Product Placement Summary of responses to consultation on issues relating to product placement*, 2006. <<http://stakeholders.ofcom.org.uk/>>

The UK's Faculty of Public Health. *Overweight and obesity: the public health problem*. <http://www.fph.org.uk/uploads/HealthyWeight_SectA.pdf.>

World Health Organization. *Obesity and overweight*, 2015.
<http://www.who.int/mediacentre/factsheets/fs311/en/>.

LIABILITY FOR ADVERTISER AND INTERNET SEARCH ENGINE SERVICE PROVIDER: A CASE STUDY OF GOOGLE ADWORDS*

*Pitiporn Anantaset***

ABSTRACT

At the age of technology, people tend to search for hotel to stay on vacation on an internet search engine more often than looking it up in the guide book and search for plumber on a search engine more often than looking it up in the yellow pages like in the past. Once consumer behavior changes, the business operator and advertiser have to chase. Search engine operators came up with an idea to sell an advertisement on its pages. Once an internet user searches for any keyword, *e.g.* coffee shop, the advertisements of certain coffee shops who purchased such keyword will appear on the search engine page result alongside the natural search results.

However, since the dominant search engine, Google, began offering trademarks for use as keywords on an unrestricted basis, trademark proprietors responded to Google by filing more than one hundred claims throughout the world, especially in the United States and European. Courts have varied in their approach to the case. It is argued whether search engine operators are entitle to sell the keyword or not, whether it should be liable for trademark infringement, any other laws, if the use of trademark as keyword causes confusion in the origin of products or services, or if it is misleading the consumer that products offered by advertiser are related to proprietor's products.

Although no cases of liability of search engine service providers have not been brought before Thai Court, the study of law in foreign countries will provide an important lesson for Thailand.

Keywords: misleading or deceptive conduct, Google AdWords, internet search engine, competition law, consumer protection, trademark infringement

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บทคัดย่อ

ในยุคของเทคโนโลยีปัจจุบัน เราเลือกที่จะค้นหาโรงแรมสำหรับพักผ่อนในช่วงวันหยุดทางอินเทอร์เน็ตมากกว่าจะเปิดหนังสือท่องเที่ยวในแบบเดิมๆ รวมถึงเลือกที่จะค้นหาเบอร์โทรศัพท์ช่างหรือหน่วยงานต่างๆ ทางอินเทอร์เน็ตมากกว่าจะค้นหาในสมุดหน้าเหลืองตามแบบเดิมๆ เมื่อพฤติกรรมของผู้บริโภคเปลี่ยน ผู้โฆษณาก็ต้องพัฒนารูปแบบในการโฆษณาตาม ดังนั้น ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ต (internet search engine service provider) จึงเริ่มขายพื้นที่บนระบบของตนเองให้เป็นพื้นที่สำหรับโฆษณา ซึ่งง่ายสำหรับผู้ใช้อินเทอร์เน็ตซึ่งเมื่อพิมพ์คำว่า “ร้านกาแฟ” ก็จะมีเว็บไซต์ (website) ร้านกาแฟต่างๆ รวมถึงเว็บไซต์โฆษณาร้านกาแฟซึ่งซื้อคำโฆษณาจากผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตต่อมาภายหลังรูปแบบการซื้อคำโฆษณาได้เปลี่ยนแปลงไปจาก “คำคีย์เวิร์ด” หรือ “คำสำคัญ” (keyword) ที่มีลักษณะทั่วๆ ไปเริ่มมีความเฉพาะเจาะจงมากขึ้นโดยรวมไปถึง คำคีย์เวิร์ด หรือคำโฆษณา ที่เป็นชื่อหรือเครื่องหมายทางการค้าของบุคคลอื่น โดยเฉพาะคู่แข่งทางการค้าของตน โดยกูเกิ้ล (Google) ในฐานะผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตรายใหญ่ได้เปลี่ยนนโยบายโดยกำหนดว่าการใช้เครื่องหมายการค้าของบุคคลเป็นคำคีย์เวิร์ดหรือคำสำคัญไม่ต้องห้ามอีกต่อไป ซึ่งการเปลี่ยนนโยบายนี้ทำให้เกิดคดีฟ้องร้องกูเกิ้ล (Google) เป็นจำนวนมาก โดยเฉพาะอย่างยิ่งในสหรัฐอเมริกาและยุโรป แต่คำพิพากษาของศาลนั้นก็แตกต่างกันไปตามข้อเท็จจริงในแต่ละคดี ดังนั้น จึงยังคงเป็นประเด็นที่ต้องพิจารณาว่า ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตซึ่งอนุญาตให้ผู้โฆษณาซื้อคำสำคัญซึ่งเป็นเครื่องหมายการค้าของบุคคลอื่นหรือคู่แข่งทางการค้านั้น จะมีความรับผิดชอบในการละเมิดเครื่องหมายการค้าของบุคคลอื่นหรือความรับผิดตามกฎหมายอื่นๆ หรือไม่ แม้ว่าในปัจจุบันประเทศไทยยังคงไม่มีคดีข้อพิพาทดังกล่าวเกิดขึ้น แต่การศึกษบทกฎหมายหรือคำพิพากษาที่ตัดสินในต่างประเทศก็น่าจะเป็นแนวทางที่ดีสำหรับศาลไทยต่อไป

คำสำคัญ: พฤติกรรมที่หลอกลวงหรือทำให้เข้าใจผิด, กูเกิ้ล แอดเวิร์ด, ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ต, กฎหมายแข่งขันทางการค้า, คู่ครองผู้บริโภค, ละเมิดเครื่องหมายการค้า

Introduction

Today, “Google” has become the most influential online information resource and is easily accessed. Regardless of the magnitude of records, Google capable of providing researchers as much information as has stored. Technically, Google plays a role of the largest online library that Internet users can access from anywhere at anytime. The users only have to input a “keyword” on the small search box on the Google page to find all the linked information and resources that they need through linking websites. Consequently, this smart tool became a great channel for sponsors to promote their products and services online by paying a high price to get on the top line of the page, which lately became a separate platform on the screen called “sponsored link”. Those sponsored links are basically operating by “Google AdWords” program,

which adds the terms and phrases to the regular ones.¹ However, the coin always has two sides, this benefit has led to legal issues when the rivals begin to take on the sponsored links by misleading the keyword to a different site. For example, one particular keyword would lead to a specific product that has an associated name to the keyword, but the result turns into another misleading way around to different product, which is owed by a direct competitors. Additionally, the sponsored link also violates trademarks, which recently became the legal issues in many countries. Especially after Google changed its policy and offered trademarks for use as keyword on an unrestricted basis in 2004, trademark owners responded by filing more than 100 lawsuits in the United States and Europe².

The misleading keyword on search engine has never been a consideration in Thailand. However, previous issues in other countries, as mentioned above, could be a significant force to encourage an awareness of online trademark legal issue that may arise in Thailand.³

1. Google Adwords and How it works

1.1 Search Engine Output Architecture and Result Page

1.1.1 Natural Search Results or Organic Search Results

One of the types of search response is a list of what is termed “natural search results” or “organic search results”. Natural search results are the webpages that naturally match the user’s search query ranking by most relevance and popularity without charging. In other word, the website owners have paid nothing to Google for displaying their websites in response to search result. The relevance, importance and popularity of each website will be determined by various algorithms. Even though the way algorithm’s work remains unknown, it is known that the natural search result rankings cannot be purchased.⁴

¹ Ashley Tan, “Google AdWords: Trademark Infringer or trade liberalizer”, available at <http://www.mttl.org/volsixteen/tan.pdf>.

² David A. Hyman and David J. Franklyn, Trademarks as Search-Engine Keywords: Who, What, When?

³ วุฒิ ศรีธีระวิศาล และเอกรินทร์ วิริโย, ผลลัพธ์ที่ได้จากการค้นหาข้อมูลบนอินเทอร์เน็ต: กรณี “Google Adwords” ในประเด็นการแข่งขันทางการค้าและเครื่องหมายการค้า, บทบัณฑิต เล่ม 70 ตอน 2 (2013) (Wut Sriterawisarn and Aggarin Viriyo, *Search Results provided by Internet Search Engine: “Google AdWords” Case on the Issue of Trade Competition and Trademark*, Bot Bundit Volume 70 Part 2 (2013)

⁴ Amanda Scardamaglia, “Keywords, Trademarks, and Search Engine Liability”, available at http://networkcultures.org/query/wp-content/uploads/sites/4/2014/06/12.Amanda_Scardamaglia.pdf.

1.1.2 Sponsored Search Results or Sponsored Links

Another type of responses is termed “sponsored links” (Google), ‘sponsored results’ (Yahoo!) or ‘sponsored sites’ (Microsoft Bing) and sometimes is referred to as “paid results”⁵, the marketing method that ascertains the business owners that their website will be placed on the ideal location in order to attract the greatest attention of internet users. The advertisers or website owners agree to pay Google to have their webpages preferential display in response to certain keywords. Google has developed the program called “AdWords Program” to generate the sponsored links. AdWords program will enter terms or phrases selected by advertisers with approval of Google into sponsored links. The paid results will appear in two different locations which are in a shaded color marked ‘Ad’ or ‘Ads related to...’⁶ at the top of list of result and on the right hand side of the natural search results. For instance, the online hotel booking website purchases the keywords ‘hotel’ which he wants his website and AdWords ads to be associated.⁷ He can choose several ad formats, *e.g.* simple text ad,⁸ this ad will be internally linked to the purchased keywords.⁹ Whenever the internet users search for the keyword ‘hotel’, the ad will appear alongside other organic search results.¹⁰ The order or ranking among sponsored links is determined by Google AdWords program, instead of the Google web search algorithm.¹¹

1.2 Sponsored Search and Trademarks of Others

Trademark use in sponsored search can be categorized into three types which are associated use, competitive use, and opportunistic use.¹² If a trademark is used by a reseller or dealer of product or service or someone who offers associated products or

⁵ For Dummies’ a Wiley Brand, *The Difference between Organic and Paid Search Engine Results*, available at <http://www.dummies.com/how-to/content/the-difference-between-organic-and-paid-search-eng.html>.

⁶ Bing labels its paid links using the same terminology (‘Ads’) while Yahoo labels paid links with the term ‘Sponsored Results’ but both use the same search page architecture as Google

⁷ AdWords Help, *What is Google AdWords?*, available at <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6084>.

⁸ AdWords Help, *Ad types*, available at <http://adwords.google.com/support/aw/bin/topic.py?hl=en&topic=16078>.

⁹ AdWords Help, *supra* note 7

¹⁰ AdWords account holders can set their ads to appear in the search results of other Google programs, such as Gmail. (AdWords Help, *Where will my ads appear?*, available at

<http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6119>.)

¹¹ Amanda Scardamaglia, *supra* note 4

¹² BJ Jansen and MA Rossa, *Smart Marketing or Bait & Switch: Competitors’ Brands as Keyword in Online Advertising* (WICOW’10 Proceedings of the 4th workshop on Information credibility 2010)

services, then such use is called associated use.¹³ If the advertiser's products are not associated to the trademarked products or services, and the advertiser is a direct competitor of the trademark's proprietor, then such use is called competitive use.¹⁴ If the advertiser does not offer the associated products, services, or is not a direct competitor of the proprietor of used trademark but by any chance used such trademark to advertise their products or services, then such use is called opportunistic use.¹⁵

1.3 Significance of Problems

The business operators and advertisers are now changing the form of advertisements from newspaper, television, billboard or whatever to the online advertising which is more direct. There might not be any trouble if every advertiser used proper purchased keywords to trigger his or her ads. It becomes a problem when some advertisers use tricky keyword to trigger their ads by using the trade name or trademark of their rivals as a keyword, *e.g.* STA Travel¹⁶ purchased the term 'Harvey Travel' which is the name of its competitor, when the internet user searched for Harvey Travel, the hyperlink headline to STA Travel's website appeared in the top of listing. In addition, some advertisers used other trade names or trademarks as a keyword to advertise their counterfeit goods.

The online advertising business experienced rapid growth up, consequently, the standard should be set among the online advertising players. According to the fact given above, once the online ads were misused by using other trade names, trademarks or catchwords, these lead to the legal problems which will be thoroughly studied in the next Chapter, as follows:

1.3.1 Trademark Infringement

The legal issue to be considered is whether using other proprietors' trademarks as keyword, on one of a part of keyword, to advertise the advertisers' websites is deemed trademark infringement. In addition, as a search engine service provider, should Google be liable for encouraging or supporting such misconduct.

1.3.2 Misleading consumer for the most relevant results

The value of AdWords for advertisers lies in the fact that Google allows its keyword-linked ads to circumvent Google's usual page ranking system for non-

¹³ Stefan Kulk, "Search Engines Searching for Trouble?", available at http://www.stefankulk.nl/publications/search_engines_searching_for_trouble.pdf

¹⁴ *Id*

¹⁵ *Id.*

¹⁶ Rosanne Sands, "Google v ACCC: The Hight Court considers misleading and deceptive conduct", 15 **UNDALR** 152 (2013)

sponsored links. Although ads are subject to “ranking” among themselves, they maintain priority over non-sponsored links in Google’s search results display. Furthermore, since the ads appear beside search results that have been subjected to the normal page ranking algorithms and often do not explicitly indicate that they are sponsored links, Internet users may be misled to assume that the ads which ranked at the top of pages are the most relevant results.

1.3.3 Misleading that the goods or services are relevant to the rival’s goods or services while they are not

In the first scenario where an advertiser uses the registered trademark or well-recognized term or phrase of its competitor, the consumers can be misled that the products or information appearing on the ‘sponsored link’ of an advertiser are relevant to the well-known mark or keyword they are searching for. The proprietor might put its effort in advertising their products by other means, *e.g.* television commercial, and might maintain a good reputation. The advertisers just purchase the famous trade name or phrase to advertise their business. No one wants others to steal the fruit of their hardworking. This is misleading or deceptive conduct and definitely causes damage to the proprietor, *e.g.* loss of profit.

2. Liability for an Internet Search Engine Service Provider under the Laws of Foreign Countries

2.1 Liability for Trademark Infringement

2.1.1 Trademark Use

In the EU, use in course of trade is a hard requirement for imposing trademark infringement. The ECJ ruled that Google was operating in the course of trade.¹⁷ However operating in the course of trade does not imply that the sign is used in the course of trade. Consequently, the Court rendered the judgment in favor of search engine operator. On the other hand, under the US Law, use is not strict requirement and the judge in the Second Circuit Court analyzed the fact that trade on the value of the plaintiff’s mark as mark made it the basis of the commercial transaction.¹⁸

2.1.2 Likelihood of Confusion

Under EU Law, ECJ focused on the time the consumer views an advertisement. ECJ does not take into consideration whether the advertisement lead to decision to buy goods.¹⁹ Under the US Law, US has the concept of initial interest

¹⁷ Case C-206/01 Arsenal Football Club plc v. Matthew Reed [2002] ECR I-10273

¹⁸ 1-800 Contacts, Inc. v. WhenU.com, 414 F.3d 400 (2d Cir. 2005)

¹⁹ Case C-342/97 Lloyd Schuhfabrik Meyer v Klijsen Handel [1999] ECR I-03819

confusion. According to this concept, a search engine user that is confused about the origin of goods the first time they see the advertisement, but during the time he makes the decision to buy, he correctly understand that facts. This is called ‘initially confused’²⁰.

2.1.3 Secondary Liability for Trademark Infringement

Secondary liability in EU trademark consists of diverging national general liability and unfair competition rules. In contrast, US trademark law does provide for US wide secondary liability rules.

2.1.4 Safe Harbors

This is the limitation of liability for intermediaries and both legal systems apply this regime. EU provides the general safe harbor that applies to the hosting service provider²¹, while US has a specific regime to apply to trademark infringement. The key principle for US trademark safe harbor is ‘innocent infringer’²² who lacks knowledge about the infringement.

2.2 Liability under Other Laws

Saunders opines that keyword banner advertising does not amount to trademark infringement or dilution but such instances may be better remedied by the other laws *e.g.* false or misleading advertising.²³ The issues of misleading and deceptive conduct have been raised to consideration of High Court. The High Court of Australia’s unanimously determined that Google as an online publisher did not engage in misleading or deceptive conduct by merely publishing or managing the display of the sponsored links. This was because “Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading representations made by advertisers.” The High Court of Australia was of the view that Google as an intermediary or advertising channel, should not be treated differently from other intermediaries, *e.g.* print or online newspaper publishers or other broadcasters who broadcast the advertisements of others.²⁴

²⁰ This doctrine was developed in *Grotrian, Helfferich, Schults., Th. Steinweg Nachf. v. Steinway & Sons* 523 F.2d 1331 (1975) (2nd Circuit Court of Appeals); *Mobil Oil Corp. v Pegasus Petroleum Corp* 818 F.2d 254 (1987) (2nd Circuit Court of Appeals). It was applied to an Internet case in: *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* 174 F.3d 1036 (1999) (9th Circuit Court of Appeals).

²¹ E-Commerce Directive, Recital 17

²² The Lanham Act, sec. 32

²³ Kurt M. Saunders, *Confusion is the Key: A Trademark Law Analysis of Keyword Banner Advertising*, *Fordham Law Review* Volume 71 Issue 2 (2002)

²⁴ *Id.*

3. Legal Problems from Search Engine

Competition, consumer, and trademark laws in foreign countries provide various lessons for Thailand. This chapter will focus on how misleading and deceptive conduct are protected under the context of Thai legal system mainly through on the Trademark Act B.E.2534 (1991), the Trade Competition Act B.E.2542 (1999), the Consumer Protection Act B.E. 2522 (1979), and the Civil and Commercial Code and the Criminal Code.

3.1 Liability under Trademark Law

Trademark Act B.E. 2534 (1991) (“Trademark Act”) does not specify whether any acts will be considered ‘infringement’ which is different from the trademark law under other jurisdiction namely the United States of America and United Kingdom that specifically provide the acts of trademark infringement.²⁵ Hence, it is responsibility of court of justice to determine an act of trademark infringement when the cases are brought to lawsuit. The court must be careful in application of any rules of laws to the case.²⁶

3.1.1. Exclusive Right

Thai Trademark Act simply regulated an exclusive right of trademark’s proprietor in Section 44 but failed to provide the detailed description. Thus, an application and interpretation of trademark law normally relies on the court judgments and academic views. In the case of word trademark, although such word trademarks are registered under the Trademark Act, this does not mean that the trademark’s proprietor shall have the exclusive rights over the ‘word’ in every cases. The proprietor can prohibit others from using the word which is substantially identical or deceptively similar to the registered word in case that it is used as trademark. This includes both made-up words and ordinary words.

For instant, in the Supreme Court Judgment No. 433/2518, the plaintiff’s trademark was registered in Roman italic letter ‘TASTE’ together with phrase ‘Modern from U.S.A’ in subsequent line and the fish-shaped symbol. By the mean of registration, this does not mean that the plaintiff was granted an exclusive right to use Roman word ‘TASTE’ regardless of including or excluding the fish-shaped symbol. Thus, the defendant’s use of the same word but in different form is not considered infringement of the plaintiff’s mark. Furthermore, the Thai Trademark Act does not provide either definition or description of term ‘use’. The elements used to be consider

²⁵ วาส ดิงสมิธร, คำอธิบายกฎหมายเครื่องหมายการค้า (พิมพ์ครั้งที่ 1 2545), น. 95 (Vas Tingsmith, Trademark (1st ed. 2002)

²⁶ *Id.*

whether the right of proprietor is infringed or not are (1) the offender uses a sign which is identical or similar to the trademark, (2) without proprietor's consent, and (3) use in relation to goods or services is identical to the goods or services for which the trademark was registered.²⁷ The most common type of suit for trademark infringement is when the business operator affixes trademark, registered to someone else, on his/her packaging and offers the products contained in the packaging for sale. There is no precedent case regarding the use of a competitor's keyword to advertise on the advertiser's website.

3.1.2. *Bona Fide Use of Personal Name*

Section 47 allows any person to use his own personal name, surname, the name of his place of business or description of the character or quality of the goods. However, such use or description is subject to 'bona fide' use. In case the registered mark is dishonestly used to describe the character or quality of one's goods or services, even though the proprietor of such registered mark cannot use his exclusive right under Section 44 to prohibit that person from using his trademark since the mark is not used as 'mark', the proprietor can hold the user liable under Section 47 because it would not be considered bona fide use.

As a result, I am of the view that Section 47 can be applied to cases where the trademark is used as a keyword to advertise one's business. The advertiser acknowledges that his competitor's trademark might be better known by users or consumers and the advertisers try to take advantage of that fame and draw consumers' attention to their products instead. Therefore, this is not considered 'bona fide use' and the advertiser shall be liable under Section 47.

3.1.3. *Passing Off*

Passing off is the course of action referring to the deceptive representation or the action, which misleads the public to believe that the goods or services offered by a defendant are relevant or in connection with the goods or services of a plaintiff. The provision of passing off also appears in Thai Trademark Act, under Section 46 and reads as follows:

Passing off is not limited to only registered marks, the goods or services in the same class, or identical to the goods or services for which the trademark was registered. Unlike the exclusive right under Section 44, the doctrine of passing off also extends to misleading in origin or owner of goods or services,²⁸ as ruled by classic Supreme Court Judgment No.343/2503. The plaintiff has sold powered detergent under

²⁷ *Id.*

²⁸ Vas Tingsmith, *supra* note 25, page 108

the mark 'FAB' for a certain period of time, the defendant's product was toothpick sold under a significantly identical mark named 'FAB'. The court held the defendant liable for passing off even though the goods offered for sale by parties were different. This is because it was clear that the defendant tried to mislead consumers to believe that the two products were from the same origin or economically related.

According to the study, I consequently opine that the passing off doctrine can be widely used since it does not stick with the term 'use of trademark' or 'use as a trademark'. The key element of passing off is deceptive misrepresentation. Thus, the use of competitor's trademark in an advertisement which aims to mislead consumer to understanding that the goods or services offered by the advertiser are relevant to the goods or services under the trademark the consumers are searching for can be deemed as 'passing off', and the advertiser shall be held liable under Section 46 para 2 of the Trademark Act.

3.1.4. Counterfeiting of Trademark

According to Section 108 of the Trademark Act, counterfeiting of trademark means making or creating the mark which is identical to the registered trademark. The defendant commits substantive offense upon completion of counterfeiting of trademark even if the mark has not been used. In order to analyze whether use of trademark as an advertised keyword should be deemed counterfeiting of trademark or not, it is important to understand the following criteria. First, the definition of trademark. According to Section 4 mentioned above, trademarks can be in the various forms, *e.g.* photograph, drawing, shape, word or letter, while the 'keyword' can only be in form of word, letter or number. Thus, trademarks which are used as keywords shall be limited to the word, letter or number since the photograph or combination of shapes and color cannot be inserted into the search engine box. Second, the character of a distinctive trademark which can help consumers in distinguishing between those trademarked goods and all other goods. Although the word trademark is distinctive because of specific font and format, once it is used as a keyword, it appears in normal text style. Thus, I opine that the advertiser who used competitor's or other's trademark as keyword has no intention of counterfeiting the trademark pursuant to Section 108.

3.2 Liability under Other Laws

In addition to trademark law, this section will analyze whether any existing law can be imposed on the internet search engine operator.

3.2.1 Liability of Advertiser and Internet Search Engine Service Provider under the Trade Competition Act B.E. 2542 (1999)

Unlike the laws of Australia, Thai competition law and consumer protection law are legislated in separated regulations which are the Trade Competition Act B.E. 2542 (1999) and the Consumer Protection Act B.E. 2522 (1979).

Thai Trade Competition Act B.E.2542 (1999) (“**Trade Competition Act**”) contains the major substantive provisions that can be found in most other competition laws.²⁹ The Trade Competition Act mainly focuses on an act of a business operator with market domination. Even though Google is deemed a business operator with market domination as it ranked the first most popular search engine in Thailand holding more than 90 percent of market shares³⁰, the Trade Competition Act mainly focuses on an abuse of market dominance provision³¹, merger control provision³², and collusive practice provisions³³. There are no provisions regarding misleading and deceptiveness as appeared in Australian Competition and Consumer Act 2010. Therefore Trade Competition Act will not apply if the misleading and deceptiveness happens in Thailand and the advertiser and the internet search engine service provider shall not be liable under the Trade Competition Act.

3.2.2 Liability for Advertiser and Internet Search Engine Service Provider under the Consumer Protection Act

The Consumer Protection Act B.E. 2522 (1979) (“**Consumer Protection Act**”) accords the provisions protecting against advertisements in Section 22.

According to the Office of the Consumer Protection Board (“**OCPD**”), advertisements containing a statement which is unfair to consumers under Section 22 includes any statement which is false, exaggerated, or causes misunderstanding of an essential element concerning goods or services³⁴. At this stage, there are no precedent cases regarding the liability of advertisers and internet search engine service providers that has been brought for consideration of Thai court. Under Thai consumer protection law, an advertiser shall be liable if he or she makes the advertisement containing a statement which will cause misunderstanding in the essential elements concerning

²⁹ Panpilai Issariyapruit, “*Summary of Thailand’s Trade Competition Act*”, available at <http://www.pricesanond.com/knowledge/summary-of-trade-competition-act.php>.

³⁰ <http://truehits.net/graph/allgraph.php#SEARCH>

³¹ Section 25 of the Trade Competition Act B.E.2542 (1999)

³² Section 26 of the Trade Competition Act B.E.2542 (1999)

³³ Section 27 of the Trade Competition Act B.E.2542 (1999)

³⁴ The Office of the Consumer Protection Board (OCPB), available at <http://123.242.175.89/office/consumerprotection/%A4%D9%E8%C1%D7%CD%E2%A6%C9%B3%D2.pdf>

goods or services while an advertising media shall be liable to one-half of such penalty. After considering Section 22 together with Section 47 of the Consumer Protection Act, I am of the view that in case any advertiser uses the search terms which are a name or trademark of its competitor in order to mislead the internet users or consumers to misunderstand that the goods or services under the name of ‘advertiser’ and ‘proprietor’ have the same origin, or the products of such advertiser are relevant to product of the competitor, the advertiser can be considered in intentional violation of Section 22 of the Consumer Protection Act and shall be liable under Section 47 of the same Act. Furthermore, in the case where the Committee on Advertisement opines that such advertisement violates the provisions regarding advertisement and orders to prohibit the use of certain statements or prohibit such advertisement, failing to do so will result in liability under Section 27 and Section 49 respectively.

However, there is another issue to be considered whether the search engine service provider, as an intermediary, shall be liable for misleading conduct under Section 22 and 47 or not. It is obvious that the person who shall be liable under Section 47 must have an intention to cause the misunderstanding. The fact that search engine service provider is not the one that chooses the ‘keyword’ for its customers, it is just an advertising channel and therefore should not be liable under Section 47 of the Consumer Protection Act. Nevertheless, if such search engine service provider becomes aware of that misleading conduct by being ordered to restrain or remove such advertisement and fails to comply with the Committee’s order, then it would be liable under Section 27 and Section 49. However, as an advertising media, it shall be liable for one-half of the penalty provided for the offense, pursuant to Section 50 of the Consumer Protection Act.

On the other hand, under the scenario where the advertiser purchases, as a keyword the proprietor’s trademark or the combination of proprietor’s trademark and the word ‘imitation’, ‘copy’ or any other words which have the same meaning, when the internet users search for such keyword, the website of advertiser which offered the imitation goods for sale will appear in response of such keywords, *e.g.* Vuitton Case, I opine that in case the consumer might not be misled in the origin of product, or mislead to understand that there is a business relationship between those two business operators as it is obvious that the proprietor offers for sale the genuine products, while the advertiser offers for sale the counterfeit goods. Thus, the advertiser shall not be liable for misleading or deceptive conduct under the Thai Consumer Protection Act.

3.2.3 Liability under Civil and Commercial Code

The trade name which is yet to be registered under trademark law can be considered under the Civil and Commercial Code. For avoidance of misleading in trade name, trademark or any other keyword, *i.e.* slogan or catchword, of other business operators, the following provisions under Section 18 of the Thai Civil and Commercial Code (“CCC”) might be able to apply to this circumstance.

In the circumstance where the advertisers use the name of their competitors as a search term, the person entitled to that name may demand the advertisers to stop using that name pursuant to Section 18 of the CCC. However, the Supreme Court Judgment ruled that the use of trade name which is prohibited must mislead or be likely to mislead public to misunderstand, in other words, the customer of Google AdWords must use other registered trade name for the same type of goods or services.³⁵

Section 18 mainly focuses on the use of a name which does not cover to other catchwords. However, the advertisers need to act in good faith by avoiding use of their competitors’ catchword. If the act of advertiser has the purpose of causing injury to its competitors by misleading the consumer that its goods or services are relevant to the competitors and may affect to the competitor’s profit, the injured person is able to demand the advertiser to stop causing the damage and claim for compensation, pursuant to Section 5 and Section 421 of the CCC.

3.2.4 Liability under Criminal Code

Section 271 of the Criminal Code rules that selling goods by any fraudulent and deceitful means in order to mislead buyer in the origin source constitutes cheating and fraud. Section 272 of the same Code imposes liability for using a name or any wording in carrying on the trade of another person or causing the same to appear on advertisement in order to make the public to believe that it is the goods or trade is the other persons. Thus, a person can be liable for misleading or deceptive conduct, pursuant to Offense relating to trade, under Section 271 and 272 of the Thai Criminal Code.

3.3 Analysis

Further to the provision or directive given above, I would like to suggest all business operators to consider ‘corporate governance’ or ‘good governance’. Corporate governance broadly refers to the plan or policy which the corporation is controlled and directed. At the end of the day, in case the advertisers and search engine service providers are able to escape from liability under any laws, there will be ‘good governance’ that they should follow. It seems unfair for the proprietor that he might put

³⁵ Supreme Court Judgment No.234/2519

all his effort to make his brand become well-known by other kinds of advertisements, *e.g.* television commercial, radio ads, billboard, etc, including maintaining his business in good reputation and someone just steals the fruit of his hardwork by using the proprietor's reputation to advertise his or her own products or make profit by consumers' misunderstandings. Besides, the intermediary or internet search engine service provider, although it does not select keyword or create the advertisement itself, its service can be counted as supporting or encouraging advertising misconduct. Google should take some responsibility in examining or preventing its customer from using others' trademark as keywords. However, it will be too much of a burden for Google to bear if they have the duty to examine if any ads violate or infringe trademark of others or not. Google can play a passive role for trademarks which are not very famous. That is to say, Google cannot prohibit its customers from purchasing or using this kind of trademark, but Google should take immediate action once it receives a trademark complaint.

Nonetheless, apart from the responsibility of advertiser, advertising businesses, namely Google to avoid misleading and deceptive conduct, the consumers or internet users should protect their own interests, maximize their own utility and be aware that there is a risk of misconduct by the business operators. It should be noted that internet sources can only be primary sources for internet users to search for some needed information, internet users cannot rely on website and search results provided by internet search engine completely.

Conclusions and Recommendations

Conclusions

According to the rapid development of technology, Google has developed a tool in order to facilitate internet users called "Google's Internet Search Engine", which enables the internet users to search for needed information available on the internet by inputting relevant words or phrases and they are provided with the search results which can be in the form of sponsored link and non-sponsored link. Sponsored links or sponsored ads were created for the advertising purposes, in other words for the business owner or advertiser to bring their products or services to public. This would not be the case if the program is used correctly. Nevertheless, legal issues in these cases arose from the businesses that nominated the names of rival businesses as a search keyword. The questions came to consideration of the court and relevant parties whether it violated the competition and consumer laws, infringed on trademark rights of the proprietors or

not, and whether the advertisers and internet search engine service providers should be liable or not.

Recommendations

1. The Trade Competition Act B.E.2542 (1999) should be amended by laying provisions of law governing liability for a person who engages in conduct that is misleading, or deceptive, or is likely to mislead or deceive.
2. The doctrine of contributory infringement should be applied under the laws of Thailand as the provisions currently used are not enough and put too much burden on the plaintiff. For instance, the proprietor has to prove the liability of advertiser first and subsequently hold the internet search engine service providers liable as a co-principal or a supporter, under Section 83 or Section 86 of the Penal Code for criminal claim, or as a co-principal under Section 432 of the CCC for civil claim.
3. YouTube has developed a program which has as ability to automatically detect copyright infringed videos upload on YouTube. Thus, an internet search engine service provider should also take more actions and have a responsibility to examine the relevance between the customers and keywords used in advertisements, especially for well-known marks.
4. In long term development, further to amendment of laws and regulations in order to cover infringement cases that will happen in future, the consumers should take part in preventing of infringement by adjusting their attitude toward intellectual property infringement. If the consumers tend to support and buy authentic products, the counterfeit products will gradually vanish from the market and the merchants offering the fake products for sale will consequently decrease.

REFERENCES

1. BOOKS AND BOOK ARTICLES

1.1 English

Alexander Tsoutsanis, *Trade mark registration in bad faith*, 1st ed. Great Britain: Oxford University Press, 2010

Ashwin Van Rooijen. *The Software Interface between Copyright and Competition Law: A Legal Analysis of Interoperability in Computer Programs*. 1st ed. The Netherlands: Kluwer Law International, 2010

Attorneys Stephen Elias and Richard Stim, *Patent, Copyright & Trademark: An Intellectual Property Desk Reference*. 4th ed. United States: Bertelsman Services Inc, 2001

Frauke Henning-Bodewig. *International Handbook on Unfair Competition*. Germany: Verlag C.H.Beck oHG, 2012

Richard Stim, *Trademark Law*. United States: The West Legal Studies, 2000

Xuan Li and Carlos M. Correa, *Intellectual Property Enforcement – International Perspectives*. United Kingdom: Edward Elgar Publishing Limited, 2009

1.2 Thai

ไชยยศ เหมะรัชตะ. *ลักษณะของกฎหมายทรัพย์สินทางปัญญา*. พิมพ์ครั้งที่ 5. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2548 (Chaiyos Hemaratchata. *Intellectual Property Law*. 5th ed. Bangkok: Nititham, 2005)

วิสต์ ดิงสมิตร. *เครื่องหมายการค้า: ตัวบทพร้อมข้อสังเกต เรียงมาตราและคำพิพากษาศาลฎีกา*. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2542

วิสต์ ดิงสมิตร. *คำอธิบายกฎหมายเครื่องหมายการค้า*. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2545

วิสต์ ดิงสมิตร. *กฎหมายศาลทรัพย์สินทางปัญญาและการค้าระหว่างประเทศ: ตัวบทพร้อมข้อสังเกตเรียงมาตราและคำวินิจฉัยของประธานศาลฎีกา*. พิมพ์ครั้งที่ 2. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2544

2. ARTICLES

2.1 English

Claire Howell, *Trade marks, registered designs and the monopolization of functional shapes: a consideration of Logo and Dyson*, Case Comment, European Intellectual Property Review, Vol.33 No.1, 2011

Christopher Morcom, *Trade marks and the Internet: Where are now?*, European Intellectual Property Review, Vol.34. No.1, 2012

David Ablett et al., *High Court finds Google not responsible for misleading “sponsored link”*, Australian Government Solicitor, 21 February 2013

2.2 Thai

วุฒิ ศรีธีระวิศาล และเอกรินทร์ วิริโย, “ผลลัพธ์ที่ได้จากการค้นหาข้อมูลบนอินเทอร์เน็ต: กรณี “Google Adwords” ในประเด็นการแข่งขันทางการค้าและเครื่องหมายการค้า *Search Results provided by Internet Search Engine: “Google AdWords” Case on the Issue of Trade Competition and Trademark*” (2013) บทบันทึกคดี เล่ม 70 ตอน 2

3. ELECTRONIC MEDIA

3.1 English

AdWords Help, “Using keyword matching options”

<https://support.google.com/adwords/answer/2497836?hl=en>

WorldStream, “Sponsored links” <http://www.wordstream.com/sponsored-links-google>

Ashley Tan, “Google AdWords: Trademark infringer or trade liberalizer”

<http://www.mttl.org/volsixteen/tan.pdf>

Google.com, “AdWords Help: What is Google AdWords?”

<http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6084>.

Google.com, “AdWords Help: Ad types,”

<http://adwords.google.com/support/aw/bin/topic.py?hl=en&topic=16078>

Google.com, “AdWords Beginner’s Guide: Ad basics,”

<http://adwords.google.com/support/aw/bin/static.py?page=guide.cs&guide=21899&topic=21903&answer=146296>

Google.com, “AdWords Help: What are keyword matching options?,”

<http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6100>

Australian Government, “Australia Consumer Law framework”

http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_framework_overview.docx

M+K Lawyer, “Google found liable for its misleading AdWords Search Result”

<http://www.mk.com.au/publications/article/google-found-liable-for-its-misleading-adwords-search-results>

IPWars, “Does anyone think Google is advertising the sponsored link”

<http://ipwars.com/2012/04/16/does-anyone-think-google-is-advertising-the-sponsored-links/>

Institute of Network Cultures, “*Society of the Query Reader: Reflections on web search*”

http://issuu.com/instituteofnetworkcultures/docs/sotqreader_def_issuu/175

Boult, European Patent and Trademark Attorneys, Chartered Patent Attorneys, “*Don’t be eviel – a tale of adwords*”

<http://www.boult.com/resources/bulletins/details.aspx?id=1112>

Panpilai Issariyapruit, “*Summary of Thailand’s Trade Competition Act*”

<http://www.pricesanond.com/knowledge/summary-of-trade-competition-act.php>

3.2 Thai

วิชัย อริยนันท์ทกะ, “ข้อสังเกตบางประการเกี่ยวกับกฎหมายเครื่องหมายการค้าและการป้องกันการแข่งขันที่ไม่เป็นธรรม”

http://elib.coj.go.th/Article/intellectual_2.phf

LEGAL MEASURES ON COMPRESSED NATURAL GAS FUEL SYSTEM COMPONENTS INSTALLATION*

*Poohdith Prakithonrungsee***

ABSTRACT

The installation process of Compressed Natural Gas (hereinafter “CNG”) components and equipment in vehicles, has no standard to adequately cover the operations, resulting in the consumer facing non-standardized installation issues. Results of the study find that the Ministerial Regulation Stipulate on Components and Equipment of CNG fuel system Act B. E. 2550 (2007), gives no clear-cut definition of the term, “Qualified Installer.” There has been no stipulation, neither the standard of installation building, nor exact qualifications of the qualified installer, nor adequate safety standard management, nor liability, nor penalty measure (both civilly and criminally), with respect to the damage consequently arising inspections and testing measures.

In this respect, this thesis has proposed that the Ministerial Regulation Stipulate the Components and Equipment of the CNG Fuel System Installation Act B. E. 2550 (2007) should be revised in reference to the virtue of the Department of Land Transportation by stipulating the establishment of the installation building, amending the verbiage regarding the standard and the term be amended in the Engineers Act, B.E 2542 (1999), by specifying the penalty provision as the liability for the punishment of a fine or imprisonment if the qualified engineer refrains from the duty of inspection and testing.

Keywords: CNG, compressed natural gas, natural gas, alternative fuel, engine retrofit, components installations

บทคัดย่อ

ในปัจจุบันการประกอบธุรกิจศูนย์บริการติดตั้งส่วนควบและเครื่องอุปกรณ์บรรจุก๊าซธรรมชาติอัด (CNG) ในรถยนต์ มีการให้บริการโดยมีมาตรฐานที่แตกต่างกัน เนื่องจากกฎหมายที่บังคับใช้กับผู้ประกอบธุรกิจศูนย์บริการติดตั้งยังไม่มีข้อกำหนดมาตรฐานของศูนย์บริการติดตั้งส่วนควบและเครื่องอุปกรณ์บรรจุก๊าซธรรมชาติอัด (CNG) ในรถยนต์ให้ครอบคลุมเพียงพอ ทำให้ผู้ใช้บริการ การประสบปัญหาจากการให้บริการจากศูนย์บริการติดตั้งที่ไม่ได้มาตรฐาน

จากการศึกษาพบว่า กฎกระทรวง กำหนดส่วนควบและเครื่องอุปกรณ์ของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิง พ.ศ. 2550 นิยามคำว่า “ผู้ติดตั้ง” ไว้ไม่ชัดเจนไม่มีการกำหนดมาตรฐานของศูนย์บริการติดตั้งคุณสมบัติของผู้ติดตั้ง การจัดการความปลอดภัยที่มีมาตรฐานเพียงพอ ไม่ได้กำหนดเกี่ยวกับความรับผิดชอบหรือมาตรการการลงโทษทั้งทางแพ่งหรือทางอาญาในเรื่องของความเสียหายที่เกิดจากวิศวกรผู้ตรวจและทดสอบที่ไม่ได้ทำการตรวจและทดสอบตาม โดยผู้ศึกษาได้เสนอแนะให้มีการแก้ไขเพิ่มเติมกฎกระทรวงกำหนดส่วน

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ควบและเครื่องอุปกรณ์ของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิง พ.ศ. 2550 โดยกำหนดให้การจัดตั้งศูนย์บริการติดตั้งควมมีมาตรฐานการติดตั้งรับรองไว้อย่างชัดเจน โดยกำหนดให้มีโทษปรับหรือโทษจำคุก รวมถึงการกำหนดมาตรฐานการทดสอบและตรวจสอบของวิศวกรผู้ติดตั้ง

คำสำคัญ: ซีเอ็นจี, ก๊าซธรรมชาติอัด, พลังงานทางเลือก, การดัดแปลงเครื่องยนต์, การติดตั้งส่วนควบและอุปกรณ์

Introduction

The problem with oil prices rising steadily is that it becomes a national crisis for Thai people.¹ These factors result in higher product price and transportation expenditure, whereas impacting the public land transportation as well as private land transportation, thus, the living cost also increases because of oil prices increasing.²

Most alternative energy costs are less than oil. In fact, the Ministry of Energy by PTT Public Company Limited has been promoting and supporting the use of natural gas to replace oil in the transportation sector, this alternative energy is called “natural gas for vehicle” (hereinafter “NGV”), or universally known as “compressed natural gas” (hereinafter as “CNG”). Government recently issued a Ministerial regulation or Announcement of Ministry to support the consumers who use CNG as fuel; however, the CNG fuel system components installation service needs to be initially concerned about public safety, as we have seen the news³ of explosions of the CNG vehicles or at CNG service center businesses.⁴ Installation must be done by standardized services with a qualified installer. After the installation, the vehicle still has to be inspected and tested by a qualified engineer who is authorized to inspect and test the vehicle before consumer use.

The problems mentioned above indicate that legislation of a proper legal measure is needed. The laws relating to controlling the CNG fuel system components installation services in Thailand are the Motor Vehicle Act B.E.2522 (1979), Ministerial

¹Deloitte Center for Energy Solutions, *Oil Prices in Crisis Considerations and Implications for the Oil and Gas Industry*, 2015, 1

²ดวงมณี เลิศอำนวยลาก, มนตรี สมหมอม, ภูวรินทร์ พงศ์ไพโรจน์, พุทธชาติ เทพยศ, ณัฏฐา นรงค์, และธัญญภรณ์ ไชยเชษฐ์, *ฝ่าวิกฤตพลังงานพลังงานทางเลือก NGV*, 2551, 24 (DaungmaneeLertumnuoy, MontreeSomhom, PhuvarinPongpairroj, PutthachartThepyos, NatthaNorakong, and ThunyaphornChaichet, **Struggle the Energy Crisis : Alternative Energy NGV**, 2008, 24

³ไทยรัฐออนไลน์, “ภัยจากรถติดแก๊ส”, Thairath (6 มกราคม 2558) (Thairath online, “Risk of Gas vehicles,” Thairath (January 6, 2015), available at <http://www.thairath.co.th/clip/10883> (last visited July 2, 2015)

⁴Independent News Network, “ผู้ติดแก๊สตลิ่งชันบึ้มไฟไหม้3คูหาารถ4คัน-เจ็บ”, Innnews (7 กุมภาพันธ์ 2556)(Independent News Network, “CNG service exploded around Taling Chun district burned 3 units of building, burned 4 cars, injured 4 person”), Innnews (February 7, 2013), available at <http://www.innnews.co.th/shownews/show?newscode=433068> (last visited June 20, 2015)

Regulation to stipulate components and equipment of CNG fuel system Act B.E. 2550 (2007)⁵ and Announcement of the Department of Land Transport issued under the Ministerial Regulation regarding the qualified installer of components and equipment of the CNG fuel system and also standard of components and equipment in CNG fuel systems. Presently, there is no legal provision that is applicable to the installation service of components and equipment of CNG fuel systems. This thesis aims at helping public safety and to set the suitable standard for every service.

1. Problems

1.1 The problem with the definition of “ผู้ติดตั้ง” in (hereinafter as "qualified installer")

Ministerial Regulation to stipulate components and equipment of CNG fuel systems Act B.E. 2550 (2007)⁶ defines as a person who installs components and equipment. The Announcement of the Department of Land Transport to stipulate on the rules, procedures and issuing the certification of The CNG fuel system Act B.E. 2550 (2007)⁷ define that a person who was been licensed or registered by the Department of Land Transport is to install components and equipment of CNG fuel systems. In the Announcement of Department of Land Transport concerning stipulation of the rules, procedures, and conditions in giving approval and cancellation of approval for being the qualified installer of CNG fuel systems, Act B.E.2550 (2007)⁸ defines that "qualified installer" is the person who is the manufacturer and general qualified installer. It will be seen that the definition of "qualified installer" gives no clear-cut term of "qualified installer." This will directly affect the entrepreneur who repairs CNG vehicles because this is not covered under such a system. There is a gap of non-standard maintenance centers that are not approved to be qualified installers.

1.2 The Problem with Buildings in Which the Installation of CNG and Liquefied Petroleum Gas (hereinafter as LPG)

Establishment of services to install LPG components and equipments has no adequate standard as CNG services. This is because LPG services are easily established

⁵กฎกระทรวงกำหนดเครื่องอุปกรณ์และส่วนควบและของรถที่ใช้ในการขนส่งที่ใช้ก๊าซ

ธรรมชาติอัดเป็นเชื้อเพลิงตามกฎหมายว่าด้วยการขนส่งทางบก พ.ศ.2550(Ministerial Regulation to stipulate on components and equipment of CNG fuel system Act B.E. 2550 (2007))

⁶*Id*

⁷ประกาศกรมการขนส่งทางบกเรื่องกำหนดหลักเกณฑ์วิธีการและการออกหนังสือรับรองการติดตั้งเครื่องอุปกรณ์และส่วนควบของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิงตาม

กฎหมายว่าด้วยการขนส่งทางบก พ.ศ.2550 (The Announced of the Department of Land Transport to stipulate on the rules, procedures and issuing the certification of The CNG fuel system Act B.E. 2550 (2007))

⁸ประกาศกรมการขนส่งทางบกเรื่องกำหนดหลักเกณฑ์วิธีการและเงื่อนไขในการให้ความเห็นชอบและการยกเลิกการให้ความเห็นชอบการเป็นผู้ติดตั้งเครื่องอุปกรณ์และส่วนควบของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิงตามกฎหมายว่าด้วยการขนส่งทางบก

พ.ศ.2550(The Announced of the Department of Land Transport to stipulate on the rules, procedures and conditions in giving an approval and cancellation of an approval in being the qualified installer of The CNG fuel system Act B.E. 2550 (2007))

by obtaining approval only from the Department of Land Transport, but they then can smuggle in and install both kinds of gas that do not follow the criteria regulations to certify standards for installation of CNG fuel system components in a light vehicle.

1.3 The Problem with “วิศวกรผู้ตรวจสอบ” (hereinafter “inspecting”)

The “qualified engineer” who examines and tests the CNG systems⁹ is that the engineer who is authorized to examine and test for approval of the certification. Unfortunately they usually (and incorrectly) refrain from duties in examination and testing before approving the certification, this violates the Announcement of the Department of Land Transport to stipulate the rules, procedures and conditions in giving an approval and cancellation of an approval in being the qualified engineer of The CNG fuel system Act B.E. 2550 (2007) section 16.¹⁰ There is no penalty to be liable for punishment, only warnings, license suspension, or temporary license withdrawal. The worst case is only engineer license revocation, which does not impose civil or criminal penalties.

1.4 The Problem with the Qualified Installer Criterion

The qualified installer issue is stipulated under the Announcement of the Department of Land Transport stipulating the rules, procedures and conditions in giving an approval and cancellation of an approval for the qualified installer of the giving an approval and cancellation of an approval for the qualified installer of the CNG fuel systems Act B.E. 2550 (2007) section 7 (2)¹¹ requires the credentials of a certified CNG fuel system installer, a qualification level of diploma or higher or equivalent in Electrical or Mechanical or passing the training courses related to the installation, which course was held at the Department of Labor. Another option is a course at the Office of Vocational Education Commission¹² or any others courses that are approved by the Department of Land Transport.

This is a profession that requires knowledge, expertise and experience. If a person does not have the expertise and experience in such work, this shall cause damage

⁹Gasthai.com, “มหัศจรรย์ถังก๊าซNGV,” (Gasthai.com, “Danger from NGV cylinder”), available at <http://www.gasthai.com/boardgas/question.asp?.id=501504> (last visited July 3, 2015)

¹⁰ประกาศกรมการขนส่งทางบกเรื่องกำหนดหลักเกณฑ์วิธีการและเงื่อนไขในการให้ความเห็นชอบและการยกเลิกการให้ความเห็นชอบการเป็นผู้ตรวจสอบส่วนควบและเครื่องอุปกรณ์ของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิงตามกฎหมายว่าด้วยการขนส่งทางบก พ.ศ.2550 ข้อ 16(The Announced of the Department of Land Transport to stipulate on the rules, procedures and conditions in giving an approval and cancellation of an approval in being the qualified engineer of The CNG fuel system Act B.E. 2550 (2007) Section 16)

¹¹ประกาศกรมการขนส่งทางบกเรื่องกำหนดหลักเกณฑ์วิธีการและเงื่อนไขในการให้ความเห็นชอบและการยกเลิกการให้ความเห็นชอบการเป็นผู้ติดตั้งส่วนควบและเครื่องอุปกรณ์ของรถที่ใช้ก๊าซธรรมชาติอัดเป็นเชื้อเพลิงตามกฎหมายว่าด้วยการขนส่งทางบก พ.ศ.2550 ข้อ 7 (2)(The Announcement of the Department of Land Transport to stipulate on the rules, procedures and conditions in giving an approval and cancellation of an approval in being the qualified installer of the CNG fuel system Act B.E. 2550 (2007)) section 7 (2))

¹²คณะกรรมการอาชีวศึกษา (Office of the Commission of Vocational Education)

to life and property of consumers¹³ (and potentially other unknown victims) that use the service; therefore, measures should be taken to develop a standard for qualified installers by providing a licensing exam to qualify a CNG installer to stringently ensure qualifications before operation.

1.5 The problem of the CNG cylinder or tank¹⁴.

The Announcement of the Department of Land Transport stipulating the standard of components and equipment of the CNG fuel system Act B.E.2550 (2007)¹⁵ have specified five standards: including the Thai industrial standard (hereinafter as “MorAorGor”), International Organization for Standardization (hereinafter as “ISO”), Economic commission for Europe Regulation (hereinafter as “ECE R”), American National Standards Institute / Canadian Standards Association (hereafter “ANSI / CSA”), American Society for Testing and Materials (hereinafter as “ASTM”),¹⁶ if the importer or possessor installs the CNG cylinder or tank does not meet the qualified standards and includes equipment used in installations. Mainly, there have been no legal measures made to control the importing of CNG cylinders and tanks to handle the improper CNG cylinders or tanks distributed to the market. The parties, who import, posses, distribute or install non-standard CNG cylinders or tanks need to be penalized.

Although the installation of the system CNG is the most popular among the consumers who want to save money, some consumers still are concerned about the long-term support from the government, including the safe usage of CNG; therefore, this thesis has studied the current situation in order to identify the problems of the consumer of the CNG fuel system components installation services to analyze and find solutions to solve this problem. This thesis desires to set up a standard for the CNG fuel system components installation service. This will ensure the trust of consumers in that they choose a proper service center to install CNG fuel system components and equipment.

2. Thai legislations concerning compressed natural gas fuel system components installation service

2.1 Legal issue on the definition of qualified installer

Due to Thai legislations that stipulate the definition of “qualified installer” which are;

a). “Qualified installer” means “one who installs components and equipment” under Ministerial Regulation stipulations on CNG fuel system components and equipment (B.E. 2550 (2007)), and

b). “Qualified installer” means “one who obtains certification from The Department of Land Transport to be an installer of components and equipment for vehicles that utilize CNG as fuel” under the Announcement of the Department of Land Transport stipulation on rules, procedures and conditions of giving an approval and cancellation of being qualified installer of CNG fuel system components and equipment (CNG fuel system B.E. 2550 (2007)).

¹³ *Supra* note 6.

¹⁴ *Id.*

¹⁵ ประกาศกรมการขนส่งทางบกเรื่องกำหนดมาตรฐานส่วนควบและเครื่องอุปกรณ์ของรถที่ใช้ก๊าซธรรมชาติอัดพ.ศ. 2550 (The Announcement of the Department of Land

Transport to stipulate on the standard of components and equipment of the CNG fuel system Act B.E.2550 (2007))

¹⁶ *Id.*

Moreover, the rules, procedures and conditions of the qualified installer are also stipulated under the Announcement of the Department of Land Transport stipulates rules, procedures and conditions in giving an approval and cancellation of being a qualified installer of components and equipment of CNG fuel systems B.E. 2550 (2007) number 7 (2) that is;

c). Qualified installer must have at least avocational certificate in mechanics or similar. They must have completed the training program for CNG installation, such as the training program from the Department of Energy Business (DOEB), training program from Department of Skill Development or training program that is certified by the Department of Land Transport.

From the above rule, if the entire CNG fuel system components installation services hire non-qualified repairers as mentioned to repair and install the CNG fuel systems, it can be claimed that they have never disrupted The Announcement of Department of Land Transport regarding to stipulation of rules, procedures and conditions in giving an approval and cancellation of being a qualified installer of components and equipment of the CNG fuel components system Act B.E. 2550 (2007) number 7 (2), The Department of Land Transport cannot give warning and temporary suspension, certified letter or revoke the qualified installer certification.

On the other hand, from the study of New South Wales State, Australia in the case of work on an NGV installations¹⁷ can only be carried out by a business licensed by the Motor Vehicle Repair Industry Council¹⁸ (hereinafter “MVRIC”). The required license for a “Natural Gas Mechanic” is issued under the Motor Vehicle Repairs Act, 1980. The work for which the license is needed includes installing an NGV system to a motor vehicle or repairing or adjusting any NGV equipment that has already been fitted to a vehicle. The tradesperson performing the installation, repair or service must hold a tradesman’s certificate as a “Natural Gas Mechanic,” issued by the MVRIC.¹⁹ It can be noted that the mentioned law has clearly defined the type of working mechanic of each category and prevented each type of mechanic from working on something beyond their qualifications.

Therefore, this thesis would like to propose a definition of “qualified installer” in the Announcement of Department of Land Transport to stipulate the rules, procedures and conditions in giving an approval and cancellation in being a qualified installer of CNG fuel system components (B.E. 2550 (2007)). The definition should be clear and fully cover the maintenance of CNG vehicles to clarify the scope of responsibilities of the qualified installer and maintenance mechanic.

2.2 Legal Issue on Standard of the CNG Fuel System Components Installation Building

The entrepreneur of the CNG fuel system components installation service can obtain approval to be a qualified installer from The Board of Certified Standards for

¹⁷ *Supra* note 125.

¹⁸ Parliament of New South Wales, “Motor Vehicle Repair Industry Council,” available at <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA19951019039> (last visited May 4, 2015)

¹⁹ RTA, “*Vehicle Standards Information No. 16 for Vehicle Owners & Operators in New South Wales*”, RTA (April 2, 1998), www.rta.nsw.gov.au/dvpr/vss.htm (last visited July 31, 2015)

NVG services²⁰, which consist of the three agencies: the Department of Energy, Department of Land Transport and the company PTT Public Company Limited (PCL), which aims to improve operation standards to be acceptable for the general consumer. The Board of Certified Standards for NVG services regulates rules and procedures by issuing the "Announcement of The Board of Certified Standards for NVG services regarding to criteria to certify standards of NGV fuel system components and installation of light-vehicles."²¹ The announcement is not an approval license to allow establishment of the CNG fuel system component installation shop. The objective is aimed to guarantee the standard of CNG service by issuing signage to owners and/or operators (who apply for this certification) to display at their CNG installation service.

Although, all the criteria seems practically effective, unfortunately the Announcement has not been published in the Government Gazette or even legislated by the Ministry of Energy. Moreover, there has been no provision supporting it, no sanction to obligate and no penalty punishment for any wrongdoing; thus, the status of the Announcement could only serve as guidance to the entrepreneur, who only needs to be certified by the board.

Therefore, this thesis proposes to enhance the Announcement of The Board of certified standards for NVG services regarding criteria for certified standards of NGV fuel system component installation services to light-vehicles, to be decreed under Department of Land Transport then amended by adding sanctions and penalty punishment for the owner and/or operator who shall not comply with said Announcement.²²

2.3 Legal Issue for Refraining From Performing Duties in Inspection and Testing of Qualified Engineer

With regards to safety issues of the CNG fuel system components installation service, Announcement from the Department of Land Transport concerning the stipulated procedures and conditions for approval and cancellation to be an examiner and tester of the components and equipment of the CNG fuel system installation B.E.2550 (2007) in article 16 indicate that if the qualified engineer does not follow the rules, procedures and conditions regulated by the Department of Land Transport, the Department of Land Transport has the authority to warn, temporarily suspend the approval letter, or revoke the letter of approval. Similarly, the Engineers Act B.E. 2542 (1999) also appointed measurements with only warnings and temporary license suspensions. In the event of misconduct in professional ethics, they only get a warning, probation, and license suspension for a period no more than five years, or the license is revoked as a disciplinary action. There's no civil or criminal penalty, thus, Engineering Act B.E. 2542 (1999) should appoint the penalty of misconduct in professional ethics of

²⁰คณะกรรมการรับรองมาตรฐานสถานประกอบการติดตั้งอุปกรณ์NGV (The Board of certified standard for NVG service)

²¹ประกาศคณะกรรมการรับรองมาตรฐานสถานประกอบการติดตั้งส่วนควบและเครื่อง

อุปกรณ์บรรจุก๊าซ NGV เรื่องหลักเกณฑ์การรับรองมาตรฐานศูนย์ติดตั้ง NGV สำหรับรถยนต์ขนาดเล็ก (Announcement of The Board of certify standard for NVG service regarding to criteria to certify standard of NGV fuel system components installation of light-vehicle)

²²Interview with Mr. Thanachot (anonymous surname), The engineers of the Department of Quality Security Safety Health and Environment section Compressed Natural Gas of PTT PCL., via the phone (25 June, 2015)

qualified engineer. There should be a civil and criminal penalty against using unsafe products in the name of Product Safety Act B.E. 2551 (2008).

Moreover, personnel that install the CNG components and equipment should have at least the qualification of a convocation certificate in mechanics or be qualified per completion of a training program that is CNG related, such as a training program for installation of CNG components and equipment by the Department of Skill Development; however, these programs aim to enhance labor skills and are very short programs. The qualified installer that passes these programs would not have enough experience and expertise in vehicle retrofitting; however, under a U.S. legal provision that the Department of Transportation (hereinafter “DOT”) has the duty to commission federal regulations concerning vehicle safety issues. Moreover, there is the National Skill Development and National Institute for Automotive Service Excellence (hereinafter “ASE”) that also approves the qualification letters and test the expertise of the mechanics. These approvals are valid for only five years. Similarly, Thailand should adopt this five-year approval of qualification in order to have qualified installers of a higher caliber working on the CNG fuel system component installation services.

2.4 Legal Issue on Standard of CNG Cylinder or Tank

Currently, the CNG Cylinder or tank is required to follow Thai Industrial Standards Institute (hereinafter “TISI”): TISI 370, or United Nation Economic Commission for Europe (hereinafter “UN ECE”): ECE R110. Most of the cylinders or tanks are imported. This could lead to difficulties in controlling the standard as Thailand does not have regulations on importation of cylinders or tanks. The Ministry of Commerce should control the importation of the CNG cylinders or tanks by the issued Announcement. There should be an approval letter in order to import the cylinder or tank. Moreover, TISI should announce the regulation, procedure and condition for submitting the approval letter for CNG cylinders or tanks that will be imported. Currently, there is no regulation on controlling and dealing with unapproved cylinders or tanks. There is no penalty on importers, distributors and qualified installers of unapproved CNG cylinders or tanks. In New South Wales, Australia, the installation of gas systems on vehicles section 27 has prevented any party from distributing any cylinder or tank that could be used to connect with the vehicle except that cylinder or tank which is suitable, safe for gas, as well as has the SAA certificate. For the installation in section 30(1), it states that connection of a cylinder or tank to a vehicle should not be done unless there is a document showing the compatibility.

The European Union (hereinafter “EU”) has a certified standard of gas tank in ECE R110, which states that cylinders or tanks need approval from the Economic Commission of EU. The manufacturer has to submit an approval request in order to get an approval number. Approved gas cylinders or tanks must have this permit with details of the approval number, capacity of the cylinder or tank, pressure on operation, pressure on testing, weight, and year of approval. In Thailand, the CNG cylinder or tank that is to be used must follow standard of ECE R110. Therefore, the Department of Commerce must announce the penalty for the importer, distributor and qualified installer of unapproved CNG cylinders or tanks.

Conclusion

Based on the study regarding legal measures on compressed natural gas fuel system components installation, in order to intensify standards for the CNG service center, this study would like to propose the amendment of related regulations as follows:

1) The Definition of Qualified Installer

The Ministerial Regulation to stipulate components and equipment of CNG fuel systems Act B.E. 2550 (2007), The Announcement of the Department of Land Transport to stipulate on the rules, procedures and conditions in giving an approval and cancellation of an approval in being the qualified installer of The CNG fuel system Act B.E. 2550 and The Announcement of Department of Land Transport concerning stipulation of the rules, procedures, and conditions in giving approval and cancellation of approval for being the qualified installer of CNG fuel systems, Act B.E.2550 (2007) should be extended the definition of qualify installer to cover the meaning of CNG engine vehicle. Those definitions should be aligned accordingly.

2) Standard of CNG Fuel System Components Installation Building

The study would like to proposes the enhancement of the Announcement of The Board of certified standards for NVG services regarding criteria for certified standards of NGV fuel system component installation services to light-vehicles, to be decreed under Department of Land Transport then amended by adding sanctions and penalty punishment for the owner and/or operator who shall not comply with said Announcement

3) Wrongful Refrain from Official Duty on Inspections and Examinations of Qualified Engineer

The study would like to amend Engineers Act B.E. 2542 (1999) by appointing a fine or imprisonment of the engineer who fails to examine and test the components and equipment and generates the certificate of examination and test for the vehicle that has not yet been checked, but falsely claims to be safe. There should be a civil penalty on the occurred damage, in which it should be different from other regular penalties by using a rule of a damages fine as punishment following the Product liability Act, B.E. 2551 (2008).

4) Standard for CNG Cylinder or Tank

The study would like to suggest that the Ministry of Commerce should consider legislation to enact an announcement for the regulation of imported CNG cylinder in which they would be prohibited or heavily controlled requiring an import certificate. There should be law enforcement in the form of the Ministry of Commerce announcement with the purpose to convict the importer, distributor and qualified installer who are involved with the non-standard CNG cylinder or tank. Finally, there should be an institute that has authority to inspect the imported CNG cylinder or tank as well as management of non-standard cylinder or tank. Furthermore, installation of CNG fuel cylinder or tank should only be performed by qualified system installers.

REFERENCES

Books and Book Articles

Thai Books

- ปรีดี เกษมทรัพย์. *คำบรรยายหลักกฎหมายแพ่งทั่วไปชุด 1*. กรุงเทพฯ: ไทยสังฆภัณฑ์การพิมพ์, 2515 (Pridi Kasemsub. *General law of civil code set 1*. Bangkok: Thai Sungkapan publishing. 2515 (1972))
- ไพฑูริย์ เอกจริยากร. *คำอธิบายกฎหมายจ้างแรงงานจ้างทำของรับขนยืมฝากทรัพย์*. กรุงเทพฯ: วิญญู, 2539 (Pathaichid Eakjariyakorn, *The explanation book for hire of services, hire of work, carriage, loan, deposit*, page 101, 2539)
- สงกรานต์ สี่มา. *เปลี่ยนใจใช้แก๊สตอนคู่ใจคนใช้เครื่องเบนซิน*. กรุงเทพฯ: จูปีตัส, 2550 (Songkarn Srma. *Change your mind for using CNG: Specially for gasoline system*. BKK. Jupitus, 2007)
- ศันสน์ โสติพิพันธุ์. *คำอธิบายกฎหมายลักษณะละเมิดจัดการงานนอกสั่งและลาภมิควรได้*. กรุงเทพฯ: วิญญูชน. (2550). (Sanunkorn Sodethipan. *Wrongful act and Manage of affairs without mandate*. Undue enrichment. Bangkok: Winyuuchon, 2550 (2007))
- สมคิด ธาดาชนะสุนทร. *ครบเครื่องเรื่องก๊าซในรถยนต์ใหม่ล่าสุด NGV/LPG*. นนทบุรี, 2549 (Somkid Thadachanasoonthorn. *Fully equipped about NGV/LPG*. Nonthaburi, 2549 (2006))
- สุขุมศุภนิตย์. *คำอธิบายกฎหมายคุ้มครองผู้บริโภค*. พิมพ์ครั้งที่ 4. กรุงเทพฯ: สำนักพิมพ์จุฬาลงกรณ์มหาวิทยาลัย, 2545 (Susom Suphanid. *Consumer protection book*. 4th edition. Bangkok: Chulalongkorn university Publishing, 2545 (2002))
- สุขุมศุภนิตย์. *องค์การเอกชนเพื่อคุ้มครองผู้บริโภค*. กรุงเทพฯ: วิญญูชน, 2544 (Susom Suphanid. *Private organization for consumer protection*. Bangkok: Winyuuchon, 2544 (2001))
- โสภณ รัตนากกร. *คำอธิบายกฎหมายลักษณะพยาน*. พิมพ์ครั้งที่ 8. กรุงเทพฯ: นิติบรรณการ, 2539 (Sophol Ratanakorn. *Law of witness*. 8th edition. Bangkok: Nitibannakarn, 2539 (1996))
- สำนักงานคณะกรรมการคุ้มครองผู้บริโภค. *กฎหมายคุ้มครองผู้บริโภค*. กรุงเทพฯ, 2530 (Office of the consumer protection board. *Consumer protection law*. Bangkok, 2530 (1987))
- เชื้อ ชูชา. *รถยนต์ระบบแก๊ส*. พิมพ์ครั้งแรก. กรุงเทพฯ: โอเดียนสโตร์, 2524 (Chaua Chukhum. *Gas system vehicles*. 1st edition. Bangkok: Odean Store, 2524 (1981))

- พงษ์พันธ์ ชมภูเพชร. *คู่มือติดตั้งก๊าซรถยนต์NGVและLPG*. พิมพ์ครั้งแรก. กรุงเทพฯ: โปรเฟสชันแนล เซ็นเตอร์, 2549 (Pongpan Chompoopetch. **Handbook of NGV and LPG installation**. 1st edition. Bangkok: Professional Center, 2549(2006))
- ดวงมณี เลิศอานวยลาภ, มนตรี สมหอม, ภูวรินทร์ พงศ์ไพโรจน์, พุทธชาติ เทพยศ, ณัฐฐานรงค์, ธัญญภรณ์ ไชยเชษฐ์. *ฝ่าวิกฤตพลังงาน พลังงานทางเลือก NGV*. พิมพ์ครั้งที่ 1. กรุงเทพฯ : ซีเอ็ดดูเคชั่น, 2551(Daungmanee Lertumnuoy, Montree Somhom, Phuvarin Pongpairaj, Putthachart Thepyos, Nattha Norrakong, Thunyaphorn Chaichet. **Struggle the Energy Crisis : Alternative Energy “NGV”**. 1st edition. Bangkok : Se-Education, 2551 (2008))

Articles

- รายงานวิจัยฉบับสมบูรณ์. *สคป. กับการคุ้มครองผู้บริโภค*. พิมพ์ครั้งที่ 11. กรุงเทพฯ: อรุณการพิมพ์, 2550 (Final report. *Office of the consumer protection board and Consumer protection*. 1st edition. Bangkok: Arun Publishing, 2550 (2007))
- ดร. อรศรี งามวิทยาพงศ์. *วิกฤตพลังงานกับแนวทางสู่การแก้ไข*. กรุงเทพฯ: วารสารสื่อพลังงานรู้จักนักคิด, 2549 (Dr. Orrasri Ngarmwittayapong. *Energy crisis and solution*. Bangkok Energy journal, 2549 (2006))
- National Energy Policy Office, *Natural gas for vehicles*. Bangkok: Energy planning journal, 2543 (2000)
- Livio Gambone, P. Eng. – Technical Manager Transportation Fuels, *Overview of NGV Fuel Tank Testing Requirements*, CSA group, MOVE Program Review November 18, 2013
- Deloitte Center for Energy Solutions, *Oil Prices in Crisis Considerations and Implications for the Oil and Gas Industry*, 2015, 1

Thesis

- โกญจนนาท เจริญสุข. *มาตรการทางกฎหมายที่เกี่ยวข้องกับธุรกิจให้บริการซ่อมบำรุง*. วิทยานิพนธ์นิติศาสตร์มหาบัณฑิตสาขาวิชากฎหมายธุรกิจ, บัณฑิตวิทยาลัยมหาวิทยาลัยรามคำแหง, 2545 (Gojanaj Charoensuk. *Legal measure concerning on vehicles maintenance*. Master's thesis. Ramkhumheng University. Law. 2545 (1981))

Electronic Media

- U.S Department of energy, *“Alternative Fuel Data Center,”* <http://www.afdc.energy.gov/laws/fed_summary> (accessed January 1, 2015)
- CleanNG, *“History of CNG,”* <<http://www.gocleanng.com/learn/cng-history>> (accessed June 20, 2015)

Automotive alternative registration board, 2555, "*History (Online)*," <<http://www.aafrb.com.au/about.aspx>> (accessed May 7, 2015).

LPG Exceptional energy, 2555, "*History of LPG (Online)*," <http://www.exceptionalenergy.com/en_GB/what-is-lpg/history>(accessed May 5, 2015).

PTT PCL, "*NGV INSTALLATION*," <<http://www.pttplc.com/en/Products-Services/Consumer/For-Vehicle/NGV/PTT-NGV/Pages/Installation.aspx>> (accessed June 19, 2015)

RTA, "*Vehicle Standards Information No. 16 for Vehicle Owners & Operators in New South Wales, April 2, 1998*," <<http://www.rta.nsw.gov.au/dvpr/vss.htm>> (accessed June 8, 2015)

CSA group, "*Importance of Specifying ANSI Safety Standards for CNG Components, December 10, 2014*," <<http://webstore.ansi.org>> (accessed August 8, 2015)

LEGAL MEASURES TO FACILITATE THE OFFERING OF EQUITY CROWDFUNDING *

*Poonhom Sookasang ***

ABSTRACT

Crowdfunding, in general, is a means of raising fund for commercial and non-commercial purposes. Non-commercial crowdfunding comprises “donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.” Crowdfunding begins with any person or entity posts a request for funding on a crowdfunding portal (normally in the form of website) with the specified details as to which project or product the persons raise money for and how they will use the money. They may indicate what investors will receive in return of their contributions or investment. When investors browse through projects shown on the crowdfunding portals and find projects of their interest, the investors then put money to finance that project. This thesis focuses on equity crowdfunding which investors receive shares of company in return of their investment.

Prior to May 16, 2015, the offer for sale of shares cannot be done without the approval from the Office of the Securities and Exchange Commission and only public limited companies are able to offer their shares to public. However, to provide an alternative and inexpensive source of funding for SMEs and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of Notifications allowing public offering of shares of limited companies possible if conducted through crowdfunding portals, and also exempt public limited companies from filing of registration statement and prospectus if the offers are made through crowdfunding portals.

Still, there might be loopholes or hindrances to these notifications that make them inadequate to facilitate the offer for sale of securities through equity crowdfunding portals in Thailand effectively. This thesis aims to identify those possible loopholes by adopting a method of comparative study of the law concerning equity crowdfunding in the United States and the United Kingdom in order to provide recommendations for Thailand’s current regulations. In conclusion, this thesis proposes that some provisions in the current notifications should be amended to better provide funding for startups and at the same time offer suitable investor protection.

Keywords: Equity crowdfunding, Capital market, SMEs

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บทคัดย่อ

การระดมทุนจากมวลชน หรือ Crowdfunding เป็นวิธีการระดมทุนที่มีวัตถุประสงค์ทั้งเพื่อประโยชน์ทางพาณิชย์และไม่ใช้เพื่อประโยชน์ทางพาณิชย์ การระดมทุนจากมวลชนที่ไม่ใช่เพื่อประโยชน์ทางพาณิชย์ได้แก่ การระดมทุนจากมวลชนเพื่อการกุศล (Donation-based crowdfunding) และการระดมทุนจากมวลชนที่ได้ผลตอบแทนเป็นสิ่งของหรือรางวัล (Reward-based crowdfunding) สำหรับการระดมทุนจากมวลชนเพื่อประโยชน์ทางพาณิชย์ประกอบด้วย การระดมทุนจากมวลชนในลักษณะกู้ยืมหรือตราสารหนี้ (Lending-based crowdfunding) และการระดมทุนจากมวลชนในลักษณะหุ้นหรือหุ้น (Equity-based crowdfunding) การระดมทุนจากมวลชนโดยทั่วไปเริ่มจากบุคคลหรือนิติบุคคลประกาศระดมทุนผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ (Crowdfunding portals) ซึ่งมักอยู่ในรูปของเว็บไซต์ โดยในประกาศระดมทุนจะระบุรายละเอียดต่างๆ เกี่ยวกับการระดมทุนนั้น เช่น จะนำเงินไปทำอะไร ต้องการเงินจำนวนเท่าไร ผู้ลงทุนจะได้รับอะไรเป็นผลตอบแทน โดยเมื่อผู้ลงทุนเลือกลงทุนให้กับโครงการที่ตนพอใจและโครงการนั้นระดมทุนได้ตามเป้าที่ตั้งไว้ เงินระดมทุนจึงจะโอนไปยังผู้ระดมทุน วิทยานิพนธ์ฉบับนี้มุ่งศึกษาการระดมทุนจากมวลชนในลักษณะหุ้นหรือหุ้น ซึ่งผู้ลงทุนจะได้รับผลตอบแทนเป็นหุ้นในบริษัท

ก่อนวันที่ 16 พฤษภาคม 2558 บริษัทมหาชนไม่อาจเสนอขายหุ้นต่อประชาชนได้หากไม่ได้รับอนุญาตจากสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ อย่างไรก็ตาม เพื่อช่วยให้กิจการขนาดเล็กเข้าถึงแหล่งเงินทุนได้ง่ายขึ้น และเพิ่มทางเลือกในการลงทุนให้กับผู้ลงทุน คณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ คณะกรรมการกำกับตลาดทุน และสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ ได้ออกประกาศจำนวนทั้งสิ้น 4 ฉบับ เพื่่อนุญาตและวางแนวทางเกี่ยวกับการระดมทุนจากมวลชนในลักษณะหุ้นทำได้ในประเทศไทย โดยยกเว้นการยื่นแบบแสดงรายการข้อมูลการเสนอขายหลักทรัพย์ของบริษัทมหาชนที่ได้ยื่นผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ รวมถึงอนุญาตให้บริษัทจำกัดเสนอขายหุ้นต่อประชาชนได้ หากเป็นการเสนอขายผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ด้วย

อย่างไรก็ตาม อาจจะมีช่องโหว่หรืออุปสรรคในประกาศเหล่านี้ ที่ทำให้การเสนอขายหุ้นผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ในประเทศไทยยังไม่เหมาะสมเพียงพอ วิทยานิพนธ์ฉบับนี้ต้องการระบุช่องโหว่เหล่านั้นโดยการศึกษาเปรียบเทียบกับกฎหมายเกี่ยวกับการระดมทุนจากมวลชนในสหรัฐอเมริกาและสหราชอาณาจักรเพื่อหาข้อเสนอแนะ สรุปได้ว่า บทบัญญัติบางประการ ในบางประกาศในปัจจุบันควรได้รับการแก้ไขเพื่อให้การระดมทุนจากมวลชนทำได้โดยมีประสิทธิภาพสูงสุดและมีระดับการคุ้มครองผู้ลงทุนที่เหมาะสม

คำสำคัญ: การระดมทุนจากมวลชน, ตลาดทุน, เอสเอ็มอี

Introduction

Small and medium businesses play a role in Thailand's economy. In 2010, there are 2.91 million small and medium enterprises in Thailand, representing about 99% of all entrepreneurs nationwide.¹ In addition to the significant number of SMEs in the country, small and medium businesses also contribute to 37.1% of Thailand's national GDP in 2010.² SMEs are responsible for 1.75 trillion Baht of the country's exports, representing 28.4% of total exports; and 1.77 trillion baht, representing 30.4% of total imports.³ Moreover, SMEs are also very crucial to the employment of the country. The

¹ EXIM Bank, "บทบาทของ SMEs ต่อเศรษฐกิจไทยและเปรียบเทียบศักยภาพในเวทีอาเซียน" (2012), <<http://www.exim.go.th/doc/newsCenter/38795.pdf>>

² *Id.* at 2.

³ *Id.* at 2.

workers in SMEs are accounting for approximately 10.51 million people, or about 77.9% of the nationwide labors. Even though the figures look impressive, but when compared with small and medium businesses in developed countries—such as Japan, South Korea, France and Germany—the SMEs in these countries contribute more than 50% to the economy.⁴ This illustrates that the Thai SMEs are still able to increase their role and contribute more to the national economy if the government provide supportive policy and easy access to capital formation.

Even though the number of SMEs in Thailand is high, the survival rate of SMEs is not as impressive. The Office of SMEs Promotion has compiled the amount of SMEs which are legal entities from the data provided by DBD and the number of SMEs which are non-legal entities from the Office for National Statistics. During the year 2010 there are 2,924,912 SMEs in Thailand while in the year 2011 the number of SMEs decreases to 2,652,854 which are 9.3% decrease.⁵ The main reasons are knowledge and skills in financial management of enterprises.⁶ Efficient working capital policy raises businesses' liquidity and competitiveness thus, boosting survival chance of such businesses.⁷

There are many sources of finance for business startups and SMEs; for example personal savings, angel investors, venture capital, and bank-based lending.⁸ Personal savings from the retained earnings might not be enough and it takes longer time to acquire. While angel investors—wealthy individual—is limited and tend to invest on larger businesses⁹ which is quite similar to venture capital. To get loans from banks is challenging for business startups and SMEs because they may lack collaterals and the transaction cost can be quite high. As for innovative business, it is difficult to evaluate the intangible assets, such as intellectual property rights, which the businesses possess. Furthermore, laws and regulations that govern fund-raising through capital market do not favor small enterprises.

Crowdfunding is a generic term refers to the mechanism of pooling small contributions, often in form of money, from a large group of people to fulfill common goals usually through the internet by means of online intermediary called crowdfunding portals. There are crowdfunding for non-commercial purpose and crowdfunding for commercial purpose. Non-commercial crowdfunding comprises “donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.” This paper focuses on equity-based crowdfunding or equity crowdfunding which investors receive shares of company in return of their investment.

Commercial crowdfunding may, and oftentimes, fall under the application of securities laws. In this case, the issuers—the project initiators—and the intermediaries—websites that facilitate financial return crowdfunding called crowdfunding portals—will have to comply with the burdensome requirement of securities offering. So, this has become an issue many capital market regulators around the world take into consideration. Some proactive regulators such as those of the United States, the United Kingdom, Canada and Italy have already come up with specific laws concerning this matter. Many more are in the process of drafting, public hearing, or finalizing their laws and regulations.

⁴ *Id.* at 2.

⁵ ศิริวรรณ ว่องวีระวุฒิ, ผศ.อารมณัฐ ไร่อินทร์ “เงินทุนหมุนเวียน ทางเลือกและทางรอดของ SMEs”

<http://www.bu.ac.th/knowledgecenter/executive_journal/jan_mar_13/pdf/aw02.pdf>

⁶ *Id.* at 2.

⁷ *Id.* at 2.

⁸ C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, **Colum. Bus. L. Rev.** 5 (2012).

⁹ *Id.* at 5.

Prior to May 16, 2015, the offer for sale of shares in Thailand cannot be done without the approval from the Office of the Securities and Exchange Commission and only public limited companies are able to offer their shares to public. However, in order to provide an alternative and inexpensive source of funding for start-up businesses and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of notifications allowing public offering of shares of limited companies possible if conducted through crowdfunding portals, and also exempt public limited companies from filing of registration statement and prospectus if the offers for sale of shares are made through crowdfunding portals.

Still, there might be loopholes or hindrances to these notifications that make them inadequate to facilitate the offer for sale of securities through equity crowdfunding portals in Thailand effectively. This paper aims to identify those possible loopholes by adopting a method of comparative study of the law concerning equity crowdfunding in the United States and the United Kingdom in order to provide recommendations for Thailand's current regulations.

1. Background of Equity Crowdfunding

1.1 Types of crowdfunding

Crowdfunding can be mainly divided to non-commercial and commercial crowdfunding. Non-commercial crowdfunding comprises “donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.”

(1) Donation-based crowdfunding, as the name indicates, expects nothing in return for the contributions that have been made to such donation crowdfunding projects.

(2) Reward-based crowdfunding and pre-purchase model crowdfunding are two similar models of crowdfunding and often appear together; the reward-based crowdfunding offers something (from memento, backstage access or having the contributors' names appeared in the credit) to the investors in return for the contribution but does not offer interest or earnings of the business; the pre-purchase model offers the end-product that the crowdfunding project creator is making in return for the contributions.

(3) Lending-based crowdfunding is a crowdfunding model that contributors provide loans to the initiators of lending crowdfunding with the expectation of repayment, either with or without interest.

(4) Equity-based crowdfunding offers shares of companies that raised financial capital from the crowd via equity crowdfunding intermediary called funding portal. Equity crowdfunding is quite obvious to notice, if investors receive corporate shares in return of their investment—it is the purchase of shares which section 4 of the Securities and Exchange Act defines as securities. Prior to May 16, 2015, the offer for sale of share to public must be made by public limited companies which obtain the approval from the Office of the Securities and Exchange Commission. However, in order to provide an alternative and inexpensive source of funding for start-up businesses and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of notifications allowing public offering of shares of companies, both public and limited companies, via crowdfunding portals possible.

1.2 Equity crowdfunding procedures

Crowdfunding begins with a company posts a request for funding on a crowdfunding portal (normally in the form of websites) with the specified details as to which project or product the persons raise money for and how they will use the money.¹⁰ The issuing company may indicate what investors will receive in return of their contributions. When investors browse through projects shown on the crowdfunding portals and find projects of their interest, the investors then put money to finance that project.¹¹ The amount of contributions varies according to the investors' wishes. However, some crowdfunding websites, such as Kickstarter.com, allow projects to be funded only if the funding goals are reached, this is called the all-or-nothing funding model.¹² While other sites, such as IndieGoGo.com, allow entrepreneurs to immediately pull money which is given to their projects without having to reach the stated funding goals.¹³ The exchanges of funds; either as the initial funding to the entrepreneurs or as paybacks to the investors; are normally facilitated by the escrow agents that are appointed by mutual agreement of issuing companies and crowdfunding websites which announced the request for funding.¹⁴

1.3 History of equity crowdfunding

Even though crowdfunding through the internet only recently becomes popular, the concept of raising money from the crowd is not new.¹⁵ It can be said that the concept of crowdfunding develops from the combination of two antecedent concepts: crowdsourcing and microfinance.¹⁶ Crowdsourcing is the collections of contributions from a large group of individuals to achieve a common goal.¹⁷ Hence, crowdsourcing is not limited only to the collections of money but other activities which need collaborations from the general public to accomplish the tasks as well.¹⁸ Microfinance or microlending is the practice of lending rather small amount of money to impoverished borrowers who typically lack access to banking services due to the absence of collateral, steady income, credit history or banking transaction costs.¹⁹

1.4 Benefit of equity crowdfunding

(1) Benefit to the companies seeking fund: bridging financing gaps for startups and SMEs; lower cost of capital.

(2) Benefits to the investors: providing investment alternative to investors; increasing the chance for investors to invest in start-up stage.

(3) Benefits to the country: channeling savings to the economy; increase competition.

1.5 Risks of equity crowdfunding

(1) Risk of fraud - can be reduced by many measures such as regulations that requires crowdfunding portals to carry out some sort of due diligence requirement that creates communication channel between investors and issuers provided by funding portals, or the use of escrow agent which crowdfunding portals do not let investors

¹⁰ Bradford., *supra* note 8, at 10

¹¹ *Id.* at 10.

¹² *Id.* at 19.

¹³ *Id.* at 19.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 27.

¹⁸ *Id.* at 27.

¹⁹ Ross S. Weinstein, "Crowdfunding in the US and Abroad: What to Expect When You're Expecting", 46 CORNELL INT'L L.J. 427 (2013)

directly transfer money to the issuing companies, rather they will use escrow agent to forward the raised fund to the issuers based on the agreed terms, to name a few.

(2) Risk of crowdfunding portal failure - can be reduced by having in place a regulatory regime for crowdfunding portal which require crowdfunding portals to be approved and complied with the regulations of the Office of the Securities and Exchange Commission.

(3) Investment risks such as illiquidity risk, dilution risk, failure of issuers' business, rarity of dividend; these risks can be mitigated by limiting the offering amount of issuers, categorize different types of investors based on their net worth or financial literacy. Plus, crowdfunding portals should help ensure that investors fully understand the risk of investment prior to invest their money through equity crowdfunding.

2. Laws Concerning the Offering of Equity Crowdfunding in Foreign Countries

2.1 The United States

The United States' President Obama signed the Jumpstart Our Business Startups Act²⁰, or the JOBS Act, on April 5, 2012²¹. The Title III–CROWDFUNDING²² of the JOBS Act creates exemptions from the Securities Act of 1933 regarding securities registration which allow financial return crowdfunding activities to be legally carried out in the United States without having to comply with the costly process of registration with the United States' Securities and Exchange Commission (hereinafter referred to as "US SEC") according to the 1933 Act. In order to protect the investors and introduce an inexpensive alternative source of funding to business startups, Title III of the JOBS Act applies to the issuers of financial return crowdfunding, intermediaries or funding portal, and crowdfunding investors. The JOBS Act permits business to raise fund from anyone—not only accredited investors—with specific limitations. As specified by the Securities Act of 1933, companies can offer or sell securities to the general public if the securities are registered with the US SEC or are exempted from registration.²³

The JOBS Act's requirements are as followed;

(1) Requirements on the issuers

Only United States-incorporated corporations which are not already registered with the US SEC are eligible corporations to offer crowdfunding shares. Those corporations must offer for sale of shares through a registered broker or funding portal. The limitation on the offering amount of a single issuer is not more than 1,000,000 USD within the 12-month period.

The JOBS Act exempts some filing and disclosure requirements on the issuers that offer their shares via crowdfunding portals still, the US SEC requires equity crowdfunding issuing companies to disclose the following information: general information about the issuing company,²⁴ financial information of the issuer which

²⁰ JOBS Act, sec. 1.

²¹ Stuart R. Cohn, "The New Crowdfunding Registration Exemption: Good Idea, Bad Execution", **64 Fla. L. Rev.** 1434 (2012).

²² cited as the "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012" or the "CROWDFUND Act" JOBS Act title III sec. 301.

²³ Shekhar Darke, "To Be or Not to Be a Funding Portal: Why Crowdfunding Platforms Will Become Broker-Dealers", **10 HSTBLJ** 183 (2014)

²⁴ Securities Act of 1933 § 4A(b)(1)(A), (B), (C), JOBS Act, sec. 302(a).

varies according to the target amount of the offering²⁵ (if the target size of offering is 100,000 USD or less the issuer only has to provide the most recent income tax return and a certified financial statement; if the target size of offering is more than 500,000 USD, the issuer must provide audited financial statements²⁶), ownership and capital structure of the issuer,²⁷ disclosure concerning the offering,²⁸ annual reporting requirement.²⁹

Issuers are prohibited from “advertise the term of the offering” other than to direct investors to brokers or funding portals.³⁰ Compensation to any person who promotes the offering “through communication channel provided by a broker or funding portal” is also restricted, unless complying with the US SEC rules of compensation disclosure.³¹

(2) Requirements on the investors

The JOBS Act imposes limitation on crowdfunding investment depending on net worth or annual income of each investor.³² For example, if both net worth and annual income is less than 100,000 USD; the limit is the greatest of either 2,000 USD, 5% of annual income, or 5% of net worth.³³

The crowdfunding portals must review investor education information, make sure that the investors answer question concerning the understanding of relevant investment risks, and affirm their understanding of the risk to lose all money and they can bear such loss.³⁴

(3) Requirements on the intermediaries (brokers or funding portals)

Crowdfunding intermediaries, either brokers or funding portals, must be registered with the US SEC.³⁵ Funding portal is a new category of intermediary created by the JOBS Act being defined as “any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6) of the Securities Act of 1933.”³⁶ Funding portals cannot offer investment advice; solicit purchases, sales or offers to buy securities displayed on their portals; compensate other persons for the solicitations or based on the sale of securities offered on their portals; hold, manage, possess or handle investors fund or securities; engage in other activity the SEC deems inappropriate.³⁷

Crowdfunding intermediaries must provide disclosures such as the ones related to risk and other investor education materials as the SEC determine appropriate.³⁸ Moreover, intermediaries must ensure that each investor reviews investor education

²⁵ Steven C. Bradford, “*The New Federation Crowdfunding Exemption: Promise Unfulfilled*”. <<http://web.law.columbia.edu/sites/default/files/microsites/capital-markets/files/Promise%20Unfulfilled.pdf>> (2012) 10.

²⁶ Securities Act of 1933 § 4A(b)(1)(D)(iii), JOBS Act, sec. 302(a).

²⁷ Securities Act of 1933 § 4A(b)(1)(H), JOBS Act, sec. 302(a).

²⁸ Securities Act of 1933 § 4A(b)(1)(E), (F), (G), JOBS Act, sec. 302(a).

²⁹ Securities Act of 1933 § 4A(b)(4), JOBS Act, sec. 302(a).

³⁰ Securities Act of 1933 § 4A(b)(2), JOBS Act, sec. 302(a).

³¹ Securities Act of 1933 § 4A(b)(3), JOBS Act, sec. 302(a).

³² Securities Act of 1933 § 4A(h), JOBS Act, sec. 302(b).

³³ *Id.*

³⁴ Securities Act of 1933 § 4A(a)(4)(C)(B), JOBS Act, sec. 302(b).

³⁵ Securities Act of 1933 § 4A(a)(1), JOBS Act, sec. 302(a).

³⁶ Securities Exchange Act of 1934 § 3(a)(80).

³⁷ Securities Exchange Act of 1934 § 3(a)(80)(A)(B)(C)(D)(E).

³⁸ Securities Act of 1933 § 4A(a)(3), JOBS Act, sec. 302(b).

information, affirms that the investor understand the risk of losing the entire investment, and answer questions concerning the risk of the investment.³⁹

Furthermore, crowdfunding intermediaries must take measures to reduce the risk of fraud which includes obtaining a background check on each officer or any person who holds more than 20% of the issuer's outstanding equity,⁴⁰ and ensure that the issuers receive the offering proceeds when the raised capital is more than a target offering amount. They must not compensate promoters, finder, or lead generators for providing the information that identifies any potential investor.⁴¹

Implementation rules

When the JOBS Act was signed into law in April 2012, it is required to issue the implementation rules within 270 days after enactment of the Act.⁴² Until the commission adopts the final rules, the use of crowdfunding exemptions under the JOBS Act is still unlawful under the federal securities laws.⁴³ However, as of May 2015 the US SEC has not yet issued the finalized rules.

Because of the uncertainty encompassing when the US SEC will finalize their implementation rules; numerous states have enacted (or are currently enacting) their own crowdfunding exemption law for intrastate offerings. As of May 2015, more than twenty states have either authorized separate intrastate crowdfunding exemptions or have enacted amendments to their current blue sky laws to allow some sort of intrastate Crowdfunding.⁴⁴

2.2 The United Kingdom

The Financial Conduct Authority (hereinafter referred to as "the FCA") is the United Kingdom's capital market regulator. The FCA has issued Policy Statement called "The FCA's regulatory approach to crowdfunding over the internet, and the promotion of non-readily realizable securities by other media (PS14/4)" which aims to outline the new regulatory regime that regulates firms operating investment-based crowdfunding portals.⁴⁵

(1) Requirements on the issuers

The PS14/4 does not specify about the issuers of equity crowdfunding. The Financial Services and Markets Act 2000 require the publication of prospectus when transferable securities are offered to the public. In practice, a majority of crowdfunding offers would fall within one of the exemptions provided in Section 86 of the Financial Services and Markets Act if the offers are "made to or directed at qualified investors only" or "the total consideration for the transferable securities being offered cannot exceed 100,000 Euro."⁴⁶ Hence, issuers may use this exemption, if they are eligible, to

³⁹ Securities Act of 1933 §4A(a)(4), JOBS Act, sec. 302(b).

⁴⁰ Securities Act of 1933 §4A(a)(5), JOBS Act, sec. 302(b).

⁴¹ Securities Act of 1933 § 4A(a)(10), JOBS Act, sec. 302(b).

⁴² JOBS Act Title III, section 302 (c).

⁴³ "Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act" (US SEC) <<http://www.sec.gov/spotlight/jobsact/crowdfundingexemption.htm>>

⁴⁴ "State of The States – List of Current Active And Proposed Intrastate Crowdfunding Exemptions (Updated)" (Crowdfunding Legal Hub) <<http://crowdfundinglegalhub.com/2015/01/16/state-of-the-states-list-of-current-active-and-proposed-intrastate-exemptions>>

⁴⁵ "PS14/4 - The FCA's regulatory approach to crowdfunding over the internet, and the promotion of non-readily realisable securities by other media - Feedback to CP13/13 and final rules" (FCA) <http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-04_PS_14/4_chapter_1>

⁴⁶ The Financial Services and Markets Act 2000, sec. 86.

not publish a prospectus. Moreover, the Companies Act 2006 also prohibits the offer of shares in a private limited company to the public.⁴⁷

(2) Requirements on the investors

Firms promoting unlisted securities via crowdfunding portals are only allow to directly communicating with the certain types of investors. Namely: professional clients; retail client who are venture capital or corporate finance contacts; retail clients who are certified as sophisticated or high net worth investors; retail clients who certify that they “will not invest more than 10% of their net investible financial assets in unlisted securities.”⁴⁸ If retail investors do not receive any advice, the appropriateness test shall be applied to those investors to ensure that investors understand the involved risks.⁴⁹

The FCA does not impose investment limit on sophisticate⁵⁰ and high net worth⁵¹ investors, whereas the investment limits for non-high net worth, non-sophisticate investors are capped at not more than 10% of the net investible assets.

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(3) Requirements on the crowdfunding intermediaries

The offer of shares will generally constitute a financial promotion which cannot be made to retail investors unless the promotion is communicated or approved by a firm authorized by the FCA or it benefits from an exemption from the financial promotion regime. Thus, either the crowdfunding portals will need to be FCA-authorized or they will need to ensure that an FCA-authorized firm approves the financial promotion.⁵³ Conducting a regulated activity without having authorization is a criminal offence. Hence, it is common for crowdfunding portals to engage an FCA-authorized firm to approve initial investor communications and secure that the promotion of investment opportunities fall within these exemptions either; (i) existing shareholders—crowdfunding portals will create a shareholder relationship with all funding subscribers and a parent/subsidiary relationship with fund-seeking subscribers; and/or (ii) sophisticated, high net worth and professional investors—crowdfunding portals will

⁴⁷ The Company Act, sec 775.

⁴⁸ *Supra* note 45, at 36.

⁴⁹ *Id.* at 7.

⁵⁰ Sophisticate investors are the following investors;

(i) an investor who received a certification by a qualified firm that has assessed the investor to be “sufficiently knowledgeable to understand the risks associated with engaging in investment activity in...non-readily realizable investments”;

(ii) an investor who self-certified by providing the intermediary a signed “Self-Certified Sophisticated Investor” statement which required the investor to affirm that he or she is a member of (a) a business angel network; (b) has invested in an unlisted company in the previous two years; (c) has worked in the business finance sector over the previous 2 years or; (d) served as a director of a company with revenues of at least 1 million GBP (1.68 million USD).

⁵¹ High net worth investors are defined by the FCA as someone with annual income of at least 100,000 GBP (168,000 USD) or net assets of at least 250,000 GBP (419,000 USD).

⁵² Robert Steinhoff, “*The Next British Invasion is Securities Crowdfunding: How Issuing Non-Registered Securities Through the Crowd Can Succeed in The United States*”, **86 U.Colo.L.Rev.** 661 2015.

⁵³ “*Review of Crowdfunding Regulation*” (European Crowdfunding Network) at 224 <<http://www.eurocrowd.org/files/2014/12/ECN-Review-of-Crowdfunding-Regulation-2014.pdf>>

assess the subscribers' investment sophistication or require the subscriber to certify their own net worth or investment experience.⁵⁴

3. Implication of Equity Crowdfunding under Thai Laws

There are 4 Notifications issued relating to the facilitation of equity crowdfunding in Thailand, namely;

(i) Notification of the Capital Market Supervisory Board No. TorChor. 7/2558 Re: Regulations on Offer for Sale of Securities through Electronic System or Network

(ii) Notification of the Capital Market Supervisory Board No. TorChor. 8/2558 Re: Rules, Conditions and Procedures for Offering for Sale of Shares by Shareholders of Limited Companies

(iii) Notification of the Office of the Securities and Exchange Commission No. SorMor. 11/2558 Re: Determination of Fees for Filing of Registration Statement, Registration and Other Applications (No. 36)

(iv) Notification of the Securities and Exchange Commission No. KorChor. 3/2558 Re: Exemption from Filing of Registration Statement for Securities Offered through Provider of Electronic System or Network

(1) Requirements on the issuers

Limited companies or public limited companies that are (i) being incorporated under Thai law; (ii) and having clear business operation or project and having intention to operate such business or project with the proceeds raised from an offer for sale of securities through crowdfunding portals. Holding company which operates its business by holding shares in limited company or public limited company in the amount not less than fifty percent of the total voting right in the invested company and does not have any other significant businesses, can offer their shares through crowdfunding portal as well, if the invested companies possess the characteristic as aforementioned in (i) and (ii).⁵⁵

There are two portions of offering amount based on characteristics of investors. Issuing companies must clearly separate the offering amount for each portion.⁵⁶ Offer for sale of shares to retail investors with the value not exceeding 20 million Baht during the period of 12 months as from the first offer and not exceeding 40 million Baht as from the first offer, providing that offer for sale to each retail investor shall not exceed fifty thousand Baht in each company. Offer solely to institutional investor, private equity trust, venture capital business and qualified investor. There is no offering limit for this portion of investors.

Transaction must be conducted through an approved crowdfunding portal. Within 15 days from the closing date, issuing companies must report the sale of securities. Plus, the issuing companies have not, in the past 2 years, making false disclosure or incomplete disclosure in materiality; failing to facilitate the crowdfunding portal in disclosing information on the portal concerning use of proceeds raised from offer for sale of securities through the crowdfunding portal; failing to disclose sufficient information on the crowdfunding portal continuously after the offer for sale of securities.

⁵⁴ *Id.*, at 225.

⁵⁵ Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 5.

⁵⁶ Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 7.

(2) Requirements on the investors

There are investment limits for retail investors. Any retail investor may invest in any company via funding portals not exceeding 50,000 Baht during 12-month period and in total a retail investor can invest not more than 500,000 Baht in equity crowdfunding shares. It is arguable if this fixed amount truly reflects the capability of each and every retail investor. As in the UK, the investment limits are set at percentage of the investors' investible assets; and the US also divide investors based on their net worth and annual income.

Furthermore, retail investors must pass an investment knowledge test. Because equity crowdfunding is rather new, and there are risks of losing all the invested money, before subscription, a crowdfunding portal must ensure that the investors tested their investment knowledge, and providing that the investors have chosen all correct answers.⁵⁷

(3) Requirements on the crowdfunding intermediaries

The requirements for becoming crowdfunding platform under Thai law provided in chapter 3 clause 12 and 13 of the notification no. TorChor. 7/2558 that filing an application with the SEC Office in accordance with Form 35-FP together with the documents specified in the application being incorporated under Thai law having paid up registered capital not less than five million Baht (around 0.15 million USD) not having a reasonable ground to believe that the applicant has financial condition problems or has any deficiency and/or not appropriate for being crowdfunding platform the person who are the directors, managers should not be prohibited by the rule regarding personnel in the capital market business having the place for operating crowdfunding platform business in cases that the applicant is a company having operated other businesses, other businesses shall not have conflict of interest with the crowdfunding portal platform.

Conclusion and recommendations

Conclusion

Comparing to the US law, the UK law is less stringent and regulating equity crowdfunding is seemingly more relaxed. However, securities crowdfunding, both equity and debt-instrument, is very successful in the UK as the FCA opt for market approach that let the players operate their business with sufficient oversight from the regulator. There are a number of British crowdfunding portals that are operating and raising money for startups now, such as the prominent Seedr.com. While the US still wait for the US SEC implementation rules to come out, a number of states have already enacted their own crowdfunding exemption laws for intrastate offering of equity crowdfunding.

In Thailand, as it is a public offering of shares, without specific laws and regulations, the offer for sale of shares through crowdfunding portal would have to comply with burdensome securities laws and regulations. Hence, the Securities and Exchange Commission of Thailand has issued a set of notifications to specifically deal with equity crowdfunding which focuses on the operation and duties of crowdfunding portals

Recommendations

The investment limit for retail investors is capped at the aggregate of 500,000 Baht, with the single-issuer investment limit of 50,000 Baht during the 12-month period. The number is insufficient to fill SMEs' financing demand. Because Thai SMEs

⁵⁷ Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 38.

need approximately 4 trillion Baht per year while the TCG can only guarantee 30,000-50,000 million Baht per year.⁵⁸ That leaves the huge amount of 3.5 trillion Baht that SMEs need for funding annually.

Because crowdfunding portals are not yet operating in Thailand (as of July 2015) but from the experience of the current donation-based crowdfunding platform in Thailand, Taejai.com, which only has 9,300 members and only 2,319 members have contributed to the donation projects on the website, together with the amount of trading accounts on the SET which is 1,098,731 accounts as of December 2014.⁵⁹ Even if the expected number of equity crowdfunding investors is as high as those of the SET and every investor invests their maximum limits of 500,000 Baht per 12-month period, the money raised through crowdfunding portals would still be insufficient to fill the financing gaps of SMEs as the demand for funding is still higher than the expected money raised through equity crowdfunding portals.

Hence, it should be taken into consideration to amend the investment limit for retail investors to be able to actually provide the SMEs the much needed capital and at the same time protect investors from exposing to too many risks by limiting the investment limit proportionately to the risk profiles of each investor.

⁵⁸ Bank of Thailand. “บทบาทของ ธปท. กับการช่วยเหลือเอสเอ็มอี”

<https://www.bot.or.th/Thai/Phrasiam/Documents/Phrasiam_4_2557/No.10.pdf>

⁵⁹ The Stock Exchange of Thailand. “Market Statistics”

<http://www.set.or.th/en/market/securities_company_statistics14.html>

REFERENCES

Articles

Bradford, Steven C. “Crowdfunding and the Federal Securities Laws”, **Colum.Bus.L. Rev.** 5 (2012).

Cohn, Stuart R. “The New Crowdfunding Registration Exemption: Good Idea, Bad Execution.” **Florida Law Review** 64 (2012): 1434-1456.

Darke, Shekhar. “To Be or Not to Be a Funding Portal: Why Crowdfunding Platforms Will Become Broker-Dealers”, **10 HSTBLJ** 183 (2014)

Steinhoff, Robert. “The Next British Invasion is Securities Crowdfunding: How Issuing Non-Registered Securities Through the Crowd Can Succeed in The United States”, **86 U.Colo.L.Rev.** 661 (2015).

Weinstein, Ross S. “Crowdfunding in the US and Abroad: What to Expect When You’re Expecting”, **46 CORNELL INT’L L.J.** 427 (2013)

Electronic Media

Bradford, Steven C. “The New Federation Crowdfunding Exemption: Promise Unfulfilled”. <<http://web.law.columbia.edu/sites/default/files/microsites/capital-markets/files/Promise%20Unfulfilled.pdf>> (2012).

Bank of Thailand. “บทบาทของ ธปท. กับการช่วยเหลือเอสเอ็มอี” <https://www.bot.or.th/Thai/Phrasiam/Documents/Phrasiam_4_2557/No.10.pdf>

EXIM Bank. “บทบาทของ SMEs ต่อเศรษฐกิจไทยและเปรียบเทียบศักยภาพในเวทีอาเซียน” (2012), <<http://www.exim.go.th/doc/newsCenter/38795.pdf>>

The Stock Exchange of Thailand. “Market Statistics” <http://www.set.or.th/en/market/securities_company_statistics14.html>

US SEC. “Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act” <<http://www.sec.gov/spotlight/jobact/crowdfundingexemption.htm>>

“Review of Crowdfunding Regulation” (European Crowdfunding Network) at 224 <<http://www.eurocrowd.org/files/2014/12/ECN-Review-of-Crowdfunding-Regulation-2014.pdf>>

“State of The States – List of Current Active And Proposed Intrastate Crowdfunding Exemptions (Updated)” (Crowdfunding Legal Hub) <<http://crowdfundinglegalhub.com/2015/01/16/state-of-the-states-list-of-current-active-and-proposed-intrastate-exemptions>>

ศิริวรรณ ว่องวีรวิทย์, ผศ.อารมณัฐ รื่นอินทร์ “เงินทุนหมุนเวียน ทางเลือกและทางรอดของ SMEs” <http://www.bu.ac.th/knowledgecenter/executive_journal/jan_mar_13/pdf/aw02.pdf>

LEGAL PROBLEM ARISING FROM ORGANIC COSMETIC*

*Punrapee Yuwaniyom***

ABSTRACT

The rising of organic cosmetics products results in many cosmetic companies claiming that their products are “organic”. This is because the Cosmetic Act B.E. 2535 that regulates cosmetics products in Thailand does not control the use of “organic” in the label of cosmetics. As a result, many cosmetics companies do not have a clear idea of what organic cosmetics are. Subsequently, they would claim that their products are organic; even there are only 10 percent of organic ingredients in those products. And if they can use organic label freely, it can lead to false claim or misleading to the consumers. Unlike the products which are of agriculture products which are strictly controlled and monitored in regard of the use of the term “organic”. This is because there is no control measure in the use of the term “organic” for cosmetics in Thailand.

This thesis will study on the problem arising from the lack of control on the use of the term “organic” in cosmetics. Also, it will propose the measure regarding control of the use of the term “organic” in cosmetics.

Keywords: Organic cosmetics, misleading claims, consumer protection

บทคัดย่อ

ในปัจจุบัน กระแสเครื่องสำอางเกษตรอินทรีย์หรือเครื่องสำอางออร์แกนิกได้รับความนิยมอย่างมากในประเทศไทย แต่ในขณะเดียวกัน ก็มีปัญหามากมายที่เกิดจากเครื่องสำอางออร์แกนิก โดยเฉพาะอย่างยิ่งปัญหาการโฆษณาเครื่องสำอางออร์แกนิก ทั้งนี้ เนื่องจากพระราชบัญญัติเครื่องสำอาง พ.ศ. 2535 ยังไม่ได้ควบคุมเครื่องสำอางออร์แกนิกและการโฆษณาเครื่องสำอางออร์แกนิก ทำให้ผู้ประกอบการเครื่องสำอางสามารถอ้างว่าผลิตภัณฑ์เครื่องสำอางของตนเป็นเครื่องสำอางออร์แกนิกได้โดยปราศจากการควบคุม แม้ว่าในความเป็นจริงผลิตภัณฑ์เครื่องสำอางดังกล่าวจะมีส่วนประกอบที่เป็นออร์แกนิกเพียง 10 เปอร์เซ็นต์ของผลิตภัณฑ์ เพราะในปัจจุบันยังไม่มีกำหนดความหมายของการโฆษณาเครื่องสำอางออร์แกนิก

วิทยานิพนธ์เล่มนี้ศึกษาปัญหาที่เกิดจากการขาดการควบคุมเครื่องสำอางออร์แกนิก และมุ่งเสนอแนวทางการควบคุมการโฆษณาเครื่องสำอางออร์แกนิกในประเทศไทย

คำสำคัญ: เครื่องสำอางออร์แกนิก, misleading claims, คຸ້ມຄອງຜູ້ບໍຣິໂກດ

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Introduction

In today world, organic cosmetics market has become one of emerging markets. It is predicted to have a value of more than 9 billion USD in 2009¹. This is due to the fact that consumers, especially women, become more aware of their appearance these days. As a result, they are becoming more conscious of the ingredients in the cosmetics and personal care products that they are putting on their body². And they opt to avoid the harmful ingredients that can cause them health issues such as cancer, tumors, allergies etc. Those harmful ingredients are such as Paraben, Benzophenone etc. Moreover, the organic trend is rising continuously in the recent year. They are much developed from the old day. As in the present, we can find are claimed to have the same quality as the conventional products in which some chemicals may be used.

The rising of organic cosmetics product leads to many cosmetic labels claiming that products are “organic” “natural,” “healthy,” and “safe”. So, this could cause confusion to a consumer who looks on a cosmetic label. The consumer could not know if the claim is true. With this topic more popular than ever, manufacturers are looking into getting certification for their cosmetics and personal care products. This is because consumers nowadays tend to think that an ingredient list is not enough as it is in a small letter and find it not accountable. Thus, they would prefer the one label that is recognizable and accountable for people when choosing organic cosmetics products. And this leads to certification system. This is to prevent the wrong use of the word “organic” in cosmetic. The organic certified cosmetics standard is firstly established by independent certifying agency called Ecocert in 2003. And the standard is a voluntary standard. This is resulted from the desire to counter with a false claim of “organic” in cosmetics and from the realizing that standards and logos are important to build consumer trust.

And the United States of America, in the past the US government does not define or investigate the use of these terms on personal care and cosmetic labels³. However, in 2011, the United States Department of Agriculture (USDA) implement organic cosmetics certification standard through the National Organic Program (NOP). That was the first time there was a governmental standard for organic cosmetics. The standard is purported to control the use of the word “organic” in cosmetics and personal care products.

As for Thailand, the rising of organic cosmetics has emerged in the recent years⁴. This is because Thai people focus more on a healthy life style. They would consume more on organic things such as food, cosmetics, body care etc. As seen from many well-known department stores importing various lines of organic cosmetics from abroad, it is also available everywhere in social network through the rising of e-commerce. This trend is called as the organic trend which is still considered a niche market in Thailand. Nonetheless, the organic cosmetics trend especially continues growing in Thai market following the global trend that organic market has become an emerging market instead of niche market. In another word, Thailand’s cosmetic industry is moving towards organic products with lots of indigenous plants and herbs for extraction for production.

¹ **Marketwatch**, Rodman Publishing(2009)

² **Understanding Natural & Organic Cosmetic Labels**, available at <http://www.quicklabel.com/blog/2010/11/natural-certification-for-cosmetic-labels-usa/> (last visited Oct. 3, 2014)

³ *Id.*

⁴ Cuyvers L. et al., **Market profile: potentials for make-up cosmetics exports of Thailand to Japan** , ASEAN Business Case Studies No 32 (August, 2013)

However, Thailand does not have any law to control on the use of the word “organic” labeling in the cosmetics in the present. The Cosmetics Act B.E. 2535 that regulates cosmetics products does not control the use of “organic” in the label of cosmetics. Also, Agricultural Standard Act B.E.2551 that regulates the use of the word “organic” in agricultural products such as food, but it does not extend to cosmetics.

1. Problem Arising from the Uncontrolled Use of the Word “Organic” on Cosmetics in Thailand

Presently, Thai Food and Drug Administration (FDA) is only responsible for regulating conventional cosmetics and label in Thailand but they do not regulate organic cosmetics. In addition, we only have an organic certification in agriculture products such as foods, agricultural products. Furthermore, Thailand’s cosmetic industry is also moving towards organic products with lots of indigenous plants and herbs for extraction for production. This is mainly due to the fact that under Cosmetic Act B.E. 2535 which governs all cosmetics sold in Thailand has not the definition of the word ”organic” for cosmetics. And this can lead to a problem as the manufacturers can use the word “organic” freely without any control on their products. The problem from the lack thereof is a false claim or a misleading of the word “organic” to the consumers. Such problem is the same as other countries who also have no control of the word “organic” in cosmetics products. Hence, that is the reason why we need to set a regulation to control the use of the word “organic” in cosmetics. And such regulation should establish a standard that provides minimum requirements for the organic cosmetic manufacturers to meet when wishing to use the word “organic” on their products’ labels. Moreover, having a governmental standard concerning organic cosmetics certification in Thailand would help reduce the cost for the manufacturers who want to have an organic certified seal. This is because they can send their products for an inspection in Thai laboratory which is cheaper than sending their product abroad for an inspection.

2. Legal Problem Arising from Organic Cosmetics in Thailand

The lack of law controlling the use of ”organic” on cosmetics’ label encourages the cosmetics companies to use organic label freely, this can lead to false claim or misleading to the consumer. Although, concerning false claim or misleading of organic cosmetics, Cosmetic Act B.E. 2535 has a provision for such claim in cosmetics. That provision is Section 37. However, it is not directly stated in the provision but it refers to the Consumer Protection Act B.E. 2522 for the false claim or misleading advertising instead. The Consumer Protection Act B.E. 2522 that can apply to cosmetics through Section 37 of Cosmetic Act B.E. 2535; has a provision of law in Section 22 preventing the false claim or misleading advertising. However, as there is no definition or a standard to provide a guideline of what organic cosmetics are. This can lead to a loophole of law of which cosmetics companies can take advantage. Moreover, regarding Section 22, the false claim or misleading advertising is proven to be difficult for the consumers to find an evidence to prove otherwise from the cosmetics companies. Thus, we can say that the lack of efficiency of Section 22 in the Consumer Protection Act B.E. 2522 together with the lack of any control measure on the use of the word “organic” on cosmetics products see many cosmetics companies in Thailand still use the word “organic” on cosmetics’ label without having to prove the claim. And if this continues without any measure to encounter the problem, it can cause many harm to organic cosmetics market. For example, the consumers would lose trust and not continue to buy organic cosmetics. This could have a negative effect on organic cosmetics industry whether domestic market, import sector or export sector. Thus, Thailand as a potential important export and market of organic cosmetics needs to establish a measure on

organic cosmetics. This is to build creditability to our organic cosmetics products. It is because consumers nowadays are rich with information about products from traditional media and online media. As a consequence, they can be educated on product ingredients, manufacturing process and product packaging. These factors can place an importance on buying decision. Hence, having something to ensure the consumer for the authenticity of the organic claims such as organic cosmetics standard is highly recommended.

3. Foreign Control Measures on Organic Cosmetics

3.1 The United State of America (USA).

USDA NOP Standard

In 2011, the United States Department of Agriculture (USDA) through the National Organic Program (NOP) firstly established the organic regulation concerning the implementation of organic cosmetics certification standard. This is the first time that a governmental body got involved in regulating the use of organic in cosmetics.⁵ The USDA National Organic Program (NOP) standard is introduced as the first legislative standard concerning organic cosmetics in this world.⁶ Prior to USADA NOP standard, the word "organic" is not properly regulated on personal care products (such as toothpaste, shampoo, lotion, etc.)⁷. The products that underwent USDA NOP standard's process is eligible to adhere the USDA label on its products.

However, the USDA has no authority over the production and labeling of cosmetics, body care products, and personal care products that are not made up of agricultural ingredients, or do not make any claims to meeting USDA organic standards.

3.2 Europe

COSMOS Standard

COSMOS is a standard created in early 2010 by a group of six European certification bodies: Ecocert along with other 5 certification bodies: Bioforum in Belgium, BDIH in Germany, COSMEBIO in France, ICEA in Italy and SOIL ASSOCIATION in UK.⁸ The purpose is to the establishment of a new cosmetic certification in order to create one standard that is internationally recognized for natural and organic cosmetics and harmonizing the sector through defining minimum requirements and common definitions for organic and natural cosmetics.⁹ The COSMOS standard will identify criteria regarding the products' origin, processing, composition (ingredients), packaging, labeling and disposal. At the present a COSMOS logo is not yet available.

⁵ Program, United States Department of Agriculture Agricultural Marketing Service, **the National Organic Program**, available at <http://www.ams.usda.gov/NOP> (last visited Nov. 7, 2014)

⁶ *Id.*

⁷ *Id.*

⁸ Maurizio Canavari, Rungsaran Wongprawmas et al, **The Perception of European operators towards Thai natural skin care products**, 1 (2011)

⁹ *Id.*

3.3 South Korea

The Regulation on Organic Cosmetics Standard

The Korean Ministry of Food and Drug Safety (MFDS) passed Regulation 2014-20, the Regulation on Organic Cosmetics Standard, which will go into effect on June 24, 2015.¹⁰ This is in an attempt to encounter the problem from the lack of detailed criteria for the organic cosmetics causing misrepresentation and exaggerated advertising.¹¹

4. Comparison of the Foreign Measures on Organic Cosmetics

4.1 The Composition of organic cosmetic product

It is found that the composition part of the 3 measures is similar; the requirement of at least 95% of organic origin ingredient.

4.2 Calculation rules for organic percentage

It is found that the USDA NOP standard has the calculation that covers all kind of product's form whether in solid, liquid or mix of both. COSMOS standard does not have a clear calculation method of the mixture of liquid and solid products. And the South Korea's organic cosmetics standard calculates based only on weight ratio. Thus, the calculation method of USDA NOP standard is the most complete one. And the USDA NOP standard can be a guideline of percentage calculation for Thailand.

4.3 Label

It is found that USDA NOP standard seems to be the only standard that provides logo unlike COSMOS standard and organic cosmetics standard that do not have a logo. The logo can be beneficial to the consumers. This is because the organic cosmetics companies can have a right to use the agency organic certified logo labeled on their products when their products meet with the requirements set by the standard.

4.4 The Authorized person

The South Korea's Organic Cosmetics standard only has a governmental body involved. While the USDA NOP standard and COSMOS standard can have accredited certifying agencies which are of private agencies. The difference between USDA NOP standard and COSMOS standard is that the accreditation of USDA NOP standard must be done by the governmental body. Meaning, there is a governmental body under USDA NOP to monitor if the accredited certifying agency follows the requirements of the standard. Hence, the USDA NOP standard seems to have a better provision to be a guideline for Thailand concerning the authorized person.

4.5 The Imported Product

It can be seen that the equivalent arrangement in USDA NOP standard is of a national treatment principle. Meaning, it is between states. Hence, private certifying agency such as COSMOS cannot have the equivalent arrangement with other countries. The equivalency arrangement allows two differing standards, regulations or procedures to remain as is, but treats them as if they are the same as long as they meet the same results and policy objectives even if through different means.¹² The benefit of the equivalent arrangement is that imported organic products certified in compliance with an equivalent foreign regulatory regime would not require re-certification to the domestic

¹⁰ *Id.*

¹¹ Karen Yarussi-King, Asia-Pacific Update on Korean Organic Standards (2015)

¹² **Canada - US Organic Equivalence Arrangement – Overview**, available at <http://www.inspection.gc.ca/food/organic-products/equivalence-arrangements/us-overview/eng/1328068925158/1328069012553> (last visited Aug. 6, 2015)

standards by a domestically accredited certifying agency. This helps to reduce the time of importation process.¹³

5. Measure concerning Organic Cosmetics Standard in Thailand

The measure using in the USDA NOP standard and COSMOS standard to assure the standard being followed is a certification system. When compared the 3 measures using in the USA, EU and South Korea, we can see that USDA NOP standard is a certification provided by government whereas COSMOS standard is a certification provided by a private certifying agency. In contrast, the South Korea's organic cosmetics standard does not offer a certification. The organic cosmetics standard also does not provide any logo signified that the cosmetic products met the requirements of the standard. Leading, the consumer in South Korea cannot know whether the organic cosmetic products are met with the standard.

The certification can serve as an extra guarantee for products. Moreover, the certified organic cosmetics are different from organic cosmetics. This is because without certification, a product can contain just one or two organic ingredients and the rest might be chemicals or synthetically derived compounds. This is the reason why many consumers will not only be drawn to products that are certified to be organic; they want the security of knowing the label's claims are genuine. Thus, now, the best and easiest way to establish whether a cosmetic product is organic for consumers is to look for a certified label.

Thailand can adopt these three foreign measures on the organic cosmetics as a guideline to establish our own measure to solve the problem arising from organic cosmetics.

Conclusion

Presently, Thailand has not regulated the labeling of "organic" in cosmetics product. This is as Cosmetic Act B.E.2535 only regulates conventional cosmetics but not organic cosmetics. Moreover, the consumer protection on advertising of cosmetics products under Cosmetic Act which refers to Consumer Protection Act B.E. 2522, Section 22 cannot also effectively prevent the misuse of the term "organic" in cosmetics products. This is as there is no definition organic cosmetic. The cosmetics companies then have no idea of what organic cosmetics are. This leads to the problem that the cosmetics companies can claim the word "organic" freely in their products. This is why Thailand should establish its own measure concerning organic cosmetics. The measure needs to be of pre-market control measures to achieve effectiveness in controlling the using of the term "organic" in cosmetics.

Recommendations

Solutions based on these three foreign measures on the organic cosmetics are as follows;

The issue of Organic Cosmetic Standard

Minister of Public Health under the Cosmetic Act B.E. 2535 cannot exercise an authority for other reasons but for public health protection as per Section 5. And Cosmetic Committee can only submit opinion to the Minister concerning cosmetics; the Committee cannot provide any measurement on cosmetics. For these reasons, we should amend Section 5 of the Cosmetic Act B.E.2535 to grant authority to the Minister to provide measurement for other reasons deemed necessary concerning

¹³ *Id.*

cosmetics not only for public health protection. This is by means of establishing the organic cosmetics standard.

The Enforcement of Standard

The Thai FDA has responsibility concerning organic cosmetics standard as a competent authority. This is as the standard is of a pre-market control of cosmetics. And the Thai FDA has duty to monitor and enforce the pre-market control of cosmetics in Thailand. Subsequently, the Thai FDA must assure the requirements of the standard are conformed to.

Standard concerning Organic Cosmetics

For this matter, before the establishing of any measure concerning organic cosmetics, there should set the standard for organic cosmetics. This is as the term “organic” using in other products such as food is different from cosmetics products. In addition, cosmetics products require much more complex process of production. Leading, we should set a specific standard for organic cosmetics. The standard should set more requirements as guideline for the cosmetics companies concerning organic cosmetics. For example, to be eligible for organic claimed, a cosmetic product must contain at least 95 percent organic ingredients. A label with a percentage indicating how much of the product qualifies as organic. In contrast, any product containing less than 95 percent organic ingredients cannot claim to be organic. Also, the organic cosmetics products must also be attach the certified logo to demonstrate compliance with the standard.

The standard would serve as a pre-market control measures applied to organic cosmetics that proved to be the most effective in a long term. For a pre-market control measure, this can be achieved by pre-market activities before introducing products into the market.

Establishment of Certification System

In addition to this, it must be mentioned that standard will set pre-market obligations which, as explained previous, are very significant in controlling what may be used in cosmetics. Thus, we can say that the consumers are better protected by the exercise of pre-market controls. Also, we need to establish a certification system to serve as a measure to ensure that product is in compliance with the standard. It is crucial for ensuring the legitimacy of the claim.¹⁴ Thus, the standard on organic cosmetic products requires a measure to ensure the standard is complied with.

Also, the most suitable certification system for organic cosmetics for Thailand is a government standard. This is because it offers a single standard. On contrary, the standard from independent agency could cause confusion and mistrust to the consumers.

¹⁴Z. Zakaria, **Regulation of Cosmetics: What has Malaysia Learnt from the European System?** 49 (New York, 2014)

REFERENCES

1. Books and Book Articles

1.1 English Books

Nava Dayan, and Lambros Kromidas, **Formulating, Packaging, and Marketing of Natural Cosmetic Products**, 1st ed. New Jersey: John Wiley & Sons, 2011.

Cuyvers L. et al., **Market profile: potentials for make-up cosmetics exports of Thailand to Japan**, ASEAN Business Case Studies No 32, 2013.

1.2 Thai Books

สุขุม ศุภนิตย์. **คำอธิบายกฎหมายคุ้มครองผู้บริโภค**. พิมพ์ครั้งที่ 5. กรุงเทพมหานคร: สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย, 2548(Suksom Supanid, **The Explanations on Consumer Protection Law**, 5th ed. Bangkok: Chulalongkorn University Publish, 2005.)

ดร.สมคิด ดิสถาพร. **เกษตรอินทรีย์ มาตรฐานสากลประเทศไทย**. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร: จามจุรีโปรดักท์, 2549(Dr. Somkit Disathaporn, **International Organic Agricultural Standard in Thailand**. 1st ed. Bangkok: Chamchuri Product, 2006.)

2. Articles

Young Kevin, Asia-Pacific Update: Korean Cosmetic Regulations, **Cosmetics& Toiletries Magazine**, Vol. 127, January 2012.

Yarussi-King Karen, *Asia-Pacific Update on Korean Organic Standards*, **Cosmetics& Toiletries Magazine**, Vol. 130, May 2015.

Duber-Smith Darrin C., *Labeling for Legitimacy: Certifications for Natural and Organic Personal Care*, **Cosmetics& Toiletries Magazine**, Vol. 128, August 2013.

3. Electronic Media

Understanding Natural & Organic Cosmetic Labels (USA),
<<http://www.quicklabel.com/blog/2010/11/natural-certification-for-cosmetic-labels-usa/>> (accessed August 3, 2015)

How Natural Makeup Can Improve Your Health,
<<http://www.thedailygreen.com/living-green/natural-beauty-cosmetics/natural-beauty-tips>> (accessed August 3, 2015)

What are the differences between certified organic cosmetics and conventional cosmetics?, <<http://corneliadum.com/wpen/quelles-sont-les-differences-entre-les-cosmetiques-certifies-biologiques-et-les-cosmetiques-conventionnels>> (accessed August 8, 2015)

The National Organic Program, Program, United States Department of Agriculture Agricultural Marketing Service, < <http://www.ams.usda.gov/NOP>>(accessed August 8, 2015)

Organic beauty labels Organic beauty labels,
<<http://www.bodyandsoul.com.au/beauty/news+reviews/organic+beauty+labels,14241>> (accessed August 8, 2015)

Be Skeptical of These 10 Marketing Terms,
<<http://www.thedailygreen.com/living-green/natural-beauty-cosmetics/safe-cosmetics>> (accessed August 8, 2015)

Understanding Natural & Organic Cosmetic Labels (USA),
<<http://www.quicklabel.com/blog/2010/11/natural-certification-for-cosmetic-labels-usa/>> (accessed August 8, 2015)

Food Marketing Institute Backgrounder; Natural and Organic Foods; September 2008,
<http://www.fmi.org/docs/media/bg/natural_organic_foods.pdf#search=%22organic%20food%20in%20retail%20markets%22> (accessed August 8, 2015)

“Green” beauty decoded, <<http://www.thedailygreen.com/living-green/natural-beauty-cosmetics/natural-beauty-product-labels>> (accessed August 8, 2015)

U.S. Department of Agriculture: Organic Labeling and Marketing Information,
<<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004446&acct=no pgeninfo>> (accessed August 8, 2015)

Asian cosmetics players opt for natural and organic standards, Simon Pitman,
<<http://www.cosmeticsdesign-asia.com/Market-Trends/Asian-cosmetics-players-opt-for-natural-and-organic-standards>> (accessed August 10, 2015)

ARBITRATION UNDER FOREIGN INVESTMENT IN CHINA*

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ABSTRACT

Despite the position of China as the 2nd largest investment destination for foreign direct investment, and the 6th largest outward investment country in the world, the number of arbitration or litigation cases conducted in China for settling the investment disputes between foreign parties and Chinese parties is very few. Foreign investors and the international community seem to have no confidence in the arbitration and court systems in China. Not only is it due to China's cultural skepticism towards the law, but also to its underdeveloped court system particularly in the enforcement of arbitration awards. Notwithstanding the efforts Chinese government has taken in improving its judicial and arbitral scheme, it is still claimed by the foreign investors that the Chinese arbitration system is still locally protective. Therefore, for the purpose of attracting more foreign direct investment and also for preparing its investors "Going Global" for investor-state proceedings in the future, China has adopted a new attitude in concluding Bilateral Investment Treaties by including the investor-state arbitration in its Model Bilateral Investment Agreement and regional treaties, and accepting the jurisdiction of ICSID, or other third party institutions. However, China needs to weigh the advantages and disadvantages brought by these strategic changes. Attracting foreign investment without sacrificing its distinctive national interests and interest of Chinese parties including those of its investors abroad are an onerous task for Chinese leaders to accomplish.

Keywords: Foreign Investment, Arbitration in China, CIETAC, Bilateral Investment Treaties, Enforcement of Foreign Arbitration, Investor – state Dispute

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บทคัดย่อ

ถึงแม้ว่าประเทศจีนจะติดอันดับสองของโลกสำหรับการเป็นจุดหมายปลายทางของการลงทุนของต่างชาติโดยตรงและเป็นอันดับหกสำหรับประเทศที่มีการไปลงทุนในประเทศอื่นนั้น การอนุญาตตุลาการหรือการพิจารณาตัดสินที่ดำเนินการในประเทศจีนเพื่อหาข้อยุติสำหรับข้อขัดแย้งที่เกี่ยวกับการลงทุนระหว่างคู่สัญญาที่เป็นชาวต่างชาติกับคู่สัญญาจีนยังถือได้ว่ามีจำนวนน้อยหากเทียบกับปริมาณของการลงทุน ซึ่งดูเหมือนว่านักลงทุนต่างชาติไม่มีความมั่นใจต่อระบบศาลและการอนุญาตตุลาการในประเทศจีนทั้งนี้มิใช่เพียงเพราะความกังขาในวัฒนธรรมจีนที่มีต่อกฎหมายแต่ความล่าช้าของระบบศาลโดยเฉพาะในการบังคับตามชี้ขาดของอนุญาตตุลาการ ถึงแม้จะมีความพยายามในการเปลี่ยนแปลงกระบวนการยุติธรรมและการอนุญาตตุลาการ นักลงทุนต่างชาติยังคงมีความเห็นว่ระบบอนุญาตตุลาการของประเทศจีนไม่ได้ให้การปกป้องแก่นักลงทุนต่างชาติเท่าที่ควร ดังนั้นจุดประสงค์ที่จะดึงดูดการลงทุนของต่างชาติและเพื่อเป็นการเตรียมการลงทุนของรัฐในอนาคตภายใต้กรอบ “Going Global” ประเทศจีนได้รับแนวคิดใหม่ในการทำข้อตกลงด้านการลงทุนในระดับทวิภาคีและระดับภูมิภาคโดยนำการอนุญาตตุลาการสำหรับการลงทุนภาคีรัฐบรรจุเข้าไปใน Model Bilateral Investment Agreement และยอมรับเขตอำนาจของ ICSID หรือสถาบันอนุญาตตุลาการอื่น อย่างไรก็ตามประเทศจีนคงต้องพิจารณาถึงข้อดีและข้อเสียที่จะตามมาของการเปลี่ยนแปลงกลยุทธเหล่านี้ ซึ่งการดึงดูดการลงทุนจากต่างชาติโดยไม่ยอมสละผลประโยชน์ที่สำคัญของชาติไปบ้างและของคู่สัญญาชาวจีนย่อมเป็นความยากลำบากที่ผู้นำประเทศต้องทำให้สำเร็จ

คำสำคัญ: การลงทุนของชาวต่างชาติ, อนุญาตตุลาการในประเทศจีน, CIETAC, ข้อตกลงพหุภาคีด้านการลงทุน, การบังคับตามการอนุญาตตุลาการต่างชาติ, ข้อขัดแย้งระหว่างนักลงทุนและรัฐ

Introduction

Upon the inward investment remaining increasing in the last two decades, China has become one of the largest markets with the most foreign investments. Simultaneously, the Chinese dispute resolution mechanism was facing a significant challenge by the numerous foreign investment disputes brought along with the increased inward investment. Considering the fact that foreign investors prefer arbitration to resorting to litigation in the PRC's local courts, in order to attract more inward investment and establish the confidence and trust of foreign investors in China, for the past two decades, Chinese government has been taking actions and efforts in establishing internal international investment arbitration mechanism to solve foreign investment disputes. The efforts made by the Chinese government did explicitly show the attitude of China government's commitment in providing a stable and healthy economic and legal environment for inward investment.

However, it is claimed that the existing international arbitration mechanism of China may not be sophisticated to secure the positions and benefits of both foreign investor and China to achieve a win-win state of affairs, and satisfy the requirement of "Going Global" strategy adopted by Chinese government encouraging the overseas direct investment of Chinese entrepreneurs. China's "comprehensive consent" to ICSID and third party arbitration by 2nd generation BITs may not be that helpful in providing protection to investors and may result in the loss of benefits of China.

Overview of International Arbitration Mechanism in China

The specific law regulating the arbitration of China is the Arbitration Law of the People's Republic of China 1994 and came into force on 1 September 1995, (hereafter referred as the "Arbitration Law (1995)"). Civil Procedural Law of People's Republic of China, as amended in 2012, also provides the regulating provision in the enforcement or setting aside of arbitration awards.

Chinese law officially recognizes three types of arbitrations: international arbitration, foreign- related arbitration and domestic arbitration. China International Economic and Trade Arbitration Commission ("the CIETAC") is one of the largest arbitration centers in the world. It is headquartered in Beijing, with Sub-Commissions in Shanghai (established in 1989), Shenzhen (established in 1990), Tianjin (established in 2008), and Chongqing (established in 2009).¹ Nowadays, China has up to about 190 arbitration institutions, and almost all of them may accept both domestic and foreign related arbitration cases. However, The CIETAC still maintains its leading position among these arbitration institutions within China in hearing international and foreign-related disputes. The CIETAC is made up of an official Chinese administrative body able to exercise its "delegated legislative power under the Chinese Constitution and the relevant regulations of the State Council."² The latest version of arbitration rules of CIETAC is the amended version in 2012 that came into effect on 1 May 2012. The rules of conducts of arbitrators are quite comparable to the international arbitration institute in developed countries. Although it is legally permitted to appoint foreign arbitrators to participate in the arbitration proceedings, the majority of arbitrators participating in the arbitration in the CIETAC and other Chinese Arbitration Institutions are still Chinese. It

¹ Ulrike Glück & Falk Lichtenstein, *Arbitration In The People's Republic Of China*, CMS GUIDE TO ARBITRATION, Vol I, at 213.

² *Id.*, at 69, cited John S. Mo, *Alternative Dispute Resolution*, in INTRODUCTION TO CHINESE LAW 368 (WangChenguang & Zhang Xianchu eds., Sweet & Maxwell Asia 1997).

is worth noting that there are currently no foreign arbitral institutions operating in China and it is also rare for a foreign arbitral institution to administer an arbitration that has its seat in China.

The Chinese court system has many unpredictable problems in recognizing and enforcing foreign- related arbitrations and foreign arbitrations, such as; local protectionism, inexperienced judges, less independence of the courts from the local governments, etc.

Treaty Practice of China Regarding International Arbitration in Foreign Investment Disputes

China acceded to the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter “the Washington Convention” or “the ICSID Convention”) in 1993. In addition to joining the ICSID, China has been trying to conclude numerous bilateral investment agreements, most of which grant jurisdiction to the ICSID tribunals. Furthermore, in 2001, China accepted the jurisdiction of “the Dispute Settlement Body of the World Trade Organization”. Thus, joining the ICSID Convention “represented an important milestone in China's engagement with mechanisms of international adjudication”³.

So far, China has concluded 139 BITs. In fact, when China began its BIT practice, it was deemed not investor-friendly. For China's first generation BITs which are “viewed as concluded before 1997, investor-state arbitration clauses were either non-existent or much restricted in scope”.⁴ It limited investor-state arbitration disputes over the amount of compensation resulting from expropriation and nationalization.⁵ Subsequent BITs contained a similar limitation on the subject-matter of arbitrations to questions of the “amount of compensation resulting from expropriation and nationalization.”⁶ “The very limited dispute resolution clause was later on replaced by

³ *Id.*

⁴ Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, TDM 4 (2010), <http://www.transnational-dispute-management.com/article.asp?key=1636>.

⁵ Agreement Between the People's Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investment, art. 9, P.R.C.-Spain, Feb. 6, 1992

⁶ see China-Norway BIT (1984), China-Denmark BIT (1985), China-Kuwait BIT (1985), China-Australia BIT (1988), China-Kazakhstan BIT (1992), China-Argentina (1992), China-Viet Nam BIT (1992), China-United Arab Emirates BIT (1994), China-Indonesia BIT (1994), China-Egypt BIT (1994), China-Peru BIT (1994), China-Syrian Arab Republic (1996), China-Sudan BIT (1997).

the broad dispute resolution clause characterized by China's second generation BITs"⁷, which provides an "comprehensive consent" for all kinds of disputes to be submitted to the jurisdiction of the ICSID or third party arbitration institution. It is viewed that "since the conclusion of the 1998 BIT between China and Barbados, most PRC BITs have granted ICSID jurisdiction without the limitation on the nature of the investment dispute".⁸

The reason resulting in a shift of attitude of China to ICSID or third party arbitration institution in BITs are claimed for preparation of "Going Global" by Chinese enterprises. In 1998, the Chinese government announced a "Going Global" strategy which aims at encouraging Chinese enterprises' outward investments. This strategy has been "embedded in the Tenth Five-Year Plan for National Economy and Social Development in 2001, marked the transition of Beijing's outward FDI policy from *regulations* to *encouragement*."⁹ The current government gives priority to "resource exploration projects, the export promotion of domestic technologies, overseas research and development as well as M&A enhancing the international competitiveness of Chinese enterprises, accelerating their foreign market presence."¹⁰ Though outward FDI is still surpassed by the volume of inward FDI, "the outward/inward FDI ratio – an indicator which refers to what Dunning has called a 'country's net international direct investment position"¹¹ – shows that outflows from China grew more rapidly than inflows during the last years, demonstrating that China's overall importance as an FDI-exporting economy is evolving."¹²

As a result of the less restrictive BIT terms, "arbitral investment disputes against China have expanded to the disputes involving investment treatment, transfer and other

⁷ Dulac, *Supra* note 4.

⁸ Julian Ku, *The Enforcement Of Icsid Awards In The People's Republic Of China*, 6(1) CONTEMP. ASIA ARB. J. 31, 2013. at 32. See also Yu Jingsong & Zhan Xiaoning, Lun Tou Zi Zhe Yu Dong Dao Guo Jian Zheng Duan Jie Jue Ji Zhi Ji Qi Ying Xiang, *On the Dispute Settlement Mechanics Between Investors and Relative States and Its Influences*, 5 CHINA LEGAL SCIENCE 175, 176-177 (2005).

⁹ See Cai, C. (2006): Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice, in: *Journal of World Investment and Trade* 7 (5), at 626.

¹⁰ See World Investment Report 2006. FDI from Developing and Transition Economies: Implications for Development, New York, Geneva: United Nations, at 210.

¹¹ *Id.* at 6, see also UNCTAD (2007a): 299-306

¹² Axel Berger, *China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making*, Paper prepared for the American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", Washington, D.C., November 14-15, 2008, at 5

issues.”¹³ Such broad clauses thus allow investors “not only to resolve disputes concerning the amount of compensation in expropriation cases, but also to invoke all substantive rights granted in the applicable BIT.”¹⁴

Limitation of Protection to Foreign Investors under Existing International Arbitration Mechanism in China

It is notable that there are very few cases of foreign investment disputes being arbitrated in the arbitration institutions in China. There was only one case in which the BIT was invoked against China, but the case was withdrawn before the commencement of arbitration proceedings. Foreign investors may feel that there is insufficient protection for them when a dispute against Chinese interests occurs. At first, the market for international arbitration within China’s territory is not open to foreign arbitration institutions. Secondly, there are strict requirements of validity of arbitration agreements under Chinese law to enable arbitration awards to be enforced in China. Thirdly, no ad hoc arbitration in China is recognized unless it is done outside of China in the country which is a member of New York Convention. Fourthly, it is not surprised to see the local government's interference in arbitration institutions and the courts. However, the most difficulty obstacle lies in the enforcement of foreign arbitral awards, especially in investment disputes.

Foreign awards were often refused recognition, estimated to be approximately 50% during the 1990s.¹⁵ After the issuance of the Notice on Handling of Arbitration Involving Foreign Elements by the Supreme People's Court on 28 August 1995, with a view of applying the New York Convention and guaranteeing enforcement of arbitral awards, a reporting mechanism was set up to prevent local courts from abusing their powers to refuse enforcement of foreign- related arbitral awards rendered within China, or foreign arbitral awards ,without prudent check and reasonable ground in order to protect local interests, the refusal of enforcing foreign arbitral award has been significantly reduced. Between 2000 and 2007, a total of 12 foreign awards were not enforced by PRC People’s Courts.¹⁶ Does it mean China has established a consummate mechanism in recognizing and enforcing foreign arbitral awards? The

¹³ Ku, *Supra* note 8, at 32

¹⁴ *Id.*

¹⁵ Glück and Lichtenstein, *supra* note 1, at 233. see also Peerenboom, *supra* note 73, at 254

¹⁶ *Id.*

answer is still doubtful. But one thing is certain and that is the reporting mechanism takes too long to process and lacks transparency.

The foreign party of a foreign award often has to confront local protectionism. In the event that the judges would like to protect the local Chinese parties against enforcement on their assets, there are many 'legitimate' methods the judges could employ to achieve this purpose. This indirectly helps the Chinese party to obtain the opportunity and time to transfer its assets to escape enforcement. The foreign party may not be able to recover the award though enforcement has been granted by the Chinese court since there is no asset preservation procedure in enforcing the arbitration award in China.

In addition, applicants are responsible to identify and locate the respondent's assets for enforcement. Article 272 of Civil Procedure Law (2012) provides a legal ground for the applicant's responsibility to locate the respondent's assets when applying for the enforcement at the Chinese court.

Apart from aforementioned factors, shortage of qualified and experienced judges and lack of transparency in judicial process of enforcement also reduce the foreign investors' confidence in the Chinese Arbitration Mechanism.

Conclusion and Suggestions

Firstly, the deficiencies in internal foreign investment arbitration mechanism of China put the foreign investment awards in a dilemma. Foreign investors have to incur more time and cost to resort to overseas foreign arbitration institutions due to too strict and less than satisfactory legislation in China. China has many arbitration institutions that may conduct the foreign-related arbitrations. It is suggested that China should endeavor to improve and perfect the local foreign investment arbitration mechanism and make them trustable from foreign investors and build up an increasingly sound legal environment.¹⁷ Secondly, it is understandable that China took a more liberal approach on the international arbitration for the investor-state dispute due to the consideration of the emerging of outward FDI of Chinese enterprises. It may be too early to say whether such approach will definitely bring a positive or negative impact to the benefits of China. However, abandoning "the right of case-by-case approval or

¹⁷ Yang Shu-dong, *Investment Arbitration and China: Investor or Host State?*, Op. J., Vol. 2/2011, Paper n. 6, pp. 1 - 19, <http://lider-lab.sssup.it/opinio>, online publication December 2011, at 14

consent" and "the priority of local remedies", "the right of significant security exception" and other relevant rights, and not excluding the disputes involving public safety, national economy and other important matters from ICSID or third party arbitration jurisdiction is apparently too risky and not worth doing only just for the purpose of protecting Chinese "Going Global" enterprises, especially during the stage that the inward investment of China still surpasses the outward investment.

What positions shall China take for the arbitration of foreign investment in the future?

It is suggested that China should build up an increasingly sound legal environment to gain the investors' confidence and trust in the international arbitration within China. The Chinese government should take a more prudent and careful attitude in the negotiation of future BITs instead of granting "comprehensive consent" in order to balance the protection of investors under BITs and the sovereignty and benefits of China.

a. Consummate the internal foreign investment arbitration mechanism

In order to enhance the confidence of the foreign investors to be more comfortable with the legal investment environment, and seek the arbitration within China as their first choice of dispute resolution instead of seeking arbitration under foreign arbitration institutions, China needs to make more effort in improving its internal legislation of arbitration mechanism, including a) enact or revise the relevant laws to loosen up the strict requirement on the elements of validity of arbitration agreement, and to recognize ad hoc arbitration; b) open international arbitration market in China for foreign arbitration institutions; c) promote the use of arbitration institutions in China to hear the international investment disputes; d) improve the efficiencies of the court in examining and deciding whether to enforce the international arbitration awards; e) remedying the setting aside of arbitration awards by enacting relevant rules concerning conditions and procedures for re-arbitration.

b. Should China Be Hospitable or Hostile to Investor-State Arbitration in Future?

In spite of its weaknesses of Investor-State Arbitration that may cause China to lose its sovereignty and benefits, it is less likely that China will withdraw from the Investor – State arbitration like what Australia and South Africa did. To be more

objective, China is not yet ready to withdraw from the Investor – State Arbitration. In consideration of the distinct situation of China that have both large inbound investments and increasing outbound investments, and the less than satisfactory domestic legal regime and arbitration mechanism, China at present needs to be Investor – State arbitration friendly to match up with the economic development strategy. Although relying on the Chinese courts may well satisfy its domestic public policy interests, however, for those Chinese investors of outbound investment will be placed in a situation of suffering from the domestic courts of host states that have even more unsatisfactory legal systems.

(i) Adopt new model of BIT with more prudence on the acceptance of ICSID arbitration jurisdiction

For inward investment of China, so far the “comprehensive consent” to ICSID arbitration jurisdiction makes no real sense to attracting foreign investment. China's huge market potential and the preferential investment commitments that China has made to the foreign capitals, are the real attracting factors to the foreign investors. Therefore, from this point of view, the “comprehensive consent” to ICSID arbitration is not that essential. For China's overseas investment, the investors choosing to invest in a state have not primarily considered whether the state signed a BIT with China and whether the BIT fully accepted ICSID jurisdiction.¹⁸ Moreover, China's current inward investment is far more than outward investment¹⁹. Therefore it seems not worth to risk the sovereign and benefits of China to protect a less possible claim of Chinese investors against the host state of outward investment.

Therefore, in terms of the arbitration mechanism to investment disputes between the host government and foreign investors, China should abandon the existing position of the “comprehensive consent”, reduce the acceptance range of international arbitration jurisdiction, and adopt a more prudent approach to accept the ICSID arbitration jurisdiction. For instance, China may reiterate the principle of exhaustion of local remedies; make a strict limitation to the range of dispute issues which foreign investors can directly file to international arbitration; adopt a position of partial acceptance as the principle and full acceptance case-by-case where appropriate as an

¹⁸ *Id.*

¹⁹ The data as of the end of March 2011 shows that China has actually used nearly \$ 1.1 trillion foreign capitals while the total non-financial overseas direct investments are \$320 billion.

exception. It is improper to have all investment disputes submitted to international arbitration except for some particular disputes in relation to expropriation, compensation, etc.

(ii) Put more effort on transparency requirements

It is worthwhile for China to learn from the 2012 U.S. Model BIT which embodies the **transparency requirements** regarding the publication of laws and decisions respecting investments (Article 10), and arbitration proceedings (Article 29), and proposed and adopted regulations (Article 11). The author personally considers that this new approach is a very effective approach to forestall the investor-state disputes as the investors could consider how the proposed regulations would affect them, and give their comments to the host states. The host states also have an opportunity to re-assess their proposed regulations before final promulgation. Thus, problems may be settled before the disputes occur. In fact, both host states and investors could benefit from this new approach.

REFERENCES

BOOKS AND BOOK ARTICLES

John S. Mo, *Alternative Dispute Resolution*, in Introduction To Chinese Law (Wang Chenguang & Zhang Xianchu eds., Sweet & Maxwell Asia 1997).

ARTICLES

Axel Berger, *China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making*, the American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", Washington, D.C., November 14-15, 2008

Cai, C. *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, in Journal of World Investment and Trade 7 (5), (2006)

Julian Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6(1) CONTEMP. ASIA ARB. J. 31 (2013)

Ulrike Glück and Falk Lichtenstein, *Arbitration in the People's Republic of China*, CMS Guide to Arbitration, Vol I

CASES

Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/1 1/15 (Date registered May 24, 2011)

LAWS

Arbitration Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress on August, 31, 1994, and implemented on September 1, 1995.

Civil Procedural Law of People's Republic of China as amended in 2012.

ELECTRONIC MEDIA

Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, TDM 4 (2010), <http://www.transnational-dispute-management.com/article.asp?key=1636>

Yang Shu-dong, *Investment Arbitration and China: Investor or Host State?*, Op. J., Vol.2/2011, Paper n. 6, pp. 1 - 19, <http://lider-lab.sssup.it/opinio>, online publication December 2011

MONEY LAUNDERING IN INSURANCE BUSINESS: PREVENTIVE AND SUPPRESSIVE MEASURES*

*Shavaorn Wongcom***

ABSTRACT

Insurance business is a target of money laundering like another financial institution such as bank and security firm in reality. A money launderer pays the insurance company premium which derived from crime, while the insurance company has duty to perform customer due diligence and should know that customer might be a money launderer or money derived from predicated crime.

There is a situation so called “dual purpose transaction”, a situation that the criminal enters to a transaction aiming either for personal use or laundering money that is quite hard to proof because a money launderer generally uses financial institutions to launder proceeds of crime like another *bona fide* customer. Since money laundering is a process to “conceal and disguise” and intention to launder money and simply spend money is relatively different, the persecutor needs to prove beyond reasonable doubt about specific intention to “conceal or disguise” of the customers. However, “acquiring possession and use proceeds of crime” of both criminal (customer as a spender) and insurer (financial institution as a transferee) has knowledge that premium has been derived from predicate offense is a criminal offense in many jurisdiction such as the U.S, the U.K and the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988 which Thailand is a member state criminalizes such offense.

The criminalization of “possession, acquiring and use” of proceeds of crime can makes a wide range of application against both criminal and insurer in the situation of “dual –purpose transaction”. If the prosecutor fails to prove specific intention “to conceal and disguise”, he can still prove about the possession, acquiring and usage of proceeds of crime in both civil case and criminal case. Moreover, the

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criminalization of such offense makes Thailand comply with the United Nations Convention against Illicit Traffic in Narcotic and Psychotic Substance 1988 entirely.

Furthermore, the insurance company shall be supervised about anti-money laundering compliance by the Anti-Money Laundering Organization effectively by risk-based approach, the AMLO also can allocate resource more wisely.

Keywords: Money Laundering, Insurance, Proceeds of Crime, Supervision

บทคัดย่อ

ในความเป็นจริงธุรกิจประกันภัยตกเป็นเป้าหมายของการฟอกเงินเช่นเดียวกับสถาบันการเงิน โดยทั่วไปแล้วผู้ฟอกเงินจะใช้วิธีจ่ายเงินค่าเบี้ยประกันภัยโดยเงินที่ได้มาจากการกระทำความผิดมูลฐาน ในขณะที่บริษัทประกันภัยมีหน้าที่ในการจัดให้ลูกค้าแสดงตน (Customer Identification and Due Diligence) และควรทราบได้ว่าลูกค้าอาจจะเป็นผู้ฟอกเงิน

มีสถานการณ์ที่เรียกว่า “ธุรกรรมสองวัตถุประสงค์” (dual purpose transaction) ซึ่งเป็นสถานการณ์ที่อาชญากรได้ทำธุรกรรมที่อาจจะนำไปเพื่อประโยชน์ส่วนตัวหรือเพื่อการฟอกเงิน ซึ่งกรณียากที่จะพิสูจน์เพราะผู้ฟอกเงินจะใช้สถาบันการเงินฟอกเงินเหมือนลูกค้าผู้สุจริตคนอื่น โดยเหตุที่ว่า การฟอกเงินนั้นเป็นกระบวนการเพื่อปกปิดหรืออำพราง การฟอกเงินและการใช้จ่ายเงินโดยปกติธรรมดาที่แตกต่างกันโดยสิ้นเชิง พนักงานอัยการต้องพิสูจน์โดยปราศจากข้อสงสัยถึงเจตนาพิเศษดังกล่าวของลูกค้า อย่างไรก็ตาม การครอบครองและการใช้ทรัพย์สินที่ได้มาจากการกระทำความผิดโดยที่ทั้งอาชญากร (ลูกค้าในฐานะผู้ใช้เงิน) และ ผู้เอาประกัน (สถาบันการเงินในฐานะผู้รับเงิน) โดยที่มิเจตนารับรู้ว่าได้ให้หรือรับเบี้ยประกันที่ได้มาจากการกระทำความผิดเป็นการกระทำความผิดอาญาในหลายประเทศ เช่น ประเทศสหรัฐอเมริกา หรือ ประเทศสหราชอาณาจักร หรือ อนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการลักลอบค้ายาเสพติดและวัตถุที่ออกฤทธิ์ต่อจิตและประสาท ค.ศ. 1988 (the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988) ซึ่งประเทศไทยเป็นภาคีของอนุสัญญาดังกล่าวก็ได้กำหนดให้การกระทำดังกล่าวเป็นความผิดอาญา

การทำให้การครอบครอง การได้มา หรือการใช้ทรัพย์สินที่ได้มาโดยการกระทำความผิดจะทำให้การดำเนินคดีต่ออาชญากรฟอกเงินและผู้เอาประกันภัยนั้นทำได้กว้างมากขึ้นในสถานการณ์ “ธุรกรรมสองวัตถุประสงค์” ถ้าหากพนักงานอัยการไม่สามารถพิสูจน์เจตนาพิเศษ “เพื่อปกปิดหรืออำพราง” พนักงานอัยการยังสามารถพิสูจน์ได้ว่ามีการรับมา หรือใช้ไปของทรัพย์สินที่ได้กระทำความผิดในทั้งคดีอาญาและคดีแพ่ง (คดียึดทรัพย์สิน) นอกจากนี้การทำให้การกระทำดังกล่าวเป็นความผิดนั้นจะทำให้ไทยได้อนุวัตรการตามอนุสัญญาสหประชาชาติว่าด้วยการต่อต้านการลักลอบค้ายาเสพติดและวัตถุที่ออกฤทธิ์ต่อจิตและประสาท ค.ศ. 1988 อย่างสมบูรณ์

พระราชบัญญัติป้องกันและปราบปรามการฟอกเงินควรให้นายหน้าประกันภัยมีหน้าที่ในการรายงานธุรกรรม จัดให้ลูกค้าแสดงตน และจัดเก็บเอกสารเกี่ยวกับการแสดงตนในลักษณะเดียวกับที่ผู้รับประกันภัยมีหน้าที่เพราะนายหน้าประกันภัยเป็นผู้ที่มีการติดต่ออย่างแท้จริงต่อลูกค้า

นอกจากนี้ ผู้เอาประกันภัยควรถูกกำกับดูแลในการปฏิบัติตามพระราชบัญญัติป้องกันและปราบปรามการฟอกเงินอย่างมีประสิทธิภาพโดยใช้ระบบกำกับดูแลตามความเสี่ยง (Risk Based Approach) ซึ่งสำนักงานป้องกันและปราบปรามยาเสพติดจะสามารถใช้ทรัพยากรได้อย่างคุ้มค่า

คำสำคัญ การฟอกเงิน, ประกันภัย, ทรัพย์สินที่ได้มาจากการกระทำความผิด, การกำกับดูแล

It is crucial to develop the anti-money laundering regime in both preventive and suppressive measures in order to improve domestic law to handle money laundering risk more effectively.

1. Legal Measures under Foreign Laws

1.1 Preventive Measures

This article focuses on roles and duties of two crucial players in anti-money laundering regime, anti-money laundering supervisor and insurance intermediary as financial institution.

For roles of supervisor, the Financial Action Task Force (FATF) recommends that every jurisdiction shall have authority which supervises financial institutions includes insurance company if such institution complies with anti-money laundering law properly. The supervisor should have authority enough to supervise financial institutions such as to revoke license and acquire information relating to money laundering from them.

In 2007, FATF developed “FATF Guideline in Risk Based Approach to Combating Money Laundering and Terrorist Financing” and proposed the “Risk Based Approach” as a method to supervise financial institution, regarding to anti-money laundering risk. The approach improves the quantity and quality of money laundering compliance, regarding to reporting duty¹. Nowadays, many jurisdictions adopt risk based approach as a tool to supervise financial institution.

In the United States, the Federal government has primary authority according to the Bank Secrecy Act and each state responsible to regulation of insurance and financial examination. However in 2006, FinCen and states insurance commissioner agree to use anti-money laundering examination as part of life and annuity insurer’s financial examination in order to enhance customer identification and money laundering detection measures.²

¹ Lucia DallaPellegrinaDonatoMasciandaro, “*The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*” 5:2 **RLE** 931, 932 (2009).

² International Monetary Fund, “*United States: Publication of Financial Sector Assessment Program Documentation – Report on Observance and Codes*”, available at https://books.google.co.th/books?id=bvAJmoPvYC&pg=PA55&lpg=PA55&dq=ICP+28+money+laund+ering&source=bl&ots=xFEPfIxxhZM&sig=ijl2M8k0CShbd3J6WL5AQZgAvI&hl=th&sa=X&ei=r8K4VMqgC9DJuATl_IHICg&ved=0CDUQ6AEwBA#v=onepage&q=ICP%2028%20money%20laundering&f=false (last visit Dec. 25, 2014).

In Canada, both life and general, in Canada is supervised in the scope of save and sound practice by “Office of Superintendent of Financial Institution” (OSFI). The OSFI uses “Supervisory Framework and Guides to Intervention” to supervised insurer. The OFSI’s formula against risk is “inherent risk mitigated by quality of risk management is net risk”³

1.2 Suppressive Measures

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) or so called “Vienna Convention” criminalizes the commission of “Money Laundering”. The convention also criminalized the commission of “acquisition, possession or use of property by any person who knows, should have known or suspects that such property is the proceeds of crime.” The offense not requires specific intention like the first offence, just general intention that receiver knows or should have known that the property derived from crime.

2. Legal Measure under Thai Laws

2.1 Preventive Measures

2.1.1 Roles of Supervision

In July 2007, “the Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism of Thailand considered that the financial supervision regarding to anti-money laundering still need to be improved because there is no designed authority to supervise anti-money laundering compliance and there is no actual punishment for severe incompliance. Furthermore, the Detailed Assessment suggested that the Thai anti-money laundering law should delineate the roles of Anti-Money Laundering Office and the supervisor for supervise anti-money laundering regime compliance and design authority to conduct inspection.

According to Section 40 (3/1) of the Act, Office of the Anti-Money laundering Organization(AMLO) is responsible for drafting guideline regarding the compliance of financial institution in comply with the Anti-Money laundering Act B.E.2542(The Act). While insurance company directly by the Office of Insurance Commission (OIC)in accordance with Insurance Commission Act Section 20 (2) but there is no specific provision prescribed with relation to money laundering compliance. There is also no provision regarding method or sanction of anti-money laundering

³ Julia Black, The Development of Risk Based Regulation in Financial Services:Canada, the UK and Australia (2004), research report, Center for the Analysis of Risk and Regulation, London School of Economic and Political Science

compliance in Insurance Commission Act. In 26 April 2011, the Office of Insurance Commission and Anti-Money Laundering and the Office of Insurance Commission signed Memorandum of Understanding in cooperation to control the operation of insurance company to be in compliance with the anti-money laundering law.⁴

There is no specific guideline or approach prescribing how to supervise and sanction insurance company which do not comply with the Act and its regulations. Even the Office of Money Laundering has authority as stipulated by the Act. I may conclude that Thailand does not control insurance company in money laundering matters practically. Furthermore, Thailand is in need to have particular approach to supervise insurance company. So the Office of Money Laundering can supervise and investigate insurance company, if it complies with statutory and regulatory obligation according to money laundering law.⁵

2.1.2 Roles of Intermediary

Both life and general insurers are the “Financial Institution” in accordance with the Money Laundering Act. Then they have duties to comply with measurements specified by the Act. So insurance companies have duties to perform customers identification and due diligence, keep customer records, report suspicious transactions, report cash transactions and manage internal control.

Although the law prescribes duties to insurer, it still not prescribes any duty to insurance intermediary, who really makes contact with customers and perform customer due diligence on behalf of the insurer. Even the law still requires the insurer to incorporate intermediary to internal program, the intermediary has no personal liability if it fails to perform duty according to Anti- Money Laundering Law.

⁴คปภ. ผนึก ปปง. ยกกระดับมาตรฐานฟอกเงิน”กรุงเทพธุรกิจออนไลน์, 26 เม.ย. 2554, (ICO and AMLO Enhances Money Laundering Standard, **Bangkokbiznews**, Apr. 26, 2011), <http://www.108acc.com/news/267414%E0%B8%84%E0%B8%9B%E0%B8%A0%E0%B8%9C%E0%B8%99%E0%B8%B6%E0%B8%81%E0%B8%9B%E0%B8%9B%E0%B8%87%E0%B8%A2%E0%B8%81%E0%B8%A3%E0%B8%B0%E0%B8%94%E0%B8%B1%E0%B8%9A%E0%B8%A1%E0%B8%B2%E0%B8%95%E0%B8%A3%E0%B8%90%E0%B8%B2%E0%B8%99%E0%B8%95%E0%B9%89%E0%B8%B2%E0%B8%99%E0%B8%9F%E0%B8%AD%E0%B8%81%E0%B9%80%E0%B8%87%E0%B8%B4%E0%B8%99.html>

⁵The Anti-Money Laundering Act §40 (3/1)

“establish guidelines for observance, supervise, examine and evaluate reporting entities on implementation of this Act in accordance with rules, procedures and guidelines established by ordinance of the Board”

2.2 Suppressive Measures

2.2.1 Money Laundering Offences

The Money Laundering offence is provided in Section 5 of the Act. The provision criminalized money laundering offence which focuses on “specific intention” which is “for concealing or disguising” origin of property or true nature, source, location, deposition, moment or right or “assisting the other to evade criminal.

However, the offense of “acquisition, possession or use” of proceeds of crime with knowledge that the asset proceeds of crime is not criminalized by Thailand. The offences are criminalized by Article 3(c) and The UN Model Law Article 5.2.1 (c). The commission of acquisition, possession or use is totally different from the two former offences because it lacks of specific intention “for concealing or disguising” Thus, commission of “acquisition, possession or use” is not a crime in Thailand and the prosecutor cannot forfeit the asset getting invalid with such acquisition, possession and use.

According to legislative history, the Minister of Foreign Affairs once addressed to the Secretary of the Prime Minister regarding the draft bill of money laundering. The Minister concerned about lack of provision “acquisition, possession and use” in the draft bill.⁶ However, the committee of anti-money laundering bill drafting considered that the implementation would affect the *bona fide* party and financial institution. Moreover, the committee considered that the Vienna Convention “acquisition, possession or use” offence is not compulsory to imply.⁷

Additionally, the Vienna Convention Art 3 paragraph 2 provided condition of implementation of “acquisition, possession or use” which is “subject to its constitutional principles and the basic concepts of its legal system”. The offense is not optional to imply which is stated in the first chapter. The jurisdiction such as the United States, the United Kingdom, Australia, Canada and Singapore implied the offence in their own concepts. While country like Bolivia consider that “use, consumption, possession, purchase or cultivation” of coca leaf by Bolivian people is part of constitutional principle and basic concept of the country.

Furthermore, the Detailed Assessment also evaluated that section 5 of the Anti-Money Laundering Act is not exactly in accordance with the Vienna Convention 1988 Art 3 (1)(b) and (c), particularly for commission of acquiring,

⁶ หนังสือด่วนที่สุดที่ถกด.0605/12500 ลงวันที่ 23 มิถุนายน 2538(Urgent Letter 0605/12500 from Ministry of Foreign Affair to Council of State (Jun 23,1995).

⁷ การประชุมครั้งที่ 9 ของคณะกรรมการร่างกฎหมาย (2/2540) 9/2539 (Meeting No.9 of Law Drafting Commission (2/1997) 9/1996).

possession and use of proceeds of crime. It also stated that there is no provision of constitution or any legal system of Thailand prohibit the criminalization. Thus, the Detailed Assessment suggested that Thailand should criminalize the commission.

3. The analysis of problems on legal measures on money laundering in insurance business.

3.1 Preventive measures

The Anti Money Laundering Act designed the Anti-Money Laundering Office as supervisor for anti-money laundering compliance. There is still no actual method or guideline to supervise financial institution. In addition, there is a need of improve effectiveness of anti-money laundering compliance of insurance company because the performance of insurance company since the statistic of reporting is very few, compare with bank industry.

3.2 Suppressive Measures

The money laundering offence according to Section 5 is the commission of “transfer or accept for concealing or disguising” and “any act to conceal and disguise information about asset”. Section 5 is not criminalized a commission of “posses, acquire and use” of asset derived from crime with knowledge that the asset derived from crime. The two main offences are very different because the former offense has specific intentions “to conceal and disguised” but the letter does not have.

The Vienna Convention 1988 and the U.N. Model law and Many jurisdictions like the United States, the United Kingdom, Canada, Australia and Singapore criminalized the commission of “acquiring, possession and use” of proceeds of crime. Moreover, countries like the United Kingdom, Australia or Singapore do not require the specific intention “to conceal and disguise” to persecute money laundering at all.

In case of money laundering in insurance business, the criminal generally buys insurance products with proceeds of crime as premium in return to right to receive an amount of money or proceeds of insurance policy in case of

life insurance and indemnity in case of general insurance. When the criminal buy insurance, it can be both money laundering and just money spending depending on intention of criminals which the prosecutor needs to prove beyond reasonable doubt. The situation is called “dual-purpose transaction”. When the prosecutor cannot prove the specific intentions “to conceal or disguise”, the practice is not a crime, even the criminal has knowledge that it is a proceeds of crime and the insurer knows or should have known that the premium has been paid by proceeds of crime, especially from process of Customer Due Diligence.

Therefore, Thailand should criminalize the commission of “possess, acquire and use” proceeds of crime” in provision of money laundering Section 5 in order to tackle “dual-purpose transaction” effectively. The criminalization will make insurance institutions more aware about customer due diligence duty. Since insurance can claim for rights in premium as owner or third party according to Section 50 which the insurer can claim that the asset is not subject to forfeiture because it is not an asset which gets involved in ‘money laundering’. The proof of intention “knows or should know that premium was an asset derived from crime” rests on the insurer as the innocent third party who owns evidence from customer due diligence process. If the insurer performs customer due diligence correctly, the premium can be relieved to insurance. The insurance should have active roles to prevent money laundering by performing due diligence properly, while the *bona fide* insurer can have protection of owner defense.

From financial institution perspectives, rather than prove that insurer did not know or should have not known that the premium is proceeds of crime from the evidence of customer due diligence obligation, the jurisdiction like The United States or the United Kingdom have outstanding system to persecute “money spending or acceptance” of insurer or financial institution and protect *bona fide* financial institution. The American system design threshold for acceptance or spend proceeds of crime exceeds than 10,000 dollars to be prosecuted, while British system lets the third party prove that they do not have

intention in civil standard even it is criminal case. Moreover, the financial institution could raise a defense in criminal charge if the financial institution reports suspicious transaction to the authority.

Moreover, Thailand has an obligation to imply the offence according to Vienna Convention 1988 “subject to forfeiture” which has one condition “subject to constitutional system and legal system”. The Thai legal system the penal offence must be impose by law, so the act of “possession, acquirement and use” of proceeds of crime must be imposed by law or provision in money laundering act.

Conclusion

For preventive measures, Thailand should adopt risk-based approach to supervise insurance company, regarding to money laundering issue. It could be increase performance of state authority to detect money laundering in insurance sector.

For suppressive measures, the possession, acquiring and usages an asset derived from crime with knowledge that asset derived from crime is a criminal offense should be criminalized like in many jurisdictions such as The United States, The United Kingdom, Australia, Canada and Singapore. Moreover, the United Nations Convention Against Illicit Traffic in Narcotic and Psychotic Substance 1988 which Thailand is a member state criminalized the acts of possession, acquiring and usages of proceeds of crime as well.

Recommendation

Preventive Measures

The Anti-Money Laundering Organization should supervise on anti-money laundering compliance more actively. The office of the Anti-Money Laundering Organization has duties to impose guideline, supervise, examine and evaluate anti-money laundering compliance of reporting entity. The office of The Anti-Money Laundering Organization has duty to specify rules, method and guideline according to section 40/1 of the Act.

Thailand should imply the risk-based approach to supervise the insurance company about anti-money laundering compliance in the same way that the Bank of Thailand supervises banks about money laundering regime too. The AMLO should more intervene to supervise insurance industries but spend resource more wisely by risk-

based approach which considers if the insurance company complies with anti-money laundering properly and meet minimum requirements by law. The measures should focus on on-site examination and communication with insurance firms. However, the Anti-Money Laundering should cooperate with the Office of Insurance Commission through mechanism of Memorandum of Understanding. The Office of Insurance Commission has authority to supervise and inspect insurance company according to The Insurance Commission Act Section 20 (2). Then they can inspect insurance company for the matters of money laundering by the guideline which Anti-Money Laundering Office issues. The Practice is also conducted in the United States and Canada. Moreover, the Anti-Money Laundering Organization has duty to educate or to train knowledge about money laundering. So they can provide training program to the Office of Insurance Commission.

Suppressive Measure

The offense of money laundering in Section 5 of the Act shall include the commission of “acquisition, possession or use of property with knowledge by any person who know or should have known that the property derived from predicated offence” which is exceed than reporting threshold.

REFERENCES

1. Books and Book Articles.

Lucia Dalla Pellegrina and Donato Masciandaro, “*The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*” **Paolo Baffi Centre Research Paper No. 2008-22**, (2009).

Black, Julia, “*The Development of Risk Based Regulation in Financial Services: Canada, the UK and Australia*”, **Research Report of Center for the Analysis of Risk and Regulation**, (2004).

2. Electronic Media

Financial Action Task Force, “*Third Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorist : the United States*”, <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>>

คปภ. สนีก ปปง. ยกระดับมาตรฐานฟอกเงิน” กรุงเทพธุรกิจออนไลน์, 2554, (ICO and AMLO Enhances Money Laundering Standard, **Bangkokbiznews**, 2011), <http://www.108acc.com/news/267414/%E0%B8%84%E0%B8%9B%E0%B8%A0%E0%B8%9C%E0%B8%99%E0%B8%B6%E0%B8%81%E0%B8%9B%E0%B8%9B%E0%B8%87%E0%B8%A2%E0%B8%81%E0%B8%A3%E0%B8%B0%E0%B8%94%E0%B8%B1%E0%B8%9A%E0%B8%A1%E0%B8%B2%E0%B8%95%E0%B8%A3%E0%B8%90%E0%B8%B2%E0%B8%99%E0%B8%95%E0%B9%89%E0%B8%B2%E0%B8%99%E0%B8%9F%E0%B8%AD%E0%B8%81%E0%B9%80%E0%B8%87%E0%B8%B4%E0%B8%99.html>

3. Other Materials

หนังสือด่วนที่สุดที่ถด.0605/12500 ลงวันที่ 23 มิถุนายน 2538 (Urgent Letter 0605/12500 from Ministry of Foreign Affairs to Council of State (Jun 23,1995).

การประชุมครั้งที่ 9 ของคณะกรรมการร่างกฎหมาย (2/2540) 9/2539(Meeting No.9 of Law Drafting Commission (2/1997) 9/1996).

PROTECTION OF TRADITIONAL KNOWLEDGE ASSOCIATED WITH PLANT GENETIC RESOURCES: A COMPARATIVE STUDY OF THAI LAW AND INDIAN LAW*

Sirakarn Meeklam**

ABSTRACT

Traditional knowledge, specifically traditional knowledge associated with plant genetic resources, has been treated as public knowledge for free exploitation without due respect or concern for the effort taken by the indigenous and local communities to preserve and develop such knowledge. Globalization has caused its misuse which in turn, has led to bio-piracy and unsustainable use of such knowledge. Consequently, the protection of traditional knowledge has been a subject of increasing importance. In this regard, several countries have developed legal mechanisms for protecting their traditional knowledge and plant genetic resources either through intellectual property protection, a *sui generis* system, or a combination of both.

Thailand, as one of the countries rich in traditional knowledge and plant genetic resources, has opted for a *sui generis* system by enacting two major laws directly addressing the protection of traditional knowledge and plant genetic resources. First, the Thailand Plant Varieties Protection Act B.E. 2542 (1999) aims to protect rights of plant breeders in order to promote innovative plant breeding activities and to protect the rights of farmers and local communities including related knowledge in respect of their participation in improving, conserving and making use of plant genetic resources. Second, the Thai Traditional Medicine Intelligence Act B.E. 2542 (1999) aims to protect Thai traditional medicine and also to manage access to traditional knowledge and biological resources in herbal medicine. However, both laws provide neither a functional system nor an effective enforcement.

This thesis aims at studying the characteristics and related fundamental principles of traditional knowledge specifically on the legal measures for protection of traditional knowledge associated with plant genetic resources, analyzing the problems of the Thailand Plant Varieties Protection Act B.E. 2542 (1999), the Thai Traditional Medicine Intelligence Act B.E. 2542 (1999), and proposing suggestions in order to resolve the difficulties arising from both of the Acts. Furthermore, the study will provide recommendations to enhance the effective enforcement of the Acts and develop a practical system for the protection by comparing them with Indian laws and legal system which is considered to be one of the most effective laws and systems in protecting its traditional knowledge and plant genetic resources.

Consequently, this thesis proposes new legislative solutions to amend the law concerning the management of access and benefit-sharing and the protection of

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farmers' rights and communities' rights. In addition, the establishment of a central database is suggested to collect and archive Thai traditional knowledge including Thai traditional medicine.

Keywords: Protection of Traditional Knowledge, Protection of Plant Genetic Resources

บทคัดย่อ

ภูมิปัญญาชาวบ้าน หรือภูมิปัญญาท้องถิ่นนั้นมีอยู่หลายแขนงทั่วโลก เช่น ภูมิปัญญาด้านการแพทย์แผนต่างๆ ด้านพันธุ์พืชสมุนไพร หรือด้านการใช้ประโยชน์จากพันธุ์พืชต่างๆ เป็นต้น ศาสตร์และภูมิปัญญาเหล่านี้ถือเป็นสิ่งที่ตกทอดจากรุ่นสู่รุ่น โดยมีชุมชนท้องถิ่นเป็นผู้ดูแลรักษาให้คงอยู่ หากแต่ความเจริญก้าวหน้าของเทคโนโลยี และความโลภกาวิวัฒน์ ทำให้การเข้าถึงภูมิปัญญาสามารถกระทำได้ง่ายขึ้น ส่งผลให้เกิดการรุกรานภูมิปัญญาท้องถิ่นหรือพันธุ์พืชเหล่านี้ รวมถึงการใช้ประโยชน์ในทางที่ผิดๆ ดังนั้นประเทศต่างๆ จึงพิจารณาให้มีการบัญญัติกฎหมายเพื่อคุ้มครองภูมิปัญญาท้องถิ่น และพันธุ์พืชขึ้น ทั้งในรูปแบบของระบบกฎหมายทรัพย์สินทางปัญญา และระบบกฎหมายเฉพาะ

สำหรับประเทศไทยนั้น นับได้ว่าเป็นประเทศที่อุดมด้วยพันธุ์พืช และศาสตร์ภูมิปัญญาชาวบ้าน แม้ว่าในปัจจุบันจะมีกฎหมายเฉพาะ 2 ฉบับ ได้แก่ พระราชบัญญัติคุ้มครองพันธุ์พืช พ.ศ. 2542 และพระราชบัญญัติคุ้มครองและส่งเสริมภูมิปัญญาการแพทย์แผนไทย พ.ศ. 2542 ซึ่งให้ความคุ้มครองและดำรงรักษาภูมิปัญญาและพันธุ์พืชเหล่านี้ไว้ อย่างไรก็ตาม กฎหมายทั้งสองฉบับนี้ยังคงมีจุดบกพร่องบางประการ ทำให้ไม่สามารถบังคับใช้ได้อย่างมีประสิทธิภาพเท่าที่ควร

จากเหตุผลที่ได้กล่าวมาข้างต้น ผู้เขียนจึงเสนอให้มีการศึกษาพื้นฐานของภูมิปัญญาท้องถิ่น และการคุ้มครองพันธุ์พืชโดยใช้กฎหมายเป็นเครื่องมือ ประกอบกับการวิเคราะห์กฎหมายทั้งสองฉบับ เพื่อศึกษาปัญหาที่เกิดขึ้น โดยศึกษาเปรียบเทียบกับกฎหมายคุ้มครองพันธุ์พืชและภูมิปัญญาท้องถิ่น รวมถึงสิทธิเกษตรกรของประเทศอินเดีย อันได้ชื่อว่าเป็นกฎหมายที่มีประสิทธิภาพและมีประสิทธิผลที่สุดประเทศหนึ่ง ซึ่งในมุมมองของผู้เขียนเห็นว่า ประเทศไทยควรมีการแก้ไขกฎหมายให้สามารถบังคับใช้ได้มีอย่างมีประสิทธิภาพมากยิ่งขึ้น นอกจากนี้ยังเสนอให้มีการบัญญัติเพิ่มเติมกฎหมายบางประการ เพื่อปรับปรุงและพัฒนาด้านการแบ่งปันผลประโยชน์ และการคุ้มครองสิทธิของชุมชนและเกษตรกร ทั้งยังเห็นสมควรให้จัดตั้งหน่วยงานสำหรับเก็บรวบรวมข้อมูลภูมิปัญญาท้องถิ่น พันธุ์พืช สมุนไพรท้องถิ่น รวมถึงภูมิปัญญาการแพทย์แผนไทย เพื่อเป็นหลักฐาน และข้อมูลภูมิปัญญาของไทย

คำสำคัญ: การคุ้มครองภูมิปัญญาท้องถิ่น, การคุ้มครองทรัพยากรพันธุกรรมพืช

Introduction

Traditional knowledge, specifically traditional knowledge associated with plant genetic resources, has been treated as public knowledge for free exploitation, which in turn has led to bio-piracy and unsustainable use of knowledge. In this regard, the protection of traditional knowledge has been a subject of increasing importance. Several countries have developed legal mechanisms for protecting their traditional knowledge and plant genetic resources either through intellectual property protection, a *sui generis* system, or a combination of both.

Thailand, as one of the countries rich in traditional knowledge and plant genetic resources, has opted for a *sui generis* system by enacting two major laws directly addressing the protection of traditional knowledge and plant genetic resources;

the Thailand Plant Varieties Protection Act B.E. 2542 (1999) and the Thai Traditional Medicine Intelligence Act B.E. 2542 (1999). However, both laws provide neither a functional system nor an effective enforcement.

Additionally, India is among the first countries in the world to have opted for a *sui generis* system and pass legislation granting farmers' rights. India's experience is important due to its international contribution to negotiations on farmers' rights, its position as a center of biodiversity, and the complexities of agriculture in India within the country, as it is attempting to implement these rights.¹ As a result, Indian laws and legal system are considered to be one of the most unique and effective in protecting its knowledge and resources. To develop laws and a system for protection of traditional knowledge and plant genetic resources in Thailand, a comparative study between Indian and Thai laws is required.

I. Characteristics of Traditional Knowledge

Traditional knowledge is an intangible component which encompasses such diversity. It generally relates to various areas and contains plenty of information resulting from creativity and constant improvements which have been used and passed on from generation to generation over a long period of time. Such knowledge has been accumulated, scrutinized, and inherited extensively, becoming traditional knowledge at last. To date, there is not yet an accepted definition of traditional knowledge at the international level. However, most traditional knowledge usually has some common characteristics as described below.²

- Traditional knowledge is holistic: all things are interconnected and nothing is comprehended in isolation.
- Traditional knowledge is intuitive: based on deeply held holistic understanding and knowledge.
- Traditional knowledge is qualitative: knowledge is gained through intimate contact with the local environment without patterns or trends. It is based on data collected by resource users through observation and hands-on experience.
- Traditional knowledge is transmitted inter-generationally by oral traditions: teaching is accomplished through stories and participation of children in culturally important activities.
- Traditional knowledge is inseparable: it is rooted in a social context that sees the world in terms of social and relations among all life forms. All parts of its nature are inseparable.
- Traditional knowledge is based on mutual well-being, reciprocity, and cooperation: these promote balance and harmony between the well-being of the individual and the well-being of the social group.
- Traditional knowledge is often based on cumulative, collective practical experiences. It has constant improvements as new knowledge is continually integrated to the existing.
- Traditional knowledge is promoting of stewardship: it takes a proactive approach to environmental protection and an ecosystem-focused approach to resource management.

¹ Anitha Ramanna, The Fridtjof Nansen Institute, *Farmers' Rights in India: A case study*, 11 (2006), <http://www.fni.no/doc&pdf/FNI-R0606.pdf> (last visited March 17, 2015).

² "Definitions of Traditional Knowledge," http://nafaforestry.org/forest_home/documents/TKdefs-FH-19dec06.pdf (last visited March 7, 2015).

II. Protection of Traditional Knowledge in India

The loss of biodiversity and associated knowledge have been causing a great concern since several patents based on Indian traditional knowledge have been granted to third parties, for example, *Turmeric* and *Neem*. Consequently, two major laws have been enacted for addressing the protection of traditional knowledge and plant genetic resources in India; the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002.

2.1 The Protection of Plant Varieties and Farmers' Rights Act, 2001

The Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act) provides for the establishment of an effective system for protection of plant varieties, the rights of farmers, plant breeders, and encourages the development of new varieties of plants.³ This has led India to become one of the first countries in the world to pass a legislation granting rights to both breeders and farmers.⁴

The PPVFR Act, which reflects the interests of its actors, allows 4 types of plant varieties to be registered including: a new plant variety; an extant variety; an essentially derived variety (EDV) and farmers' variety. The provision for protecting farmers' variety is the most unique aspect of the Indian law.⁵ It emerged to satisfy the interests of farmers who have participated in conservation and preservation of plant genetic resources and related knowledge.

According to the PPVFR Act, farmers' variety means "*a variety which (i) has been traditionally cultivated and evolved by the farmers in their fields; or (ii) is a wild relative or land race of a variety about which the farmers possess common knowledge.*" Where farmer means "*any person who (i) cultivates crops by cultivating the land himself; or (ii) cultivates crop by directly supervising the cultivation of land through any other person; or (iii) conserves and preserves, severally or jointly, with any person, any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.*"

Furthermore, the PPVFR Act contains specific provisions to safeguard the interests of farmers and local communities by granting farmers' rights. The rights granted include: rights to save; use; sow; resow; exchange; share or sell farm produce; sell the variety of seed protected under the PPVFR Act; rights of innocent infringement; rights to be recognized and rewarded from the National Gene Fund; and rights to claim compensation from the breeders if the variety or propagating material fails to meet the expected performance under given conditions as claimed by the breeder of the variety.

For the benefit-sharing, commercial breeders have to share the benefits arising from the registration of the variety with farmers or traditional rural communities

³ The Protection of Plant Varieties and Farmers' Rights Act, 2001

⁴ Anitha, *supra* note 1.

⁵ Anitha Ramanna, Environment and Production Technology Division, *India's Plant Variety and Farmers' Rights Legislation: Potential Impact on Stakeholder access to Genetic Resources*, **EPTD Discussion Paper**, 17 (2003), <http://ageconsearch.umn.edu/bitstream/16105/1/dp020096.pdf> (last visited March 17, 2015).

who have contributed towards development of the variety.⁶ Therefore, farmers that have played a role in conservation and development of plants can be properly recognized and rewarded.

2.2 The Biological Diversity Act, 2002

India recognized the sovereign rights of states to use their own biological resources by enacting the Biological Diversity Act, 2002 (BDA), which aims at the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.⁷

The BDA established a three-tiered decentralized system for implementing its provisions; the National Biodiversity Authority, the State Biodiversity Boards, and Biodiversity Management Committees, which are respectively at the National level, State level, and Local level institutions for implementing the Act.⁸

(1) The National Biodiversity Authority (NBA)

The NBA supervises and implements all matters relating to request for access by foreigners, including non-resident Indians, institutions or companies and all matters relating to the transfer of results of research to any foreigner.⁹ Furthermore, the NBA performs facilitative, regulatory and advisory functions for the Central Government of India on matters relating to the conservation of biodiversity.¹⁰ In addition, it has the full authority to check for misappropriation of its biological resources and discharge all decisions pertaining access and benefit-sharing including: prior informed consent processes; approval for access and transfer of biological resources; scientific research results; several other matters related to access and benefit-sharing.¹¹

While granting approval for access, the NBA will impose terms and conditions to secure equitable sharing of benefits and establish a guideline with the specific details of a benefit-sharing formula in an official gazette on a case-to-case basis.¹² However, it also decentralizes. The time period and method of benefits to be shared will be decided based on mutually agreed terms and conditions between the applicant, the BMCs, and relevant stakeholders including local communities that own specific biological resources. This creates bargaining power and promotes participation of local communities in access and sustainable use pertaining to biological resources and equitable sharing of benefits.

⁶ Sujith Koonan, *Developing country sui generis options: India's sui generis system of plant variety protection*, 5 (2014), <http://www.quno.org/sites/default/files/resources/QUNO%20India%20-%20plant%20variety%20protection%20%202014.pdf> (last visited March 16, 2015).

⁷ The Biological Diversity Act

⁸ National Study on ABS Implementation in India, Commissioned by the ABS Capacity Development Initiative in collaboration with the Government of India, available at http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/ABS_Dialogue_042014/National_study_on_ABS_implementation_in_India_20140716.pdf.

⁹ The BDA Section 3 and 4

¹⁰ The BDA Section 18(3)

¹¹ K. Venkataraman, *Access and benefit sharing and the Biological Diversity Act of India: A progress report*, 10 *Asian Biotechnology and Development Review*, 69-80 (2008).

¹² *Id.*

The monetary benefits will be deposited in the National Biodiversity Fund which will be used for preservation, conservation and development of areas. In the case that the utilization of biological resources was accessed from a specific individual, groups, or organizations, the benefits may be provided directly to those individuals or groups.

(2) The State Biodiversity Boards (SBBs)

The SBBs operate at the State level to deal with matters relating to access of any biological resource by Indians for commercial purposes. Moreover, they focus on advising the State Governments, subject to any guidelines issued by the Central Governments, on matters relating to the conservation, sustainable use of biodiversity, and equitable sharing of benefits arising from the utilization of biological resources.¹³

(3) Biodiversity Management Committees (BMCs)

At the local level, the BMCs are constituted by every local body in their jurisdiction responsible for promoting conservation, sustainable use, documentation of biological diversity, and knowledge relating to biological diversity.¹⁴ One of the main functions of the BMC is to prepare People's Biodiversity Registers*, which contains information about the biological resources of their respective areas in consultation with the local people.¹⁵ This is an attempt to identify where the biological resources are from, which will facilitate the access and benefit-sharing arising from the utilization of such resources. The BMCs would be consulted by the NBA and the SBBs on matters related to the use of biological resources and associated knowledge within their jurisdiction.¹⁶

(4) Access and Benefit-Sharing

All approvals for access from the NBA will be in the form of a written agreement between the NBA and the applicant¹⁷ in accordance with mutually agreed terms and conditions between the applicant, the BMCs, and local communities or benefit claimers.¹⁸ The agreement will contain the terms and conditions for access of resources¹⁹ aiming at an equitable share of benefits arising from the utilization of the biological resources and related knowledge. The NBA is authorized to determine the benefit-sharing resulting from the use of biological materials which include the following: monetary benefits received as fees and royalties; grant of joint ownerships of

¹³ The BDA Section 23

¹⁴ The BDA Section 41(1)

* PBR is a comprehensive data base recording people's traditional knowledge and insight of the status, uses, history, ongoing changes and forces driving these changes on the biological diversity resources of their own localities. The information is critical for conservation, sustainably monitoring of biological resources at local level. This helps in identification of a beneficiary with whom benefits can be shared when an ABS agreement becomes operational, available at <http://asbb.gov.in/preparation.html> (last visited May 31, 2015).

¹⁵ Biological Diversity Rules, 2004 Rule 22 (6)

¹⁶ The BDA Section 41

¹⁷ Yeshwanth Shenoy, **National Conference on Biodiversity, Development and Poverty Alleviation**, May 22, 2010, *An introduction to the Biological Diversity Act, 2002*, 65 (2010), <http://www.upsbdb.org/pdf/Souvenir2010/11.pdf> (last visited March 20, 2015).

¹⁸ The BDA Section 21(1); the Biological Diversity Rules, 2004 Rule 14(5)

¹⁹ The Biological Diversity Rules, 2004 Rule 14(6)

IPRs; transfer of technology; association of Indian Scientists in R&D; and setting up of venture capital funds among other deals.²⁰

Monetary benefits will be deposited into the National Biodiversity Fund,²¹ which will be distributed to the stakeholders and will be used for conservation, promotion of biological resources, and socio-economic development of the areas accessed to obtain biological resources.²² However, in case the utilization of biological resources has been accessed from a specific individual, groups or organizations, the NBA may deposit such benefits directly to those individuals, groups or organizations in accordance with the terms of agreement.²³

2.3 The Traditional Knowledge Digital Library (TKDL)

The TKDL objective is to protect the traditional knowledge of India from exploitation through bio-piracy and unpatentable inventions because the TKDL makes the prior art on traditional knowledge available to patent examiners²⁴ by documenting it electronically and classifying it using modern classification systems based on the structure of International Patent Classification,²⁵ also known as “the Traditional Knowledge Resource Classification (TKRC).”²⁶

Moreover, the TKDL breaks language barriers and creates a bridge between traditional knowledge, information existing in local languages, and the patent examiners.²⁷ It breaks the Indian bindings of existing traditional knowledge from local languages, for example, Sanskrit, Urdu, Arabic, Persian, Tamil, etc. into 5 international languages which are English, French, Spanish, German and Japanese in a patent application format readily accessible and understandable to patent examiners.²⁸ This is to make Indian traditional knowledge understandable by patent examiners at International Patent Offices and to prevent granting of the wrong patents. Currently, the TKDL is proving to be an effective deterrent against bio-piracy and is recognized as a global leader in the area of traditional knowledge protection.²⁹

²⁰ The BDA Section 21(2)

²¹ The BDA Section 21(3)

²² The BDA Section 27

²³ The BDA Section 21(3)

²⁴ “*Traditional Knowledge Digital Library*,” available at http://en.wikipedia.org/wiki/Traditional_Knowledge_Digital_Library (last visited March 21, 2015).

²⁵ V.K. Gupta, *Traditional Knowledge Digital Library, Paper presented at the Sub-Regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies*, Bangkok, Thailand, 13-16 December 2005.

²⁶ TKDL, *supra* note 24.

²⁷ **CROP BREEDING AND BIOTECHNOLOGY** 255 (C P Malik, Chitra Wadhwani & Bhavneet Kaur ed., Pointer Publishers 2009).

²⁸ *Id.*

²⁹ Council of Scientific and Industrial Research [CSIR], *Traditional Knowledge Digital Library (TKDL)*, available at http://www.csir.res.in/External/Utilities/Frames/career/main_page1.asp?a=tkdl_topframe.htm&b=tkdl_left.htm&c=.%2F..%2F..%2FHeads%2FTKDL%2Fmain.htm (last visited June 24, 2015).

III. Protection of Traditional Knowledge in Thailand

3.1 Thailand Plant Varieties Protection Act B.E. 2542 (1999)

An outstanding feature of the Thailand Plant Varieties Protection Act B.E. 2542 (1999) (Thai PVP Act) is that it has been designed to protect the interests people involved in agricultural practices in 2 main ways; to protect the rights of plant breeders in order to promote innovative plant breeding activities and to recognize and protect the rights of farmers and local communities, including related knowledge in respect of their participation in improving, conserving, and making use of plant genetic resources. Therefore, the protection of new plant varieties and extant varieties has been introduced, under the Thai PVP Act, to promote agricultural development in the country.³⁰

The most significant feature of the Thai PVP Act is the protection of extant varieties in order to create special and differential treatment in favor of farmers and local communities.³¹ The Thai PVP Act divides extant varieties into two main categories: the local domestic plant varieties, and the general domestic plant and wild plant varieties.

Firstly, the legal protection offered for the local domestic plant varieties is regarded as a success in implementing the concept of farmers and local communities' rights. Generally, an individual or a community that takes part in the conservation or development of the plant variety may register their local domestic plant variety. A plant variety capable of registration must exist only in a particular locality within Thailand and must not be registered as a new plant variety.³²

Secondly, the protection of the general domestic plant and wild plant varieties provides automatic protection to plant varieties, without registration, in order to strengthen farmers and local communities' rights.³³ Consequently, it is clear that the extension of this kind of extant variety protection is to cover all plant varieties found within Thailand.³⁴

(1) Access and Benefit-Sharing

In authorizing any person to collect, procure or gather local domestic plant varieties for commercial interests and in making the profit-sharing agreement, the local government organization, farmers' group or co-operative to which the certificate of registration of the local domestic plant variety is granted shall make the agreement in the name of the community, provided that approval of the Commission shall first be obtained.³⁵ The benefits derived from such activity shall be calculated into percentage and distributed to persons who conserve or develop the plant variety, the community as

³⁰ Pawarit Lertdhamtewe, *Implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement): A Case Study of Thailand's Plant Protection Regime*, ANZSIL–SCIL Research Symposium on International Economic Law, available at

https://www.academia.edu/1205715/Implementing_the_TRIPS_Agreement_A_Case_Study_of_Thailands_Plant_Protection_Regime (last visited March 23, 2015).

³¹ See Chapter IV of the Thai PVP Act (Section 43-51)

³² The Thai PVP Act Section 43 and 45

³³ Pawarit, *supra* note 30.

³⁴ *Id.*

³⁵ The Thai PVP Act Section 48

its common revenue and the local government organization or farmers' group or co-operative that makes the Agreement.³⁶

Another access and benefit-sharing measure applies to collectors of the general domestic plant and wild plant varieties for commercial purposes. In this case, a person who collects, procures or gathers general domestic plant varieties, wild plant varieties or any part of such plant varieties shall obtain permission from the competent official and make a profit-sharing agreement.³⁷ The profit-sharing agreement shall be considered and negotiated between the applicant and the working group appointed by the Director-General of the Department of Agriculture.³⁸ The profits derived shall be remitted to the Plant Varieties Protection Fund following the agreed terms in the benefit-sharing agreement.³⁹ For the use of study, experiment or research of general domestic plant and wild plant varieties for a non-commercial purpose, it is also required to comply with the Regulation prescribed by the Commission.⁴⁰

3.2 The Thai Traditional Medicine Intelligence Act B.E. 2542 (1999)

The Thai Traditional Medicine Intelligence Act has been established for protection of traditional Thai medicinal intelligence which is considered as part of traditional knowledge.⁴¹ It promotes and protects Thai traditional medicine and related knowledge and also manages access to traditional knowledge and biological resources in herbal medicine.

Accordingly, the Thai Traditional Medicine Intelligence Act provides the protection of herbs for sustainable conservation and utilization of medicinal plants by authorizing the Minister, with the advice of the Committee, to issue a Notification specifying herbs that are valuable for study and research, have economic significance, or may become extinct as controlled herbs.⁴² When an herb is notified as a control herb, permission from the licensing authority is required in order to obtain any management activities involving the controlled herb except for research done by State agencies.⁴³

IV. Protection of Traditional Knowledge in India vs. Thailand

4.1 Access and Benefit-Sharing

Relatively, the Thai PVP Act seems to ignore the participation of farmers and local communities, since they cannot directly take part in the consideration and negotiation of the benefit-sharing agreement. Additionally, Thailand is still lacking

³⁶ The Thai PVP Act Section 49

³⁷ The Thai PVP Act Section 52

³⁸ Ministerial Regulation on Rules, Procedures and Conditions for collecting, procuring or gathering general domestic plant varieties or wild plant varieties for the purpose of variety development, education, experiment or research for commercial interest and making a profit-sharing agreement B.E. 2553 (2010) Section 7

³⁹ The Thai PVP Act Section 52

⁴⁰ The Thai PVP Act Section 53

⁴¹ Chavalit Uttasart, *The Relevance of Traditional Knowledge to Intellectual Property Law*, <https://www.aippi.org/download/committees/232/GR232thailand.pdf> (last visited June 27, 2015).

⁴² The Thai Traditional Medicine Intelligence Act Section 44

⁴³ The Thai Traditional Medicine Intelligence Act Section 48

mechanisms and specific institution that would monitor and follow up the use of accessed biological resources and related knowledge, especially for commercial purposes. Unlike the benefit-sharing agreement under the BDA of India, which is mutually agreed between the applicant, the BMCs, and local communities together with the full authority of the NBA to oversee the misappropriation of its biological resources and discharge all decisions pertaining to access and benefit-sharing.⁴⁴ This has strengthened the protection of biological resources and related knowledge in India. As a result, India has become one of the most successful countries in protecting their own traditional knowledge and plant genetic resources.

4.2 Farmers' Rights and Communities' Rights

Under the PPVFR Act, the definition and scope of farmers' rights and communities' rights including farmers' varieties have been clearly expressed. This facilitates the identification of the actual farmers that would be given the privilege and rights under the PPVFR Act.

For Thailand, farmers and local communities, as a group of people registered as a community under the Thai PVP Act, may register their local domestic plant varieties existing only in a particular locality which has been conserved or developed exclusively by a particular community. However, it has been claimed that the qualification to register a domestic plant variety is hardly met since it is highly unlikely that the plant variety exists in only one particular place. Usually, it scatters throughout various places resulting from the free exchange of plant materials and knowledge among various communities. Therefore, the difficulty of identifying a specific community that has originally conserved or developed a particular domestic plant variety that is eligible for registering its variety has emerged.

Despite that the Thai PVP Act furnishes the farmers' privileges by allowing them to cultivate and propagate protected new plant varieties from the propagating material they make. Though it does not permit them to exchange, share or sell the protected new plant, including the seeds of a protected variety, which is an important ingredient for conservation of plant varieties. On the other hand, exchanging, sharing or selling of the protected new plant by farmers could be considered as an act of commercial purpose, which infringes the rights of the holder of a new plant variety.

4.3 A database for Traditional Knowledge

While the law for the protection of Thai traditional knowledge is being promulgated, the Department of Intellectual Property (DIP) has enacted the regulation concerning the establishment of databases on Thai local intelligence, dated 7 November B.E.2545 (2002),⁴⁵ aiming to invite people or groups of people who conserve, reserve or develop Thai traditional knowledge to notify and register information of their knowledge as a reference databank and to promote the use of the registered traditional

⁴⁴ วิวัธ วงศ์ทิพย์, *แนวทางการคุ้มครองภูมิปัญญาท้องถิ่นของไทย: ศึกษาเปรียบเทียบประเทศไทยกับประเทศอินเดีย*, 87 *วารสารสุทธิปริทัศน์*, 336, 323-344 (2557) (Vivit Vongthip, *The Guiding Principle to the Protection of Traditional Knowledge in Thailand: A Comparative Study between Thailand and India*, 87 *Suthiparithat Journal*, 336, 323-344 (2014).

⁴⁵ Panamas Kudngaongarm, *Thai Traditional Medicine Protection (Part I)*, 14 *Thailand Law Journal* (2011), available at <http://www.thailawforum.com/articles/Thai-traditional-medicine-protection-part1.html> (last visited March 21, 2015).

knowledge. This helps prevent redundancy and overlapping of traditional knowledge obtained in Thailand.⁴⁶

However in March 2015, the Notification of the DIP has been repealed and the Thai traditional knowledge notification system was withdrawn. Presently, Thailand still has no proper *sui generis* law for protection of all traditional knowledge.⁴⁷ Some of existing *sui generis* laws only provide protection for specific types of traditional knowledge under the supervision of different institutions. For example, the traditional Thai medicinal intelligence is under the supervision of the Ministry of Public Health, and plant varieties are under the supervision of the Ministry of Agriculture and Cooperatives.⁴⁸ Therefore, the DIP has considered it better to have each of the institutions directly oversee relating traditional knowledge under its specific *sui generis* law including the registration of relating traditional knowledge, preparing a traditional knowledge database, etc.

As a result, currently Thailand has no central database for the overseeing of all traditional knowledge as a whole. Instead, the knowledge is usually scattered in many institutions such as the Department of Agricultural Extension, Department of Thai Traditional and Complementary Medicine, Department of National Parks, Wildlife and Plant Conservation and National Center for Genetic Engineering and Biotechnology (BIOTEC), leading to redundancy and overlapping of the traditional knowledge. Each of the above institutions works individually to oversee different kinds of resources and knowledge, which does not provide a collaborative function for the supervision of Thai traditional knowledge. This may lead to bio-piracy, unsustainable use of the resources and related knowledge derived from Thailand.

V. Proposed *Sui Generis* Law for the Protection of Traditional Knowledge in Thailand

5.1 Management of Access and Benefit-Sharing

A State, provincial and local institution that systematizes collaboration between each of the communities in Thailand should be established to encourage the participation of farmers and local communities in negotiating benefit-sharing. However, the Ministry of Agriculture and Cooperatives should be the primary agency to oversee Thai traditional knowledge, plant genetic resources, and facilitate benefit-sharing on behalf of the communities, since farmers and local communities alone may not be fully prepared to be able to properly negotiate with companies or organizations.

5.2 Protection of Farmers' Rights and Communities' Rights

The development of traditional knowledge and plant genetic resources protection in Thailand should not only seek to prevent bio-piracy but also recognize the rights of owners who protect, develop, and preserve their traditional knowledge and plant genetic resources. Therefore, the granting of rights that empower farmers and

⁴⁶ “กรมทรัพย์สินทางปัญญายกเลิก ขอรับบริการข้อมูลภูมิปัญญาท้องถิ่นไทย” (“*Department of Intellectual Property repealed the regulation concerning the establishment of databases on Thai local intelligence*”), available at <http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9580000033634> (last visited June 25, 2015).

⁴⁷ *Id.*

⁴⁸ *Id.*

communities to promote their traditional knowledge and plant genetic resources to control the use and benefits from the commercial exploitation is recommended.⁴⁹

To start with, the definition and scope of a ‘farmer’, ‘community’, ‘rights of farmers’, and ‘rights of communities’ to be protected under the Thai PVP Act should be clearly expressed to identify the actual farmers and communities that would be provided protection and benefits. The given definition shall be specific and must not create any confusion. Also, the rights provided shall be collective rights with a participation of farmers and local communities in the setting of proper terms and conditions of access and benefit-sharing. Furthermore, the Thai PVP Act should clearly permit farmers to exchange, share or sell the protected new plant varieties including seeds to encourage development and conservation of plant varieties in order to bring about biological diversity.

5.3 Establishment of a central database for Traditional Knowledge

The establishment of a national central database to collect and archive Thai traditional knowledge including Thai traditional medicine is suggested. It shall be a one-stop service center collecting all information related to Thai traditional knowledge. In this case, a special institute, for example, a National Mission on Traditional Knowledge, may be established to directly supervise and be responsible for all national traditional knowledge in an organized way. The established institute should support initiatives at different levels including State, provincial and local level and also coordinate with other related institutions, as well as NGOs, and private sectors for the purpose of unity.⁵⁰

For the established traditional knowledge database, it could be an important source of reference for all Thais to access national traditional knowledge for the purpose of studying, researching and development of the existing traditional knowledge. A searchable database can be used as evidence of prior art by patent examiners when accessing patent applications. This follows the Indian concept of their TKDL, which has been successful in protecting their traditional knowledge and plant genetic resources.

CONCLUSIONS

In order to develop an effective *sui generis* system regarding the protection of traditional knowledge and plant genetic resources, Thailand has various alternatives. Thai laws should adopt the general concept of access and benefits-sharing, farmers’ rights and TKDL suggested by Indian laws and systems and adjust these concepts to be suitable for Thailand. The law should be revised to grant the rights that empower farmers and communities to promote their traditional knowledge, and to participate in negotiating the benefit-sharing arising from the use of their knowledge and resources. Furthermore, it should clearly permit farmers to exchange, share or sell the protected new plant varieties including seeds to encourage development and conservation of plant varieties in order to bring about biological diversity. Additionally, the establishment of a national central database to collect and archive Thai traditional knowledge including Thai traditional medicine is suggested.

⁴⁹ Hanamshet Kritika et al., *Traditional knowledge protection*, available at <http://www.slideshare.net/AbhishekSingh337/intellectual-and-traditional-knowledge-of-india-ppt> (last visited April 15, 2015).

⁵⁰ Vishwas Kumar Chouhan, “*Protection of Traditional Knowledge in India by Patent: Legal Aspect*,” 3 *Journal of Humanities and Social Science* (JHSS) 35, 35-42 (2012).

REFERENCES

1. Books and Book Articles

1.1 English

- Chouhan, Vishwas Kumar. “Protection of traditional knowledge in India by patent: Legal Aspect.” **Journal of Humanities and Social Science (JHSS)**, no. 3, 2012: 35-42.
- Kudngaongarm, Panamas. “Thai Traditional Medicine Protection (Part I).” **Thailand Law Journal**, no. 14, 2011.
<http://www.thailawforum.com/articles/Thai-traditional-medicine-protection-part1.html> (accessed March 21, 2015).
- Malik, C.P., Wadwani, Chitra., and Kaur, Bravneet., editor. **Crop Breeding and Biotechnology**. Jaipur: Pointer Publishers, 2009.
- Venkataraman, K. “Access and Benefit Sharing and the Biological Diversity Act of India: A progress report.” **Asian Biotechnology and Development Review**, no. 3, 2008: 69-80.

1.2 Thai

- วงศ์ทิพย์, วิวิธ. “แนวทางการคุ้มครองภูมิปัญญาท้องถิ่นของไทย: ศึกษาเปรียบเทียบกับประเทศไทยกับประเทศอินเดีย.” **วารสารสุทธิปริทัศน์**, no.87, 2557:323-344.
 (Vongthip, Vivit. “The Guiding Principle to the Protection of Traditional Knowledge in Thailand: A Comparative Study between Thailand and India.” **Suthiparithat Journal**, no. 87, 2014:323-344.

2. Articles and Reports

2.1 English

- Gupta, V.K., “Traditional Knowledge Digital Library.” *Paper presented at the Sub-Regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies*, Bangkok, Thailand, 13-16 December 2005.
- Koonan, Sujith. *Developing Country Sui Generis Options: India’s sui generis system of plant variety protection*. 2014.
<https://www.quno.org/sites/default/files/resources/QUNO%20India%20-%20plant%20variety%20protection%20%202014.pdf> (accessed March 16, 2015).
- Lertdhamtewe, Pawarit. “Implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement): A Case Study of Thailand’s Plant Protection Regime.” *ANZSIL–SCIL Research Symposium on International Economic Law*. 2011.
https://www.academia.edu/1205715/Implementing_the_TRIPS_Agreement_A_Case_Study_of_Thailands_Plant_Protection_Regime (accessed June 20, 2015).
- Ramanna, Anitha. Environment and Production Technology Division “India’s Plant Variety and Farmers’ Rights Legislation: Potential Impact on Stakeholder access to Genetic Resources.” *EPTD Discussion Paper*.

2003. <http://ageconsearch.umn.edu/bitstream/16105/1/dp020096.pdf> (accessed March 17, 2015).
- Ramanna, Anitha. The Fridtjof Nansen Institute. "Farmers' Rights in India: A Case Study." *FNI Report*. 2006. <http://fni.no/doc&pdf/FNI-R0606.pdf> (accessed March 17, 2015).
- Research and Information System for Developing Countries India Habitat Centre.
- "National Study on ABS Implementation in India." The ABS Capacity Development Initiative in collaboration with the Government of India. 2014. http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/ABS_Dialogue_042014/National_study_on_ABS_implementation_in_India_20140716.pdf (accessed April 11, 2015).
- Shenoy, Yeshwanth. "An Introduction to the Biological Diversity Act, 2002." *National Conference on Biodiversity, Development and Poverty Alleviation*, May 22, 2010. <http://www.upsbdb.org/pdf/Souvenir2010/11.pdf> (accessed March 5, 2015).

4. Electronic Media

4.1 English

- Council of Scientific and Industrial Research [CSIR]. "*Traditional Knowledge Digital Library* (TKDL)." <https://www.csir.res.in/External/Utilities/Frames/career/main_page1.asp?a=tkdl_topframe.htm&b=tkdlleft.htm&c=.%2F..%2F..%2FHeads%2FTKDL%2Fmain.htm> (accessed June 24, 2015).
- "*Definitions of Traditional Knowledge.*" <http://nafaforestry.org/forest_home/documents/TKdefs-FH-19dec06.pdf> (accessed March 7, 2015).
- Hanamshet, Kritika., Abinash, Sahoo., Singh, Abhishek A.P., Clyde, Vincent., and Priyanka, Yadav. "*Traditional Knowledge Protection.*" <<http://www.slide-share.net/AbhishekSingh337/intellectual-and-traditional-knowledge-of-india-ppt>> (accessed April 15, 2015).
- "*Traditional Knowledge Digital Library.*" <http://en.wikipedia.org/wiki/Traditional_Knowledge_Digital_library> (accessed March 21, 2015).
- Uttasart, Chavalit. "*The relevance of traditional knowledge to intellectual property law.*" <<https://www.aippi.org/download/committees/232/GR232thailand.pdf>> (accessed June 27, 2015).

4.2 Thai

- "กรมทรัพย์สินทางปัญญายกเลิก ขอรับบริการข้อมูลภูมิปัญญาท้องถิ่นไทย." ("*Department of Intellectual Property repealed the regulation concerning the establishment of databases on Thai local intelligence.*" <<http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=958000033634>> (accessed June 25, 2015.)

5. Other Materials

The Biological Diversity Act, 2002

Ministerial Regulation on Rules, Procedures and Conditions for collecting, procuring or gathering general domestic plant varieties or wild plant varieties for the purpose of variety development, education, experiment or research for commercial interest and making a profit-sharing agreement B.E. 2553 (2010)

The Protection of Plant Varieties and Farmers' Rights Act, 2001

Thailand Plant Varieties Protection Act B.E. 2542 (1999)

The Thai Traditional Medicine Intelligence Act B.E. 2542 (1999)

LEGAL MEASURES ON SANITARY FOOD TRANSPORTATION*

*Sutapat Vithayarungruangsri***

ABSTRACT

At present, Thailand has not yet regulated specific law respecting the issue on food transportation sanitation control. Although we have ministerial regulations to control the standard of some food products, and preventive measures for food quality control, there is none of regulations specifies the general rules of sanitary food transportation, liabilities of persons engaged in food transportation, and also other rules that the food transport business should follow, e.g. the temperature control, the hygiene control, and the control of vehicles used in food transportation.

Due to the fact that food is one of the four significant factors of life, it is greatly important that the food is safe when we consume. Many fresh foods are deemed perishable foods or foods that easily spoiled when being kept in improper manner. Therefore, food safety control is necessary, and transportation is one step of the food chain that takes an important role since the food comes out from the slaughterhouse, to the manufacturers, then comes to the distributors, to the markets, or to the restaurants, and finally on our plates. The consumers will never know whether the food they eat is safe along the way, the regulations for controlling the transportation of food is necessary therefor.

In this article, the author presents and compares the regulations of United States, United Kingdom, and Australia concerning sanitation control during food transport in order to apply with the problems in Thailand. The author wishes that this article will be useful for the government to adapt the foreign regulations with the problems in Thailand, which will benefit the consumers' health and protection, and will decrease the problems of food spoilage.

Keywords: carrier, clean, compensation, consumer, contaminate, contamination, control, damage, food, food chain, food safety, health, hygiene, operator, operation, perishable, product, protection, receiver, remedy, safety, sanitary, shipper, spoil, temperature, time, transport, transportation, vehicle

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บทคัดย่อ

ในปัจจุบัน ประเทศไทยยังไม่มีกฎระเบียบเกี่ยวกับการควบคุมสุขอนามัยในการขนส่งอาหาร แม้ว่าประเทศไทยจะมีกฎกระทรวงและประกาศกระทรวงที่บัญญัติควบคุมมาตรฐานของผลิตภัณฑ์อาหารแล้ว อย่างไรก็ตาม ยังไม่มีกฎระเบียบที่ระบุถึงข้อกำหนดทั่วไปในการขนส่งอาหาร หน้าที่ความรับผิดชอบของผู้ที่มีส่วนเกี่ยวข้องในการขนส่งอาหาร และกฎระเบียบอื่น ๆ ที่ธุรกิจขนส่งอาหารควรปฏิบัติตาม เช่น การควบคุมอุณหภูมิระหว่างขนส่ง การควบคุมความสะอาด หรือการควบคุมยานพาหนะที่ใช้ในการขนส่งอาหาร

จากข้อเท็จจริงที่ว่าอาหารเป็นหนึ่งในปัจจัยสี่ที่สำคัญในการดำรงชีวิต การที่อาหารจะต้องมีความปลอดภัยเมื่อรับประทานจึงมีความสำคัญเป็นอย่างมาก และเป็นที่ทราบดีอยู่แล้วว่าอาหารสดเป็นอาหารที่เน่าเสียได้ง่ายหากจัดเก็บไม่ดี ดังนั้นการควบคุมด้านความปลอดภัยอาหารจึงเป็นสิ่งสำคัญ และการขนส่งก็เป็นหนึ่งในกระบวนการของห่วงโซ่อาหาร ที่มีบทบาทสำคัญนับแต่อาหารออกมาจากโรงฆ่าสัตว์ไปยังโรงงานผลิต ศูนย์กระจายสินค้า ตลาดหรือร้านอาหาร และสุดท้าย อยู่บนจานอาหารของผู้บริโภค ซึ่งผู้บริโภคจะไม่สามารถทราบได้เลยว่า อาหารที่พวกเขาได้รับประทานนั้น มีความปลอดภัยหรือไม่ ดังนั้นการมีกฎระเบียบในการควบคุมการขนส่งของอาหารจึงเป็นสิ่งจำเป็นอย่างยิ่งยวด

ในบทความฉบับนี้ ผู้เขียนได้นำเสนอและเปรียบเทียบกฎระเบียบข้อบังคับของประเทศสหรัฐอเมริกา สหราชอาณาจักร และออสเตรเลีย ที่เกี่ยวข้องกับการควบคุมสุขอนามัยของอาหารในระหว่างการขนส่ง เพื่อประโยชน์ในการนำมาปรับใช้กับปัญหาในประเทศไทย โดยผู้เขียนหวังว่ากฎระเบียบของทั้ง 3 ประเทศ จะเป็นตัวอย่างและเป็นกรณีศึกษาให้หน่วยงานของรัฐนำมาพิจารณา เพื่อดูแลสุขภาพของประชาชนให้ดียิ่งขึ้น และส่งผลดีในการลดปัญหาการปนเปื้อนและการเน่าเสียของอาหารในระหว่างการขนส่ง ซึ่งจะเป็นประโยชน์ต่อการคุ้มครองผู้บริโภคต่อไป

คำสำคัญ: ผู้ขนส่ง, ความสะอาด, ค่าเสียหาย, ผู้บริโภค, การปนเปื้อน, การควบคุม, ความเสียหาย, อาหาร, ห่วงโซ่อาหาร, ความปลอดภัยอาหาร, สุขภาพ, อนามัย, ผู้ประกอบการ, การดำเนินการ, เน่าเสียง่าย, ผลิตภัณฑ์, การคุ้มครอง, ผู้รับ, ความปลอดภัย, สุขอนามัย, ผู้ส่ง, ทำให้เน่าเสีย, อุณหภูมิ, เวลา, ขนส่ง, การขนส่ง, ยานพาหนะ

Introduction

According to section 4 of Food Act B.E. 2522, “food” means things to eat or life preserved things i.e.

(1) Every kind of objects that humans eat, drink, keep in the mouth, or bring into the body no matter how or what factor it is, excluding drugs, psychotropic substances, or narcotic according to laws regarding such matters as the case may be.

(2) Objects that are intended to be used, or used as ingredients, in food production including food additives, color, and seasoning.

Over the past half century, the process by which food gets from the farm to the plate has changed drastically. Food contamination that occurs in one place may affect the health of consumers living on the other side of the planet. This means that everyone along the production chain, from producer to consumer, must observe safe food handling practices.¹

¹ 10 facts on food safety, World Health Organization, http://www.who.int/features/factfiles/food_safety/en (last visited July 26, 2015).

Land transportation is the greatest mode of all transportation that the food businesses use to transport goods domestically. From the 2014 domestic goods transport statistic of Ministry of Transport, 82.67 percent of all transportation is land transportation – road and rail, while other transportation mode takes only 17.33 percent², as of the following table.

Unit: Thousand Ton

Transportation Mode	2010	2011	2012	2013	2014	2014 % of total
Road	423,677	420,449	406,538	425,804	426,086	80.44%
Rail	11,517	11,288	10,667	11,849	11,817	2.23%
Inland Waterways	41,561	48,185	46,932	47,423	47,422	8.95%
Coastal Shipping	35,692	36,731	41,273	34,968	44,261	8.36%
Air Transport	104	121	131	130	122	0.02%
Total	512,551	516,774	505,541	520,174	529,708	100.00%

Source: Office of the Permanent Secretary, Ministry of Transport

Considering land transportation, road and rail, road is the greatest mode which takes 80.44 percent of all transportation, while rail takes only 2.23 percent from the statistic of 2014.

In 1991, Thailand started performing food safety program and continued developing until 2003, the “Framework on Monitoring and Control of the Quality of Agricultural Commodity and Food” was created. Then the government announced that 2004 is the year of “Food Safety” of Thailand. There are two main authority agencies designated by laws in charge of agricultural produces and food products for human consumption; Ministry of Agriculture and Cooperatives oversees the safety and quality of agricultural produces and foods produced from farm for domestic and export market, and Ministry of Public Health is responsible for safety and quality of imported food, processed food, as well as prevention and control of foodborne illnesses and outbreaks, including risk communication for consumers’ health at national and international levels. In addition, there are other support agencies such as Ministry of Interior who supervises all local administration organizations to control domestic food facilities such as supermarkets, fresh food markets, restaurants, street vendors, etc.

Law concerning food and people’s health issues includes:

- Food Act B.E.2520
- Public Health Act B.E.2535
- National Food Committee Act B.E. 2551

² การขนส่งสินค้าภายในประเทศ, สำนักงานปลัดกระทรวงคมนาคม กระทรวงคมนาคม

<http://vigportal.mot.go.th/portal/site/PortalMOT/stat/indexURL> (Domestic Transportation of Goods, Office of the Permanent Secretary, Ministry of Transport) last visited Aug. 5, 2015.

- Consumer Protection Act B.E. 2522
- Land Transportation Act B.E. 2522
- The Civil and Commercial Code B.E. 2522
- The Criminal Code B.E. 2556
- Ministerial Regulations concerning food products under the Ministry of Public Health

Moreover, Thailand already has enforceable laws to remedy the injured persons in general tort cases, since the injured persons in cases regarding food poisoning or illness caused by contaminated or spoiled food are protected under Consumer Protection Act B.E. 2522 and Liability for Damages arising from Unsafe Products Act B.E. 2551.

However, there is no law directly regulating on how food should be stored and treated during transportation, the person who has the responsibility for food sanitation control, or what kind of proper vehicle for food transport is. Thailand has only sanitation guidance for practitioner and whoever involved in food transport.

Due to the difficulties of how to define what the real cause of food spoilage is, we therefore need to ensure that the food is safe from its origin until it comes to the table.

I. Rules and Laws of Other Countries regarding Sanitary Food Transportation

United States

On August 10, 2005, President Bush signed into law the Sanitary Food Transportation Act of 2005 (2005 SFTA). The 2005 SFTA amends the Federal Food, Drug, and Cosmetic Act (FDCA) to reallocate responsibilities for the transportation of food products among the U.S. Department of Health and Human Services (HHS), the U.S. Department of Transportation (DOT), and the U.S. Department of Agriculture (USDA). The new law requires the Secretary of HHS to promulgate regulations establishing sanitary food transportation practice. Such regulations will apply to shippers, motor vehicle and rail carriers, receivers, and any other persons engaged in the transportation of food. Failure to comply with these regulatory requirements would render the food adulterated and constitute a “prohibited act” under the FDCA. The 2005 SFTA went into effect on October 1, 2005.

The 2005 SFTA shifted authority for the regulation of sanitary food transportation practice from DOT to FDA. It amended FDCA Section 402 so as to render unsanitary transport adulteration, and added a new FDCA Section 416 concerning “sanitary transportation practices.” Section 416(b) requires FDA to develop and implement regulations governing the safe transportation of food and food products. The new FDA regulations will apply to any “shipper, carrier by motor vehicle or rail vehicle, receiver or any other person engaged in the transportation of food.” “Transportation” is defined in the 2005 SFTA as “any movement in commerce by motor vehicle or rail vehicle.” Thus, interstate and intrastate rail carriers and truckers, as well as shippers and receivers must comply with the forthcoming FDA regulations.

Then, the congress of United States passed Food Safety Modernization Act (FSMA) in 2011, which focuses on preventing illness from unintentional food contamination. FSMA requires U.S. Food and Drug Administration (FDA) to enact the regulations concerning transportation including air, waterways, rail and road. But

currently FDA is proposing new rule - Sanitary Transportation of Human and Animal Food - which covers only rail and road transportation, not air and waterways. However, this proposed rule is likely to be the most advance food transportation implementation among other countries since it is the world's initially developed rule with properly studies and has clear requirements for each person involved in the food transportation. Currently, the proposed rule covers meanings, responsibilities, and liabilities of shipper, carrier, and receiver on land transportation.

With some exceptions, this proposed rule would apply to shippers, receivers, and carriers who transport food in the United States by motor or rail vehicle, whether or not the food is offered for or enters interstate commerce. It would also apply to a person outside of the United States, such as an exporter, who ships food to the United States in an international freight container by oceangoing vessel or in an air freight container, and arranges for the transfer of the intact container in the United States onto a motor vehicle or rail vehicle for transportation in U.S. commerce, if that food will be consumed or distributed in the United States. The FDA would consider this person to be a shipper under this proposed rule because the person would be initiating a shipment of food by motor vehicle or rail vehicle, even if doing so from abroad, that would be entering U.S. commerce.³

Highlights of the Proposed Rule

Specifically, the proposed rule would establish requirements for:

- Vehicles and transportation equipment: The design and maintenance of vehicles and transportation equipment to ensure that it does not cause the food that it transports to become contaminated.
- Transportation operations: The measures taken during transportation to ensure food is not contaminated, such as adequate temperature controls and separation of food from non-food items in the same load.
- Information exchange: Procedures for exchange of information about prior cargos, cleaning of transportation equipment, and temperature control between the shipper, carrier, and receiver, as appropriate to the situation. For example, a carrier transporting bulk liquid non-dairy foods would want to ensure that vehicles that have previously hauled milk will not introduce allergens into non-dairy foods through cross contact.
- Training: Training of carrier personnel in sanitary transportation practices and documentation of the training.
- Records: Maintenance of written procedures and records by carriers and shippers related to transportation equipment cleaning, prior cargos, and temperature control.
- Waivers: Procedures by which the FDA will waive any of these requirements if it determines that the waiver will not result in the transportation of food under conditions that would be unsafe for human or animal health and that it is in the public interest.

United Kingdom

The regulations regarding hygienic food transportation of the United Kingdom are stated in the Food Safety (General Food Hygiene) Regulations 1995.

³ *FSMA Proposed Rule on Sanitary Transportation of Human and Animal Food*, U.S. Food and Drug Administration, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm383763.htm> (last visited July 26, 2015).

“Food business” is defined as “any undertaking, whether carried on for profit or not and whether public or private, carrying out any or all of the following operations, namely, preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling or offering for sale or supply, of food”; while “hygiene” means “all measures necessary to ensure the safety and wholesomeness of food during preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer”, and “hygienic” shall be construed accordingly.

Moreover, one of the obligations of a proprietor of a food business is to ensure that transportation of food is carried out in a hygienic way.

In Chapter IV, there states the regulations regarding transport that the vehicles and/or containers used for transporting foodstuffs must be kept clean and maintained in good repair and condition in order to protect foodstuffs from contaminations, and must, where necessary, be designed and constructed to permit adequate cleaning and/or disinfection. And where the vehicles and/or containers have been used for transporting anything other than foodstuffs or for transporting different foodstuffs, there must be effective cleaning between loads to avoid the risk of contamination.

Chapter X also states about training that the proprietor of a food business shall ensure that food handlers engaged in the food business are supervised and instructed and/or trained in food hygiene matters commensurate with their work activities.

In addition, there is guidance on Temperature Control Legislation in the United Kingdom (EC Regulation 853/2004 The Food Hygiene Regulations 2006 (as amended))⁴ which concerns ‘Foods Subject to Temperature Control’

Australia

The Australia New Zealand Food Authority (ANZFA) developed four national standards, contained in Chapter 3 of the Australia New Zealand Food Standards Code, in consultation with State and Territory health authorities, the food industry, and other interested organizations and individuals. But three standards are applied only in Australia, which are stated in Chapter 3 of the Australia New Zealand Food Standards Code as of followings:

- 3.1.1 Interpretation and Application
- 3.2.2 Food Safety Practices and General Requirements
- 3.2.3 Food Premises and Equipment

The food standards were developed in order to:

- provide more effective food safety regulations and reduce the level of food - borne illness in Australia;
- provide nationally uniform food safety standards for Australia so businesses operating in more than one State or Territory have only one set of requirements;

⁴ **Guidance On Temperature Control Legislation In The United Kingdom**, Food Standards Agency, 2007, *available at* <http://www.food.gov.uk/sites/default/files/multimedia/pdfs/tempcontrolguiduk.pdf> (last visited July 26, 2015).

- replace existing food hygiene regulations that were sometimes significantly out-of-date;
- introduce less prescriptive regulations, that are simpler to comply with and give business more flexibility to determine the best way for them to comply with the requirements – providing food safety is not compromised.

Regulations on food transportation are stated in Standard 3.2.2 (10).

A food business must, when transporting food:

- (a) protect all food from the likelihood of contamination;
- (b) transport potentially hazardous food under temperature control; and
- (c) ensure that potentially hazardous food which is intended to be transported frozen remains frozen during transportation.

For the purposes of Standard 3.2.2, food that meets both of the following criteria is considered potentially hazardous;

- the food that may contain a pathogen that needs to multiply in order to cause illness; and
- the food that will support the growth of this pathogen

Food that must be stored under adequate and proper temperature control in order to prevent toxins forming as a result of bacterial decomposition is also considered potentially hazardous.

In addition, temperature control means maintaining food at a temperature of:

- (a) 5 degrees Celsius, or below if necessary to minimize the growth of infectious or toxigenic micro - organisms in the food so that the microbiological safety of the food will not be adversely affected for the time the food is at that temperature; or
- (b) 60 degrees Celsius or above; or
- (c) another temperature – if the food businesses demonstrate that if the food is maintained at this temperature for the period of time, it will not adversely affect the microbiological of the food.

II. Applicable Legal Measures of Thailand

National Regulations Concerning Matters between Government and Food Providers

a. Food Act B.E. 2522

In Chapter 4 Food Control, section 25 prohibits manufacturing, importing for sale, distributing the following foods:

- (1) contaminated food;
- (2) fake food;
- (3) under - standard food;
- (4) other foods as the Minister shall determine

The authorities of the officers are defined in Chapter 6 The Officers; section 43 (4) empowers the officers to seize or freeze food or containers suspected to cause harm to public health in order to examine, and Section 43 (5) empowers the officers to seize or freeze fake food, under – standard food, or containers that may pose a danger to health of citizens. Moreover, the criminal punishments are stated in Chapter 8 from section 47 to section 75.

b. National Food Committee Act B.E. 2551

Section 3 states that “food safety” means the safety management and assurance of food and agricultural products which are consumed by humans to be safe and clean without characteristics of contaminated food according to the food law and other relating laws, including food as of the followings:

- (1) food that is contaminated with pathogens or harmful substance for health or can be stored in the body and cause the diseases or impacts on health;
- (2) food that contain chemical substances in ratio that might decrease the food quality other than such contamination is necessary for manufacturing process, production, and is permitted by the officer;
- (3) food that is unhygienically produced, cooked, baked, packed, transported, or stored;
- (4) food that is produced from animals or products from animals with diseases that may be transmitted to humans;
- (5) food that is produced, cooked, or baked from animals and vegetables or the produces containing harmful chemical substances or remaining antibiotics in ratio that might be harmful for health;
- (6) food with containers containing objects that could be dangerous for humans’ health.

c. Land Transportation Act B.E. 2522

Section 4 (1) of this Act describes “transportation” as carriage of people, animals, and goods by land, by motor vehicles. And in Section 4 (9), “motor vehicles” means every kind of vehicles used in land transportation, which operate by motor, or other sources of power, including the trailer of such vehicles, excluding trains.

Thus, this Act only applies with common goods transportation, while food is a product that requires special supervising as it tends to be spoiled easily, and should not be under conditions that can lead to contamination, otherwise the result of contaminated food may seriously impact people’s health.

National Regulations Concerning Matters between Consumers and Food Providers

a. Civil and Commercial Code B.E. 2535

In Section 608 of the Civil and Commercial Code states that a carrier, within the meaning of this title, is a person who in the usual course of business undertakes to transport goods or passengers for remuneration. And Section 616 states that the carrier is liable for any loss, damage, or delay in delivery of the goods entrusted to him, unless he proves that the loss, damage or delay is caused by force majeure or by the nature of the goods, or by the fault of the sender or consignor.

Applying with food transportation, the carrier shall be liable for the damage occurring to food if the food is contaminated, deteriorated, or rotten due to such transportation, but the carrier might defend that it is caused by nature of the food, such as rotten vegetables by the hot weather, if there is no measure or rule to control the method of good sanitary transport. However, most practitioners shall already have their own settled regulations in order to protect their business interest. Although, the regulations’ strictness may vary depending on each practitioner; some may be strict, whereas some may be loose. Therefore, there should be the standard regulations for applying to all food business in order to protect the public’s interest - people’s health.

b. Consumer Protection Act B.E. 2522

Section 4 (3) states the consumers' right protection that they receive safety while using the products or services. For example, if the consumers get ill from consuming food, they can claim that their rights are protected under this Act.

Moreover, section 36 paragraph 2 and paragraph 3 of Consumer Protection Act B.E. 2522 also empowers the consumer protection committee to prohibit the distribution of the unsafe products or destroy if it is suspicious that the enterprises will continue selling the products.

c. Liability for Damages arising from Unsafe Products Act B.E. 2551

Section 5 describes the liability of the practitioners or operators to be jointly liable to the injured party for the damage caused by unsafe products, which has been sold to the consumer, whether the damage has been caused by willful act or negligence of the operator or not. For example, if the consumers get damaged from food bought from a food retailer, all the operators involving in such food business are jointly liable for such damage.

Consequently, the consumers' rights are protected by Consumer Protection Act and Liability for Damages arising from Unsafe Products Act. Therefore when the consumers get damaged from food products, they have rights to ask for compensation.

Remedial Regulations

Considering applicable laws for the remedy of problems arisen from food transportation, there are section 420 of Civil and Commercial Code, section 4(3) of Consumer Protection Act B.E. 2522, and section 5 of Liability for Damages arising from Unsafe Products Act B.E. 2551 that are enforceable to compensate the injured consumers who suffer from eating spoiled food caused by improper transportation methods, which is only civil remedy.

Section 11 of Liability for Damages arising from Unsafe Products Act B.E. 2551 also empowers the court to determine the additional compensation for (1) psychiatric injury or (2) in case that the practitioners knowingly produce, import, or distribute the unsafe products, or do not know that such products are unsafe by serious negligence, depending on the situations.

Conclusions and Recommendations

To control the sanitation and standard of food transportation, the author suggests that the state agency which is accountable for sanitary food transport, in the author's opinion, the Ministry of Public Health, which is responsible for people's health, issues regulations to specify the liabilities of the food transport businesses when perform food transportation.

The specific functions of the shipper, carrier, and receiver should be regulated in new specific terms to apply particularly with food transportation operations in order to stipulate duties and responsibilities of such personnel. The regulations should be specified regarding temperature control, sanitation control, and also the category of products that can be hauled immediately before or concurrently with food products. For example, pesticides or hazardous chemical substances should not be hauled with food

products even the packages are separated, because the chemical substance can leak and cause the food contaminated.

The temperature control during transportation should also be enacted in accordance with the regulation in Standard 3.2.2 of the Australia New Zealand Food Standards Code. The time control is also important if the food transportation operators cannot control the temperature during transport, the 4-hour/2-hour rule shall be applied.

Therefore, the three solutions the author suggested in Chapter 4 should be considered as ways to develop sanitary food transportation operation in Thailand. It can be concluded as follows:

Solution 1: the Ministry of Public Health shall issue a regulation that requires the food transport business to register for a license before transporting food, and also the regulations regarding requirements needed for licensing and licensing renewal method. In addition, the state agency shall legislate a regulation to control the standard of licensing and to reduce loopholes.

Solution 2: the Ministry of Public Health shall develop an enforceable rule to control the standard of sanitary food transport practices. For examples, temperature control, contamination prevention, hygiene control, time control, and specific requirements for food transportation units. At present, the ministry already has the guidelines regarding good sanitation but they are not legally enforceable, therefore, some businesses will follow in order to protect their benefits, but some might not.

Solution 3: the Ministry of Public Health shall legislate new regulations regarding the responsibilities, liabilities of the shipper, carrier, and receiver engaged in food transportation operation, which will result in more diligence while performing food transportation which will benefits the food safety standard of Thailand, and consumer's protection law, and benefits the restaurant because it can request exhaustively for compensation if the food is found spoiled or contaminated during transport.

The Ministry of Public Health should provide training for food transport enterprises, or publish the regulations and guidelines regarding sanitation in food transport and distribute to the food transport enterprises, and also to the restaurant and consumers, as a result, they can learn about their protected rights in the food case.

When the responsibilities of the shippers, carriers, and receivers engaged in food transportation are specifically regulated, the burdens of proof shall fall on the person who has such responsibility as the case may be. The benefit would be an increase of effectiveness of consumer protection law and more reliability of food transport business of Thailand.

REFERENCES

- Australia New Zealand Food Authority. "New Food Safety Standards for Australia." City of Victor Harbor.
<https://www.victor.sa.gov.au/webdata/resources/files/Food_Safety_New_Food_Safety_Standards_for_Australia1.pdf> (accessed July 26, 2015). World Health Organization. "10 Facts on Food Safety." World Health Organization.
<http://www.who.int/features/factfiles/food_safety/facts/en/index9.html> (accessed July 25, 2015).
- UK Food Standards Agency. "Guidance On Temperature Control Legislation In The United Kingdom." UK Food Standards Agency, 2007.
<<http://www.food.gov.uk/sites/default/files/multimedia/pdfs/tempcontrolguiduk.pdf>> (accessed July 26, 2015).
- World Health Organization. "10 Facts on Food Safety." World Health Organization.
<http://www.who.int/features/factfiles/food_safety/facts/en/index9.html> (accessed July 25, 2015).
- สำนักงานปลัดกระทรวงคมนาคม กระทรวงคมนาคม".การขนส่งสินค้าภายในประเทศ ".Thailand Transport Portal.
<<http://vigportal.mot.go.th/portal/site/PortalMOT/stat/indexURL>> (สืบค้นเมื่อวันที่ 5 สิงหาคม .2558
]Office of the Permanent Secretary, Ministry of Transport. "Domestic Transportation of Goods." Thailand Transport Portal.
<<http://vigportal.mot.go.th/portal/site/PortalMOT/stat/indexURL>> (accessed August 5, [(2015
- U.S. Food and Drug Administration. "FSMA Proposed Rule on Sanitary Transportation of Human and Animal Food." U.S. Food and Drug Administration.
<<http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm383763.htm>> (accessed July 26, 2015).

MEASURES AGAINST PROFIT DEFERRAL THOUGHT OFFSHORE COMPANY*

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ABSTRACT

In the globalization, international business transactions have been increasing rapidly over the years. This is the reason why the world economy has become increasingly integrated. Trade flows have grown as a proportion of national income, global capital market and investments have expanded in many states. These international business activities have led to the formation of groups of companies with mutual interests.

Generally, the goal of business enterprise is to create profit. In practice, most companies make profit by business expansion as well as in many other ways, such as it can be enhanced through transfer pricing using a foreign company. Profits that arise in the company are generally not taxed in the shareholder's country until the shareholder receives dividends or disposes of the shares in the foreign company, implying that taxation in the shareholder's residence state is deferred. This is beneficial to the extent that the foreign tax payable is lower than the residence state's tax. Thus, the tax deferral encourages residents to remove income to low tax jurisdictions and to accumulate such income there instead of repatriating the dividends to the residence state.

Currently, since Thailand is a source income country and needs capital inflow and high technologies, MNEs have influenced the development of Thailand through their investments. The problems of tax deferral and tax base erosion have existed because it is difficult to transparently identify the matter due to a lack of information and the nature of trans-border business transactions of MNEs. All the information and documentation are also often kept in the parent company established in other countries.

Thailand is also facing the problem of international tax planning or tax avoidance by MNEs based in Thailand and abroad. Moreover, Thailand has not had any protection measures in Thai Revenue Code that would enable the authorities to prevent

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or respond effectively to such international tax planning. Therefore, the “Controlled Foreign Company” measures should be used for preventing international tax avoidance in Thailand.

Keywords: Taxation, Controlled Foreign Company, Tax Deferral, Tax Base Erosion, Tax Avoidance, Multinational Company, Offshore Company

บทคัดย่อ

ในปัจจุบัน การค้าและการลงทุนระหว่างประเทศได้ขยายตัวอย่างกว้างขวางสำหรับประเทศไทย และด้วยเหตุผลนี้ จึงมีนักลงทุนไทยจำนวนมากได้ขยายการลงทุนไปยังประเทศต่างๆ เช่น ประเทศสิงคโปร์ ประเทศจีน และประเทศเวียดนาม ทั้งนี้เหตุผลของการเข้าไปลงทุนในต่างประเทศนั้นมีอยู่หลายสาเหตุด้วยกัน เช่น ประเทศที่เข้าไปลงทุนมีค่าจ้างแรงงานถูก หรือทรัพยากรธรรมชาติมาก และที่สำคัญที่สุดคือประเทศที่เข้าไปลงทุนจัดเก็บภาษีในอัตราต่ำ หรือ มีลักษณะเป็นดินแดนปลอดภาษี หรือที่เรียกว่า Tax Haven Country โดยผู้เขียนเห็นว่า ปัญหาที่เกิดขึ้นในขณะนี้คือ กรณีที่บริษัทแม่ในประเทศไทยมิได้มีการเข้าไปลงทุนอย่างแท้จริงในประเทศที่มีลักษณะเป็นดินแดนปลอดภาษี แต่บริษัทแม่ในประเทศไทยกลับไปจัดตั้งบริษัทในประเทศดินแดนปลอดภาษีเพื่อใช้บริษัทที่ตั้งขึ้นมาเหล่านั้นเป็นผู้ดำเนินการลงทุนแทนบริษัทแม่ ในประเทศไทย โดยมีวัตถุประสงค์หลักเพื่อที่จะดำเนินการโยกย้ายถ่ายเทเงินได้หรือผลกำไรจากการเข้าไปลงทุนในต่างประเทศให้ไปเป็นเงินได้ของบริษัทที่ตั้งอยู่ในประเทศดินแดนปลอดภาษีก่อน ซึ่งทำให้บริษัทแม่ ในประเทศไทยไม่ต้องเสียภาษีจากเงินได้ดังกล่าวในประเทศไทยเพราะผู้มีเงินได้จริงๆ ในทางภาษีอากรจะไม่ใช่บริษัทแม่ในประเทศไทย แต่เป็นบริษัทที่ตั้งอยู่ในประเทศดินแดนปลอดภาษี โดยบริษัทแม่ในประเทศไทยจะมีหน้าที่เสียภาษีเงินได้อีกครั้งก็ต่อเมื่อบริษัทในประเทศดินแดนปลอดภาษีได้นำผลกำไรจากการเข้าไปลงทุนในต่างประเทศมาจ่ายเป็นเงินปันผลให้แก่บริษัทแม่ในประเทศไทย

จากการศึกษาปรากฏว่า การที่บริษัทแม่ในประเทศไทยเข้าไปตั้งบริษัทในประเทศดินแดนปลอดภาษี เพื่อเป็นผู้ดำเนินการลงทุนในประเทศต่างๆ แทนตนเอง จึงกลายเป็นรูปแบบที่นิยมใช้กันอย่างมากเพื่อเป็นช่องทางในการหลีกเลี่ยงภาระภาษีเงินได้ในประเทศไทย และหากบริษัทในประเทศดินแดน ปลอดภาษีได้ดำเนินการพักหรือเก็บกัก (“Deferral”) เงินได้ต่างๆ ไว้ ณ ประเทศดินแดนปลอดภาษีเป็นอย่างมากและเป็นเวลานาน สิ่งเหล่านี้จะส่งผลเสียต่อประเทศไทยซึ่งเป็นประเทศที่บริษัทแม่ในประเทศไทยเป็นผู้มีถิ่นที่อยู่ เนื่องจากทำให้ฐานรายได้เพื่อเรียกเก็บภาษีจากบริษัทแม่ในประเทศไทยลดน้อยลง

ดังนั้น ผู้เขียนจึงได้ศึกษามาตรการ Controlled Foreign Company (“CFC”) เป็นมาตรการเพื่อป้องกันการหลีกเลี่ยงภาษีระหว่างประเทศจากการพักหรือเก็บกักเงินได้ไว้ที่บริษัทในเครือซึ่งตั้งอยู่ในต่างประเทศสาระสำคัญของมาตรานี้คือการใช้อำนาจของกฎหมายภายในเพื่อเรียกเก็บภาษีสำหรับเงินได้ที่เก็บอยู่ภายนอกประเทศเสมือนหนึ่งว่าบริษัทที่ตั้งในต่างประเทศนั้นได้จ่ายเงินปันผลให้แก่บริษัทแม่ในประเทศไทย ซึ่งเป็นผู้ถือหุ้นของบริษัทต่างประเทศเหล่านั้นเอง

นอกจากนี้ ผู้เขียนเห็นว่า มาตรการ CFC เป็นมาตรการที่ใช้อย่างแพร่หลายในประเทศต่างๆ เช่น สหรัฐอเมริกา อังกฤษ และประเทศสมาชิก OECD ในขณะที่ประมวลรัษฎากรของประเทศไทยไม่มีมาตรการป้องกันการหลีกเลี่ยงภาษีระหว่างประเทศในทำนองเดียวกับมาตรการ CFC ของหลายประเทศที่กล่าวมาข้างต้น ดังนั้น ปัญหาจึงเกิดขึ้นว่า ประเทศไทยสมควรจะนำมาตรการ CFC มาใช้เป็นหนึ่งในมาตรการป้องกันการหลีกเลี่ยงภาษีอากรระหว่างประเทศหรือไม่

คำสำคัญ: ภาษี,บริษัทที่ถูกควบคุมโดยบริษัทต่างชาติ, การกักเก็บภาษี, การกีดกันฐานภาษี, การหลีกเลี่ยงภาษี, บริษัทข้ามชาติ, บริษัทที่อยู่ห่างจากชายฝั่ง

Introduction

Nowadays, most of Thai companies who invest their business in the foreign countries often engage in Multinational Enterprise format and use a base company for tax and financial benefits including tax avoidance of Thailand where the residence country is located in.¹ Using the base company located in tax haven by the Thai company has a specific purpose for the advantage of tax avoidance against the equality in taxation and also lead to unfairness in the legal system. These results in the fact that some taxpayers can get an opportunity from tax avoidance, and if any Multinational Enterprises avoid taxes by the same channel, this will cause serious damage to the national budget.² It also distorts the structure of the economy and destroys the competition system in international trade and investment as well as a capital flows between countries. Using tax base in tax haven country for avoiding income tax is an important problem on finding and having a legal measure against such act.³

As mentioned above, Thai law-makers and businesses must prepare themselves in several aspects for the AEC, particularly by amending laws and regulations on tax-related issues that have hindered the country's competitiveness on trade and investment.

This article, therefore, focuses on the study of the CFC rules are one of anti-tax avoidance measures which many countries recognize and adapt in their countries while The Thai Revenue Code still does not contain the anti-tax avoidance rules. As a result, the problem is raised whether Thailand should apply the CFC rules in order to prevent the tax avoidance and tax deferral and how to apply the CFC rules. The author, therefore, outlines the problems on collecting income tax as follows:

¹ ปฐมาภรณ์ นิธิชัย, การลงทุนทางตรงในต่างประเทศของบริษัทจดทะเบียนไทย สถานะปัจจุบันและข้อเสนอแนะเชิงนโยบาย, เอกสารงานวิจัย ฉบับที่ 2 กุมภาพันธ์ 2554 (Patamaporn Nitichai, **Foreign Direct Investment of Thai Enterprises**, Current status and Policy Suggestion, Documentary Research Issue Feb. 2, 2011, at 16.

² สุเมธ สิริคุนโชติ, กฎหมายภาษีอากรระหว่างประเทศ น. 153 (มหาวิทยาลัยธรรมศาสตร์ 2544) (Sumat Sirikunnachote, **International Tax Law** University 153 (Thammasat Publishing 2001).

³ International Economic Industry Organization, *ASEAN Economic Community Opportunity and Impact on Thai Industrial*, **International Economic Industry Organization**, March 15, 2011.

Problems on Collecting Income Tax

According to the study of the problems on collecting income tax, the elements of the important factors are as follows:

1. Base erosion and profit shifting (BEPS)

There are composed of a serious risk to tax revenues, tax sovereignty and tax fairness for both groups of OECD Member countries and Non-OECD Members countries alike. While domestic tax bases can be eroded and the government have lost many revenues. Significant sources of base erosion are profit shifting and tax deferral in zero or low tax rate jurisdictions.⁴

Currently, the problems of tax deferral, profit deferral and tax base erosion have been existing because it is difficult to transparently identify the right things.⁵ In addition to the foregoing the lack of information and the nature of the multinational companies' trans-border business transactions are obstacles to parent company established in other countries. Deferral provides an incentive to multinational corporations to keep foreign-sourced active income offshore because corporate taxes are not due until the income is repatriated. Furthermore, deferral also provides an incentive to shift income to low-tax jurisdictions and to keep it there. Moreover, the profit deferral is a global problem because the impact of the tax laws and policies of one country can adversely affect another country's ability to collect tax that the government losing even more revenue and having a negative effect on the economy.⁶

2. Transfer pricing

The gigantic problem is to create an incentive to shift functions, assets and risks to where their returns are taxed more favorably. Many corporate tax structures focus on allocating significant risks and hard-to-value intangibles to low-tax jurisdictions, where their returns may benefit from a favorable tax regime. Such arrangements may result in or contribute to BEPS. Shifting income through transfer pricing arrangement related to the contractual allocation of risks and intangibles under the arm's length standard adopted by related parties. The evaluation of risk often involves in fact, a low-tax transferee of intangibles should be treated as having borne,

⁴ OECD, **Action Plan on Base Erosion and Profit Shifting**, OECD Publishing 8 (1st ed. 2013).

⁵ Price Waterhouse Cooper Ltd., **Base Erosion and Profit Shifting**, Impact on jersey, (2nd ed. 2013)

⁶ OECD, **Tax Policy Studies Corporate Tax Incentives for Foreign Direct Investment**, OECD Committee on Fiscal Affairs, 40 (2001).

on behalf of the MNE group, significant risks related to the development and use of the intangibles in commercial operations. Such controversies are lead to a cause of the ability of tax administrations to examine the substance of such arrangements such as the avoidance of inappropriate base erosion.⁷

There are a number of examples of risk allocations that can be undertaken under the arm's length principle between members of an affiliated group such as a low-risk manufacturing and distribution, contract R&D and captive insurance. Under each of models, the insurer could be located in a low-tax jurisdiction, and the service provider/insured located in a high-tax jurisdiction. A key challenge is determining the circumstances under which such arrangements result in or contribute to base erosion.⁸

3. Analysis of corporate tax structures

A critical observation in any analysis of corporate tax structures is the interaction of various principles and practices that the interaction of withholding tax rules in one country, the territorial taxation system in another country, and the entity characterization rules in a third country may combine to make it possible for certain transactions to occur in a way that gives rise to no current tax and have the effect of shifting income to a jurisdiction.⁹

In practice, any structure aimed at BEPS will need to incorporate a number of coordinated strategies, which often can be broken down into four elements:

1) Minimization of taxation in a foreign operating or source country (which is often a medium to high tax jurisdiction) either by shifting gross profits through trading structures or reducing net profit by maximizing deductions at the level of the payer;

2) Low or no withholding tax at source;

3) Low or no taxation at the level of the recipient (which can be achieved through low-tax jurisdictions, preferential regimes or hybrid mismatch arrangements) with entitlement to substantial non-routine profits often built up via intra-group arrangement; and

⁷ OECD, **Update: Base erosion and profit shifting** 26, OECD Publications, (1st ed. 2013).

⁸ European Central Bank Working Paper Series No. 31, *The Disappearing Tax Base*:

Is Foreign Direct Investment Eroding Corporate Income Taxes, 7 October 2000,

<http://www.Imf.org/external/pubs/ft/wp/2000/wp00173.pdf>

⁹ OECD, *supra* note 8, at 29

4) No current taxation of the low-taxed profits.

In conclusion, their overall effect is a tendency to associate more profit with legal constructs and intangible rights and obligations, and to legally shift risk intra-group, with the result of reducing the share of profits associated with substantive operations. While these corporate tax planning strategies may be technically legal and rely on carefully planned interactions of a variety of tax rules and principles, the overall effect of this type of tax planning is to erode the corporate tax base of many countries in a manner that is not intended by domestic policy. This implies that it may be very difficult for any single country, acting alone, to effectively combat BEPS behaviors.¹⁰

4. Use of tax havens for tax avoidance

According to the Harmful Tax Competition : An Emerging Global Issue 1998 of the OECD which studies the measures against the use of the tax haven, which affect the international consensus on the International Tax Avoidance and Evasion reports 1987 as it is difficult to give a definition for the tax haven, but also provides an overview of the tax haven that the land is not taxed or taxed at a lower rate by the collection of income tax evasion issues of all source including in the proposed country to resident in another country to avoid paying taxed to the country of their residence. These regions attract economic activity with financial and other services with the primary objective of 3 reasons: providing a place for storing the interests from investment, providing a place where you can gain that is just paper and conveniently with taxpayers. Particularly, service of the bank's high performance has retained the information and confidentiality of the inspection of the Revenue authorities of the country of residence.¹¹

The main characteristic of classical tax havens are described below

- (1) None or low taxes on all or certain types of income and capital;
- (2) Bank and commercial secrecy;
- (3) Lack of exchange controls;
- (4) Relative importance of banking;
- (5) Communications;
- (6) Tax treaties; and
- (7) Other aspect.

In summary, from study of the historical documents, Thai Tax Revenue Department has no specific rules to deal with the effective profit deferral and

¹⁰ *Id.* at 34.

¹¹ OECD, **Harmful Tax Competition An Emerging Global Issue** 16, France: OECD Publications, (1988).

controlling/manipulating these multinational companies, tax authorities always use their own discretions and judgments which may create uncertainty, a lack of consistency and unfairness for all taxpayers. Consequently, the country would be damaged for the long run by the loophole of Thai Tax Revenue Code

Guideline for Dealing with Harmful Tax Practices in OECD

From the study of guideline for dealing with Harmful Tax Practices in OECD, the guidelines will be created under the auspices of the Committee to undertake an on-going evaluation of existing and proposed regimes in Member and Non-Member countries in order to prepare to intensify their co-operation to counter harmful tax practices from adopting practices constituting harmful tax competition by set out these recommendations into the following three categories:¹²

1. Recommendations concerning domestic legislation and practices: starting from various counteracting measures currently found in domestic laws and how to increase their effectiveness:

1.1 CFC rules or equivalent rules;

1.2 Restrictions on participation exemption and other systems of exemption foreign income;

1.3 Foreign information reporting rules;

1.4 Transfer pricing rules; and

1.5 Access to banking information for tax purposes.

2. Recommendations concerning tax treaties: dealing with the benefits of tax conventions do not unintentionally make policies constituting harmful tax competition more attractive or prevent the application of domestic counteracting measures:

2.1 More efficient use of exchanges of information;

2.2 The entitlement to treaty benefits;

2.3 The clarification of the status of domestic anti-abuse rules and doctrines in tax treaties; and

2.4 Tax treaties with tax havens countries.

3. Recommendations to intensify international co-operation: put forward new ways through which countries will be able to act collectively against harmful tax competition:

3.1 Develop and actively promote principles of good tax administration; and

¹² Ibid., 39.

3.2 Associating non-member countries with the recommendation.

In conclusion, Non-Member Countries outside the OECD should consider the serious impact and tax base distortion by the harmful tax practices in order to eliminate the harmful tax practices out of the economic exercise. To eliminate the harmful tax practices on a global basis, Non-Member Countries will coordinate and comply themselves with the 1998 Report on Harmful Tax Practices and prepare to accept the same obligations as the OECD members. In this way, Non-Member countries can become partners in the development of an international framework appropriate in an era of free-trade and liberalized financial markets.

Nevertheless, the OECD has addressed the issue of harmful tax competition in a report from 1998. In the report the OECD recommends countries to adopt Controlled Foreign Company (CFC) rules in order to counteract harmful tax competition. In addition, the CFC rules is to prevent erosion of the tax base in the parent company's resident country due to the fact that the parent company will try to transform themselves into foreign companies so as to take advantage of low tax rate and avoid domestic taxation on its foreign income simply way by interposing a foreign base company in a territory with a lower level of taxation to receive such income instead of remitting its income to parent company's resident country because resident country has a higher tax rate that it is not incentive to remitting foreign income.¹³

Adopting of CFC Rules in Foreign Countries

According to comparative study of the laws of the United State and Japan, both countries have the concrete rules of the main provision governing tax deferral payment as described below:

United States

The United States generally does not tax foreign business profits earned through a foreign subsidiary until the subsidiary repatriates those earnings through a dividend. This policy, known as "deferral", allows U.S. companies to compete in foreign markets on tax parity with their foreign competitors. In addition to promoting the competitiveness of U.S. companies abroad, however, deferral also creates an opportunity for avoiding U.S. taxes on inventory trading profits and other income which can be easily shifted to a foreign base company. One weapon that the IRS can use to attack such schemes is Code Sec. 482, which gives the IRS the authority to allocate

¹³ OECD, **Controlled Foreign Company Legislation** 10, Paris: Head of Publications Service, (1996).

income among domestic and foreign affiliates whenever an allocation is necessary to clearly reflect the income of each party. As a result, in 1962 Congress enacted Subpart F, which automatically denies deferral to certain types of tainted income earned through a foreign corporation.¹⁴

The U.S. CFC rules do not apply only to CFCs in designated jurisdictions. Because of the operation of certain exceptions to subpart F income, the U.S. CFC rules target CFCs in tax havens or in countries with low-tax regimes. A low-tax regime is effectively identified as one with an applicable tax rate which is less than 90% of the applicable U.S. tax rate. A designated jurisdiction approach is not followed.¹⁵

The U.S. CFC rules impose current tax on U.S. shareholders, as defined above, in respect of certain undistributed income of those corporations. Persons who do not rise to the level of a U.S. shareholder are not currently taxed on the undistributed tainted income of the CFC. Attribution rules apply to expand the group of U.S. residents which may be required to include income currently as a deemed dividend.

However, some people have not agreed on measure to protect a delay taxation by alleged that this measure will affect taxpayers in any domestic countries. The impact will vary and is not able to make fairness between taxpayers together. In addition, the provisions on the protection of the taxing statute delay still have a complex that will lead to the expenditure to enforce and comply with such provisions both the tax authorities and the taxpayers.¹⁶

It can be said that the CFC rules are accelerated taxation from U.S. shareholder of company income which are not residents in the U.S., Income of such companies shall be deemed to be the income of the shareholders directly. If any without this provision, the U.S. shareholders are taxable income earned through foreign companies in which they invest when foreign companies distributed dividends. If the

¹⁴. Robert E. Meldman, Michael S. Schadewald and Robert J. Missey, Jr., **A practical guide to U.S. Taxation of International Transactions** 132-133 (3th ed. 2003).

¹⁵ OECD, **Tax Policy Studies Corporate Tax Incentives for Foreign Direct Investment**, OECD Committee on Fiscal Affairs, 30-31 (2001).

¹⁶ Shaw C., **Legal Problems in International Trade and Investment** 339, (1st ed. 2003).

foreign companies do not distribute dividends, shareholders are not taxable income to the U.S.¹⁷

Japan

The CFC Rules, originally established in 1978, were in need of revision to accommodate changes to modern business practices and corporate structures. The Reforms liberalized the tax rules by generally reducing Japanese companies' requirements to report the income of their controlled foreign companies. At the same time, however, the Japanese government instituted a tax regime involving the taxation of the passive income of many controlled foreign companies of Japanese parent companies, which could lead to greater levels of taxation.¹⁸

The 2009 Tax Reform included significant amendments to the Japanese tax haven (CFC) rules due to the introduction of the foreign dividend exclusion system; e.g. the timing to aggregate taxation for dividends and the mechanism to mitigate double taxation.

On March 24, 2010, the Japanese Diet amended Japan's income Tax Law and other laws including those that make up the CFC Rules (Reforms), based on the 2010 tax reform proposals issued by the tax commission portion of the Japanese Cabinet on December 22, 2009.¹⁹ There were also notable amendments, e.g. the reduction of the threshold rate and the introduction of the Passive Income Aggregate Tax Rule.

There are two pieces of legislation as well as anti-tax haven measures to combat tax avoidance by multinational enterprises as follows;

If Japan adopted a principle of "effective management or control" for the determination of corporate residence, it would be easier for the tax authority to treat a foreign subsidiary incorporated in a country with a low-tax regime in certain circumstances. To prevent capital flight, with a transfer of income to tax haven countries, a possible change in the doctrine for the test of corporate residence was an important theme of the Tax Commission as regards tax revisions, but there has been no change until now.²⁰ Under the current doctrine, a corporate residence is the location of

¹⁷ Sara Anderson, "*CFC rules and double tax treaties article*," **The OECD and UN model tax conventions** (August 2006) at 13-14.

¹⁸ Yasutaka Nishikori, Tsuyoshi Ito, James Emerson, and Atsushi Mizushima, **EUROMONEY Handbooks, New developments in Japan's CFC rules: liberalisation, expansion and clarification**, 2010 at 50.

¹⁹ KPMG tax corporation, **Japanese tax haven (CFC) Rules**, August 10, 2010, at 2.

²⁰ *Ibid.*, 10.

the head office or main office of a corporation for tax purposes in Japan. Without statutory anti-tax haven measures, it is hard to extend the taxing right to any retained income of a foreign corporation with a legally independent status, unless a part of the income retained in tax havens is deemed to be “income derived from sources within Japan”. This is true even if the foreign corporation has a permanent establishment in Japan.²¹

The first legislation mentioned above is the transfer pricing tax system. Article 66-4 of the Special Tax Measures Law (STML) prescribes that transfer prices of assets sold or purchased, remunerations for personal services provided or compensation for other dealings between associated enterprises should be at arm’s length prices when the actual prices are more or less than the arm’s length prices, for the purpose of corporation tax. A foreign corporation with a permanent establishment in Japan is also subject to this rule. The term “associated enterprises” includes (a) a parent company and its subsidiary, where the parent company directly or indirectly owns half its shares; (b) brother or sister companies, where half of the respective shares are directly or indirectly owned by the same person; and (c) two companies, one of which is in substance controlled by the other in respect of personnel affairs, trade or business, and financial aid etc. For the purpose of the arm’s length price, a comparable uncontrolled price method, a resale price method, a cost plus method, and other method are used.

The second legislation afore-mentioned is anti-thin capitalization tax measures. Article 66-5 of the STML prescribes that excess of interest paid over the limit shall not be treated as an expense of the payer, where the beneficiary of the interest is a foreign corporation which directly or indirectly owns more than 50 per cent of the shares of a domestic corporation as the payer. The limit means the part of the interest paid which is equivalent to an amount corresponding to the part of the loan which is three times equity. When the excess of interest over the limit is denied as the expense of the payer, the denied amount is treated as a part of the distributed income of the payer, and as “interest” to have tax withheld at source, not as a “deemed dividend” of the beneficiary.²²

²¹ Dennis Campbell, **International Taxation of Low-Tax Transactions: High Tax Jurisdictions** 256-257, (2nd ed. 2008).

²² Anuschka Bakker, Belema Obuoforibo, **Transfer Pricing and Customs Valuation: Two worlds to Tax as One** 441, (4th ed. 2009).

Conclusion

According to the study of the problem of using the foreign base company for profit deferral, the author then is of the opinion that Thailand ought to bring the CFC rules to be ones of the anti-tax avoidance measures in Thailand. It should be noted that CFC rules have pros and cons as indicated above but if the Revenue Department would like to exercise the CFC rules cautiously to the extent of the appropriate enforcement, such as determining the nature of the taxable income or defining some exceptions of enforcement pursuant to the CFC rules in order to prevent CFC rules to become the unreasonable burden or the obstacle to Thai investors who would like to invest overseas along with the tax structure of Thailand. That is, the tax structure of Thailand has been adjusted to comply with the CFC rules (e.g. elimination of double taxation).

Therefore, Thailand should be applied the CFC rules as Royal Decree or Revenue Code in pursuant to solving the adversities Controlled Foreign Company in Thailand, by having the significant measures as follows;

1. Definition of Controlled Foreign Company under Control Rule should be amended in the following details:

In Thailand, the definition of the control rule is presumed to exist when the parent company owns, directly or indirectly, in aggregate in all levels through foreign base company, not less than 25 percent of the voting power of a corporation in a following manners;

- (1) The total combined voting power of all classes of stock of such corporation entitle to vote, not less than 25 percent of total stock;
- (2) The total of stock, directly or indirectly, in aggregate in all levels, holds stock not less than 25 percent of total capital;
- (3) The power to govern the financial and operating policies of the corporation under a statute or an agreement;
- (4) The power to appoint or remove the majority of the members of the board of directors or equivalent governing body where the foreign base company is controlled by that board or body; or
- (5) The power to control or supervise the operation and management of the foreign base company.

Nevertheless, it should be taken into account that, in Thailand, is owned or is considered as owned by Thai parent company on any day during the taxable year of such foreign base company.

2. Target Territory

There are 2 methods to justify that the company is located in the target country's status as CFC or not. For the target territory is composed of 2 different methods used to define are as follows; Transaction approach is focuses on the type of income distinguish between active income and passive income. On the contrary, Jurisdiction approach is focuses on where the foreign base company is situated on tax havens or low tax jurisdictions.

In this regard, Thailand should take into account of the objective of business that foreign base company is located in tax havens or low tax jurisdictions. if it have a real business operation and management in tax havens or low tax jurisdictions in normal trade activities for driving Thai economy for trade competition in foreign countries that is very important source of income. Therefore, Thailand should apply compatible with transaction approach.

3. Attributed Income

The attributed income can be classified into 2 types as follows; active income is derived from the real business operation or active business, and passive income is generally the most mobile form of income such as interest, royalty, rent dividend and capital gain, and is thus easily diverted to foreign base company in target territories in order to avoid or deferral domestic tax.

In Thailand, it should be considered the CFC's income have used in any manner. If the CFC derived the passive income, investment-type income or foreign base company income from the related parties which may be described generally as sales and services income in a particular country in circumstances which have not the reason for an economic or business justification for the CFC's establishment in tax havens countries, or if the income is used directly in the active business or normal trade of business such as the CFC have not remitted the income to parent company because the CFC shall collect the income in order to carrying out within the CFC for operated in respect of its main business. It conclude that the income should not be treated as passive income.

4. Related Party Transaction

Proceeding of the related parties will have the priority to the enforcement of the CFC rules, as required under the CFC rules should be taken into account the relevance business transactions of the parties.

For Thailand, if the parent company have a business transaction more than 50 % of revenue with the foreign base company that is a related parties in order that the foreign base company receive the sale income or service income instead of the

parent company. For this case, such income should be owned or mostly owned by the parent company that should be calculated the corporate income tax under the CFC rules.

5. Computation of CFC's income

For the computation of CFC's income, CFC's income must be calculated for the taxation from the parent company who is resident in the countries enacted the CFC rules following the proportionate share as the shareholder's interest in the CFC.

In Thailand, there is no provision concerning the anti-tax avoidance measures. Thailand should adopt the concept of The United States law by clearly prescribing cap in the treatment of the computation of CFC's income. Moreover, the CFC's income can be marked as a currency to convert foreign currency following as the parent company's resident country into the local currency at the exchange rate on the day that the attributed income is repatriated to parent company in order to be easiest way at the end of fiscal year.

REFERENCES

1. Books and Book Articles.

- Anuschka Bakker and Belema Obuoforibo, **Transfer Pricing and Customs Valuation : Two worlds to Tax as One**, First Edition, 2009
- Crawford Shaw., **Legal Problems in International Trade and Investment**, First Edition, The World Community Association by Oceana Publications, 2011
- Dennis Campbell, **International Taxation of Low-Tax Transactions : High Tax Jurisdictions**, First Edition, Yorkhill Law Publishing, 2008
- KPMG Tax Corporation, **Japanese Tax Haven (CFC) Rules for 2010**, First Edition, KPMG, August 2010
- Price Waterhouse Cooper Ltd., **Base Erosion and Profit Shifting**, Impact on jersey, (2nd ed. 2013)
- OECD, **Action Plan on Base Erosion and Profit Shifting**, OECD Publishing 8 (1st ed. 2013).
- OECD, **Controlled Foreign Company Legislation**, Paris: Head of Publications Service, OECD, First Edition, 1996
- OECD, **Harmful Tax Competition an Emerging Global Issue**, France: OECD Publications, First Edition, 1998
- OECD, **Tax Policy Studies Corporate Tax Incentives for Foreign Direct Investment**, OECD Committee on Fiscal Affairs, 2001
- Robert E. Meldman, Micheal S. Schadewald and Robert J. Misesy JR., **A Practical Guide to U.S. Taxation of International Transactions**, Sixth Edition, CCH, 2003
- Yasutaka Nishikori, Tsuyoshi Ito, James Emerson and Atsushi Mizushima, **New Developments in Japan's CFC rules: Liberalisation, Expansion and Clarification**, Euromoney Handbooks, First Edition, 2010
- สุเมธ สิริคุนโชติ, กฎหมายภาษีอากรระหว่างประเทศ, พิมพ์ครั้งที่ 2 แก้ไขเพิ่มเติม กรุงเทพมหานคร, สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2550, (Sumat Sirikhunnachote, **International Tax Law**, Second Edition Revise, Bangkok: Thammasat University Press, 2007)
- International Economic Industry Organization, *"ASEAN Economic Community: Opportunity and Impact on Thai Industrial"*, **International Economic Industry Organization**, (2011).
- Sara Anderson, *"CFC Rules and Double Tax Treaties Article"*, **The OECD and UN Model Tax Conventions**, (2006).

ปฐมภรณ์ นิธิชัย, การลงทุนทางตรงในต่างประเทศของบริษัทจดทะเบียนไทย : สถานะปัจจุบันและข้อเสนอแนะเชิงนโยบาย, เอกสารงานวิจัย ฉบับที่ 2/2554 (Patamaporn Nitichai, Foreign Direct Investment of Thai Enterprises: Current status and Policy Suggestion, **Documentary Research Issue** 2/2011).

2. Electronic Media

European Central Bank Working Paper Series No. 31, *The Disappearing Tax Base:*

Is Foreign Direct Investment Eroding Corporate Income Taxes, 7 October 2000, <http://www.Imf.org/external/pubs/ft/wp/2000/wp00173.pdf>

LEGAL CONTROL NOISE POLLUTION GENERATED BY PUBLIC ENTERTAINMENT PLACES*

*Thanawan Chalayonnawin***

ABSTRACT

Noise pollution can be prejudicial to health and can cause annoyance which can eventually constitute to legal context of nuisance. It crucially impacts on community areas where many activities occur. The important question is that whether the noise is out of ordinary or not.

Operating public entertainment places is one of business activities which are popular in recent years. Long term operation of public entertainment places such as pubs, bars, discotheques, clubs as well as some kind of restaurants is the major source creating noise pollution which affects vicinity, workers and customers of such public entertainment places.

Although, there are various laws relating to the control of noise pollution in Thailand, the standards issued under such laws are insufficient, inappropriate, lack of harmonization among responsible organizations and lack of guidelines for local officials to exercise their powers and use discretion effectively.

This article aims to study governing laws themselves, their loopholes and functions of local official powers. Analyze and compare to foreign countries namely; United Kingdom and Hong Kong. In sum, the thesis proposes that, two major recommendations should be introduced. First, governing laws themselves should be amended. Some inappropriate standards of noise pollution control should be adjusted. Second, the functions of exercising powers by responsible authority should be amended by promoting the coordination among responsible authorities and setting forth standard guidelines for local officers' adoptions in order to handle with noise pollution generated by public entertainment places.

Keywords: Noise, Noise Pollution, Public Entertainment Places, Noise Control, Nuisance Control, License Control, Local officials, Official discretions, Official powers.

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บทคัดย่อ

มลพิษทางเสียง คือเสียงที่สามารถส่งผลร้ายต่อสุขภาพและทำให้เกิดความรำคาญ ซึ่งท้ายที่สุดสามารถส่งผลให้เป็นเหตุรำคาญตามกฎหมาย มลพิษทางเสียงส่งผลกระทบอย่างมากในพื้นที่ชุมชนที่มีการจัดกิจกรรมต่างๆ คำถามที่สำคัญก็คือเสียงที่กระทบสู่สิ่งแวดล้อมภายนอกนั้น เป็นเสียงที่ออกมาสู่สิ่งแวดล้อมตามปกติหรือไม่

การประกอบกิจการสถานบันเทิงของประชาชนเป็นหนึ่งในกิจกรรมทางธุรกิจซึ่งเป็นที่นิยมในปีที่ผ่านมา การดำเนินงานในระยะเวลายาวนานของสถานบันเทิงสาธารณะ เช่น ผับ บาร์ ดิสโก้เทค คลับ และร้านอาหารบางเป็นแหล่งสำคัญในการสร้างมลพิษทางเสียงซึ่งมีผลต่อประชาชนบริเวณใกล้เคียง ลูกจ้างของสถานบริการ และลูกค้าของสถานบริการนั้นๆ

แม้ว่าจะมีกฎหมายต่าง ๆ ที่เกี่ยวข้องกับการควบคุมของมลพิษทางเสียงในประเทศไทยแต่จากการศึกษาพบว่ามาตรฐานต่างๆเหล่านั้น ไม่เพียงพอ ไม่เหมาะสม และขาดการประสานกันระหว่างองค์กรที่รับผิดชอบ รวมถึงขาดแนวทางปฏิบัติสำหรับเจ้าหน้าที่ท้องถิ่นที่ในการใช้อำนาจตามดุลยพินิจอย่างมีประสิทธิภาพ

บทความนี้มีวัตถุประสงค์เพื่อศึกษากฎหมายที่เกี่ยวข้องกับการควบคุมมลพิษทางเสียงจากสถานบริการ และช่องโหว่ของการใช้อำนาจของเจ้าพนักงานท้องถิ่น รวมถึงการวิเคราะห์และเปรียบเทียบกับกฎหมายต่างประเทศคือ; สหราชอาณาจักรและฮ่องกง ข้อเสนอของบทความนี้มีสองประการสำคัญที่ควรได้รับการแนะนำ ประการแรกกฎหมายควบคุมมลพิษทางเสียงเองนั้นควรจะได้มีการแก้ไข บางส่วนของมาตรฐานการควบคุมมลพิษทางเสียงซึ่งไม่เหมาะสมนั้นควรมีการปรับเปลี่ยน ประการที่สองขั้นตอนการใช้สิทธิอำนาจโดยหน่วยงานที่รับผิดชอบควรได้รับการแก้ไขโดยการส่งเสริมการประสานงานระหว่างหน่วยงานที่รับผิดชอบและการออกแบบแนวทางมาตรฐานในการใช้ดุลพินิจของเจ้าหน้าที่ท้องถิ่นเพื่อจัดการกับมลพิษทางเสียงที่เกิดจากสถานบริการ

คำสำคัญ: เสียง, มลพิษทางเสียง, สถานบริการ, การควบคุมเสียงรำคาญ, การควบคุมใบอนุญาตเจ้าหน้าที่ท้องถิ่นดุลยพินิจอย่างเป็นทางการอำนาจอย่างเป็นทางการการใช้ดุลพินิจของเจ้าหน้าที่ท้องถิ่น

Noise pollution has become an issue rooted from community settlements. Noise pollution can be generated from many sources depending on types of activity such as increase of population, transportation systems, construction sites, industrial activities, loudspeakers, plumbing and boilers. According to complaints statistics recorded by Pollution Control Department, noise pollution generated by public entertainment places and garages have been the first issue while industrial noise came as a second source of noise pollution complaints.¹

The increasing of public entertainment places such as pubs, discotheques, bars, restaurants, karaoke and so on plays significant role in many metropolitans. As a consequence, noise pollution generated by public entertainment places is increased; it affects nearby residents. Though the amount of tourists that continuously come to travel in Thailand reveals a good sign for business development and incomes, the responsibility and liability of public entertainment operators to environment should be considered.

With reference to the tort provision stated under the Civil and Commercial Code of Thailand as “The exercise of right which can only have the purpose of causing injury to another person is unlawful,” it can be implied that though human has his right to exercise any activities as long as they do not contravene to the scope of law, human rights of other people are the matter that every single individual has to respect. In this sense, though public entertainment places operators have their operation licenses, in order to carry on their business, individual being nearby the premise has the rights to stay peacefully of individual living nearby must be concerned.

Noise pollution generated by public entertainment places normally occurs during late night which is supposed to be the time for human relaxation. This brings about many consequences to vicinity in both short term consequences and long term consequences. Short term consequences, to illustrate, are such as annoyance, impaired communication, decrease of ability to monitor the work, anxiety, irritability, decrease of self-esteem² while long term health consequences are such as sleep deprivation, hearing loss, cardiovascular risks and hypertension.³

Entertainment noise emitted from Public entertainment places is the major problem affecting neighborhood nearby. The method for aggrieved person of relieving such nuisance is to rely on administrative organizations; therefore, legal control over nuisance generated by Nightlife Entertainment Public Place has to be precisely considered in order to make effective noise pollution management.

Entertainment noise covers a wide range of situations including lives events; concerts, permanent premises; pubs, clubs⁴, public entertainment places providing food, beverages, live music performances and any other performances for entertainment that closes after 12.00 pm. etc⁵. Subjected to Public Entertainment Place Act B.E.2509, legal licenses for the operation and the location of entertainment business are required. In other words, public entertainment places have to be separated from

¹ สำนักงานคุณภาพอากาศและเสียง กรมควบคุมมลพิษ กระทรวงทรัพยากรธรรมชาติและสิ่งแวดล้อม. เอกสารประกอบการสัมมนา ระดมความคิดเห็น เรื่อง แผนแม่บทการจัดการคุณภาพอากาศและเสียง พ.ศ. 2549-2559 11.(2547), available at <http://www.pcd.go.th/count/airdl.cfm?FileName...59.pdf> (

² Marisol Concha-Barrientos, Diarmid Campbell-Lendrum, Kyle Steenland World Health Organization Protection of the Human Environment Geneva, Occupational Noise Assessing the burden of disease from work-related hearing impairment at national and local levels 11, (2004).

³ *Id.* at 13

⁴ Rosalind Malcom and John Pointing, Statutory Nuisance Law and Practice, (Oxford University Press New York 2005).

⁵ Public Entertainment Places, Section 3.

living community in order to prevent nuisance problem which may have an impact on residents nearby.

However, it should be concerned that many public entertainment places are situated near religious places, institutions and other academic places. These are also the problems which have been complained by monks and students' parents since such noise pollution disturbs the activities and disvalues way of cultures.⁶

According to statistics recorded by Department of Health, Ministry of Public Health, noise nuisance generated by licensed business Detrimental to Health has been complained most by population in Bangkok.⁷ As well, in other municipality areas in Thailand, the record shows that in 2014 (B.E.2557), 22 percent of the complaints in municipalities of Thailand are mainly about noise and noise nuisance;⁸ this 22 percent is found to be a second place after the 37 percent of complaint about odor.⁹

According to section 420 of Tort under Civil and Commercial Code, a person shall have the liability for wrongful conduct if he intentionally or negligently causes wrongful conduct. The problem with applying section 420 to noise pollution generated by public entertainment places appears when a person affected by the noise has a burden to prove that the public entertainment places operators intend to cause or negligently cause noise pollution. He, moreover, will need to prove causation from the alleged act. Consequently, provided that an injured person is unable to prove the intention or causation mentioned above, the public entertainment operators shall not liable for such conduct. Some of the consequences generated by environmental pollution may take a long time to show its results; this leads to the difficulty in determining the consequences of the alleged act.¹⁰ The effects from hearing exceeding noise (noise pollution) normally take years to appear that it is detrimental to hearing systems. Temporary hearing of exceeding noise will not cause impairment while permanent impairment of hearing may take decades to show its consequences. Therefore, during the time that the symptoms caused by hearing exceeding noise do not appear, an injured person is not allowed by the law of tort to claim for compensation.¹¹

It seems that the rule of tort law is not prescribed for the prevention of causing pollution but for providing remedy to an aggrieved person with evident injury.¹²

Another provision regarding the prevention of nuisance is prescribed under section 1337¹³ of Civil and Commercial Code. It is noticeable that the right to claim for

⁶ไทยรัฐออนไลน์, ผวจ เชียงใหม่ จัดโซนนิ่งสถานบันเทิง พื้นที่วัด โรงเรียนกรณีศึกษาปัญหาสถานบันเทิงใกล้กับมหาวิทยาลัย, <http://www.thairath.co.th/content/213947>, <http://pub-geoinformatics.blogspot.com> (last visited October 20, 2013).

⁷กรมอนามัย กระทรวงสาธารณสุข, คู่มือวิชาการ เรื่อง การควบคุมและจัดการปัญหาเหตุรำคาญ 2 (กรุงเทพมหานคร: สำนักงานกิจการโรงพิมพ์องค์การสงเคราะห์ทหารผ่านศึก พิมพ์ครั้งที่ 1 2553). (Health Department Ministry of Health, Academic Handbook Titled Nuisance Control and Management, 2 (Bangkok : Veteran Organization Office Publication 1st ed. 2553))

⁸ สมศักดิ์ ศิริวันรังสรรค์. ระบบจัดการเหตุรำคาญ สำนักงานอนามัยสิ่งแวดล้อม กรมอนามัย, <http://www.env.anamai.moph.go.th> (last visited November 18, 2013).

⁹ *Id.*

¹⁰ อำนาจ วงศ์บัณฑิต, กฎหมายสิ่งแวดล้อม คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 541 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน 2557). (Amnat Wongbandit, Environmental Law 541 (Bangkok: Winyuchon Publication House 2015))

¹¹ *Id.* at 542.

¹² *Id.* at 543

¹³Section 1337 of Civil an Commercial Code states that “If a person in the exercise of his right causes to the owner of an immovable property greater injury or inconvenience than should naturally and reasonably be expected or anticipated, having regard to the nature an situation of such property, the owner is entitled, without prejudice to any claim for compensation, to have such injury or inconvenience abated”

compensation derived from noise generators is limited to the owner of an immovable property. Also, this is required greater injury or inconvenience than one should naturally be expected to be proved.

In this circumstance, although an injured person does not have a burden to prove polluter's intentions, he still has to prove that the effects or the consequences of exceeded noise occurred is much more than one could reasonably expected or anticipated with regard to the nature and situation of the property.

To the problem concerning of the right to claim for compensation of a property's owner nearby public entertainment places which situated in their business area (zoning),mProfessor Amnat Wongbandit views that though the law of Town Planning has been enacted in Thailand, other relevant factors are required to determine the extent of injury or inconvenience. Thus, merely the nature and situation of the property are insufficient since some areas situated under town planning, still accepts some activities which do not comply with the purpose of the area planned.¹⁴

In addition, it is undeniable that there are difficulties in applying section 1337 to solve the effect of noise pollution generated by public entertainment places. The solution seems to be only a remedy to compensate an aggrieved person instead of prevention for noise pollution method.

¹⁴ Wongbandit, *supra* note 10, at 545.

LEGAL PROBLEMS ON NOISE POLLUTION GENERATAED BY PUBLIC ENTERTAINMENT PLACES IN THAILAND

In Thailand, comprehensive law governing for noise pollution has not been regulated. Legal control on noise pollution are scattered in Environmental law, Public Health Act and local by laws. Noise pollution generated by public entertainment places should comply with ambient noise standard provided by the Enhancement and Conservation of National Environmental Quality Act B.E.2535. Also, it can be considered as noise nuisance which shall be controlled by Public Health Act B.E.2535. In addition, noise generated from public entertainment places should respect local bylaws at a local stage.

Notification of National Environment Board No.17 B.E.2540 prescribes that the standard of ambient noise and the maximum of Background noise level should not exceed 115 dBA. As well, a weigh equivalent noise level or the average of sound level in 24 hours should not exceed 70 dBA. These standards are limitation for noise occurring in residential area. Additionally, in order to calculate specific noise during interference, it is prescribed in the Notification of the National Environment Board No.29 B.E.2550 that the Specific Noise Level at 10 dBA which means the difference between background noise and specific noise exceeding 10 dBA shall be deemed as specific noise and shall be controlled by laws.

Apart from legal control by the Enhancement and Conservation of National Environmental Quality Act, another legal control of noise pollution is to be controlled by local officials by virtue of Public Health Act B.E.2535. Noise from public entertainment places falls into category of noise nuisance according to Section 25 (4) of Public Health Act B.E.2535 which defines that *“any action which causes odor, light, ray, noise, heat toxic matter, vibration, dust; powder, soot, ash, or any other to the extent that causes impairment or may be harmful to health”* shall be a source of nuisance in the event of an occurrence that may cause annoyance to residents in the neighboring area.

In order for noise assessment, specific Noise Level as stated by National Environment Board No.29 B.E.2550 is also applied by Public Health Act B.E.2535.¹⁵ Although the Public Health Act gives the powers to local authority to forbid any person who causes the nuisance in a public place or private place, abate nuisance, issue written order to abate as well as eliminate and control sources of nuisance,¹⁶ it remains the problems with the local authorities exercising such powers in practice.

It should be noted that after considering through the provisions of Public Entertainment Act B.E.2509, it seems that noise generated by public entertainment places has not been sufficiently paid much attention by the law. The provisions are likely to protect more for social problems and drug issues whilst control of noise emitted by public entertainment place is under the Public Health Act and Municipality Bylaws administered by local officials.

By virtue of Public Entertainment Places Act B.E.2509, the Royal Decree specifying the area of locating public entertainment places have been issued in many areas to control over the noise generated by public entertainment places such as in Chiang Mai and Bangkok. However, residents living nearby such zoning area are still affected because of the excessive noise which disturbs their sleep at night.¹⁷

¹⁵ Health Department Ministry of Health, *supra* note 7, at 18.

¹⁶ Section 26 Public Health Act

¹⁷ ร้องทุกข์ : ปัญหาสถานบันเทิงเสียงดัง ตำรวจช่วยได้แล้ว, <http://www.cm108.com/bbb/index.php/topic/>, เทศบาลเมืองแม่โจ้ อำเภอสันทรายจังหวัดเชียงใหม่, http://maejocity.go.th/webboard_detail.php?id=16 (last visited December 3, 2013).

It should be considered accurately that whether the existing legal controls by laws governing on noise generated by public entertainment places are sufficient, effective and appropriate for controlling noise from entertainment activities.

According to the Pollution Control Department statistics, in 2013 (B.E.2556) Bangkok and Chonburi were complained most about noise pollution as there are crowded by populations and gathered various kinds of public entertainment places. Meanwhile, Chiang Mai, appears to be the first place which has been complained about noise pollution in Northern Area.¹⁸ Therefore, the author would like to illustrate the issues regarding legal control, legal implementations and legal effectiveness of legal control of noise pollution generated by public entertainment places in these provinces.

In sum, after having reviewed relevant laws governing for noise pollution generated by public entertainment places in Thailand, it can be observed that various laws have been set forth functions which can be applied to control noise pollution either direct way or indirect way however, in practice, those provisions are insufficient to handle the problems as some of the laws are obsolete and ineffective. Particularly, the Enhancement and Conservative of National Environmental Quality Act, the Public Entertainment Places Act B.E.2509, the Public Health Act B.E.2535 and Local Bylaws, which play roles as major and direct laws governing the control of public Entertainment Places, still have loopholes which have been considered as follow;

1). Pursuant to the Enhancement and Conservative of National Environmental Quality Act B.E.2535, noise pollution generated by public entertainment places, is not categorized as specific pointed source and the Notification of the National Environment Board No.15 B.E.2540 Titled: Prescription of Background Noise Level states that the maximum noise level at not exceed 110 dBA and average of noise standard at not exceed 70 dBA is not applied to the noise occurring in rural area with low density of people since the standard aims to control noise pollution generated within residential area.

In addition, breaching those standards does not lead to direct punishment from responsible official since the purpose behind standard set forth by the Enhancement and Conservative of National Environmental Quality Act B.E.2535 is to settle general standards for other organizations' adoptions.

2). Noise standard provided under Public Entertainment Place Act B.E.2509 depicted by Ministerial Regulation for Designate the Principle of Obtaining License B.E.2549 which stipulates that noise standard of public entertainment places shall be complied with the National Environmental Quality Act B.E.2535, however, the provision does not seem to be effective in practice.

The reason behind this is that the purpose of the Act aims to maintain public orders and good morals therefore, in case when excessive noise occurs, officials responsible under the Act (police and provincial administration) normally do not exercise their power to suspend operation license in practice.¹⁹

3). At a local stage, Public Health Act B.E.2535 provides direct provisions enabling local official to issue an abatement in case when noise nuisance occurs; either in public places or private places, if the fact appear to meet two major satisfactions; physical Examination and Scientific Examination. In many circumstances, the damage affected to vicinity is not apparently noticed, some of them appear to be only annoyance and, particularly, the extent of annoyance is varied by personal sensitivity.

Thus, the problem arises under the scientific examination which requires proof of causation from the alleged noise, this, in practice, leads to many difficulties to

¹⁸ กรมควบคุมมลพิษ, สถิติการร้องเรียนปัญหามลพิษ ปี 2556,

http://www.pcd.go.th/info_serv/pol2_stat2556.html (last visited January 5 2014).

¹⁹ Mr.Thanorm Kuikaew, Governing officer, Professional level, Chiang Mai Provincial Administration Office, interview by author, 21 November 2013 (นายถนอม กุยก้าว เจ้าหน้าที่งานปกครองชำนาญการ ที่ทำการปกครองเชียงใหม่)

local official to exercise their power since the standard or guidelines for local officials to exercise their discretion are absent.

4). Local bylaws (by virtue of Public Health Act B.E.2535) issued local regulation called ‘The Control of business detrimental to Health’ provide that the maximum of noise shall not exceed 110 dBA and the average of noise standard occurring within public entertainment places shall not exceed 90 dBA, however, the standard does not apply to noise emitted outside the premises. The regulations aforementioned that the noise emitted outside the premises shall not cause nuisance to vicinity. This ,thus, leaves burdens to local officials to exercise their power under the Public Health Act B.E.2535 mentioned previously.

LEGAL CONTROL OF NOISE POLLUTION GENERATED BY PUBLIC ENTERTAINMENT PLACES IN FOREIGN COUNTRIES

In the United Kingdom, noise standard control from public entertainment premises is prescribed by the Noise Act 1996 which focuses on night noise or noise emitted from 11 pm. to 7 am.²⁰ from public entertainment premises which in the Act called “offending premises”.²¹ In connection with Licensing Act 2003, the term “offending premises” under the Noise Act 1996 refers to any premises in respect of which a premises license or a temporary event notice under the Licensing Act 2003 has effect on individual who is in a dwelling during night hours complaining on its excessive noise emitted.²²

Although, the condition which constitutes to offenses under the Noise Act 1996 is based on “The permitted level,” at the initial stage, local authority is able to exercise the investigation and issue a warning notice to the noise maker.²³ A responsible person of the premises shall be guilty of an offense if it appears that; firstly, the noise is emitted from the premises specified in the notice and secondly, such measured noise exceeds the permitted level.²⁴

As for licensing scheme, United Kingdom provides the Licensing Act 2003 to plays role in noise pollution control as it prescribes public nuisance prevention as one of the four objectives which the operators have to achieve for all the application of licenses.²⁵

Therefore, causing noise nuisance by offending premises may lead to a closure order by a senior police officer at initial stage. Section 161 of the Licensing Act 2003 enables a senior police officer in a rank of inspector or above to give a

²⁰ Noise Act 1996, Section 2(6).

²¹ Noise Act 1996, Section 2(2).

²² Department for Environment Food and Rural Affairs : *The Noise Act as amended by Anti-social Behavior Act 2003 and the Clean Neighbourhoods and Environment Act 2005 Guidance to Local Authorities in England*, 2008 Version 1, available online at www.defra.gov.uk

²³ *Id.*

²⁴ The Noise Act 1996, Section 4.

²⁵ The Licensing Act 2003, Part 2 Paragraph 4(2) it is stated that “The licensing objectives are—

- (a) the prevention of crime and disorder;
- (b) public safety;
- (c) the prevention of public nuisance; and
- (d) the protection of children from harm.

command to close individual premises. However, four conditions for local authority discretions must be satisfied before the issuance of closure order.²⁶

In Hong Kong, it is interesting that under the Noise Control ordinance; Technical Memorandum for the Assessment of Noise from Places other than Domestic Premises, Public Places or Construction Sites contains the technical procedures for the Authority to adopt before the Abatement Notice is issued. The following criteria are needed to be determined by the Authority before issuing an abatement of Notice;²⁷

- Location of the Noise Sensitive Receiver (NSR) such as hospital, education institute, place of public worship, library and court of law
- Area Sensitivity Rating (ASR) specifies types of area affected by noise such as rural area, low density residential area, urban area, area other than those mentioned previously
- Acceptable Noise Level (ANL) means period of the noise occurrence; day (07.00 am.-7.00 pm), evening (7.00 pm.- 11.00 pm.) and night (11.00 pm.-7.00 am)

LEGAL ANALYSIS

According to the study of legal control of noise pollution generated by public entertainment places of Thailand and foreign countries including problems and obstacles of law enforcements, the author would like to propose some recommendations for legal control of noise pollution in Thailand as followed;

1. Since section 55 of the Enhancement and Conservation of National Environment empowers the Minister by the advice of the Pollution Control Committee and National Environment Board to prescribe the standards in control of pollutants from specific point sources into the environment in order to meet the environmental quality standard set by virtue of the Enhancement and Conservation of National Environmental Quality Act B.E.2535, noise generating from public entertainment places should be specified by section 55 a specific point source as to be controlled, inspected and examined by responsible authority under section 82 of the Act.

2. The standard of noise level generating from public entertainment places under Public Entertainment Places Act B.E.2509 and Local bylaws Titled; Business Detrimental to Health should be amended in regard to the nature of entertainment noise and location of public entertainment places.

The factors relating to this point of amendment including location and zoning where public entertainment places are situated as well as time of their operations and type of activities should be taken into account. For example, noise emitting from outdoor live music performance during nighttime from public entertainment situating out of zoning area surrounded by academic institutes and temples should be controlled by higher noise standard than that for noise from indoor music or live performance indoor occurring in daytime.

In author's opinion, criteria on determination of the acceptable noise level of Hong Kong Noise Control Ordinance should be a good role model.

3. Conditions for operation licenses application under Public Entertainment Place Act B.E.2509 and local bylaws should be improved by imposing some provisions regarding to noise pollution prevention. Local officials should also examine their

²⁶ Colin Manchester, Susanna Poppleston, Jeremy Allen, *supra* note 221 at 505.

²⁷ Environment Protection Department, Noise Control Authority : *Technical Memorandum for Assessment of Noise from Places other than Domestic Premises, Public Places or Construction Sites, 19 June 1997 (Revised)*, available online at www.epd.gov.hk

operations before issuing operation license. Examples of the conditions which public entertainment places operators should be satisfied are the operators strictly providing noise nuisance management policy, preparing a sound limiting devices and locating entertainment facilities.²⁸

4. Details on exercising discretions to issue abatement notice under public Health Act B.E.2535 of local officials should be provided.

Section 28 of the Public Health Act B.E.2535 enables local officials to issue a written order to the owner of private place requiring him to abate the nuisance within a reasonable time. Also, local officials may prescribe the method of prevention for future nuisance and specify such method in the order. Additionally, The Public Health Act B.E.2535 provides provision for local official to use their discretions on the method of nuisance abatement at the present and in the future. In practice, local officials use their discretions on the method to abate the nuisance case by case depending on the matter of fact. Nevertheless, the scope and criteria of applying such discretions provided by law whether it be in terms of how the method would be in a circumstance occurring, period for the operator to comply with the method, and any other condition for the abatement are still unclear.

Since local official of municipality is the organization which directly involves with the controlling of nuisance, precise and flexible guidelines of conduct for using discretions for local officials should be enhanced.

5. Cooperation of Organizations which are responsible for public entertainment places control should be promoted. Agreement between local bylaws and provincial administration in order to solve the issue of overlapping power to suspend and revoke the operation license under the Public Entertainment Place Act B.E.2509 and the operation license under local Bylaw should be imposed.

The author would like to suggest that the Public Entertainment Places Act B.E.2509 and local bylaws should be amended, the punishment under both laws should be complied with each other in the same way as to eliminate the difficulties which may arise in practice.

6. Stricter punishments for causing noise nuisance should be imposed. It is stated under section 74 of public Health Act 2535 that a person who fails to comply with an abatement notice under section 27 and section 28 is liable to an imprisonment not exceeding one month or fine not exceeding 2,000 Bath

The author views that the punishment imposed on a person who causes noise nuisance from public entertainment premises should be increased; the fine of 2000 Bath seems unreasonable. Furthermore, additional fine in case of repetitive and continual activities of causing nuisance should be forced.

CONCLUSION AND RECOMMENDATIONS

Having studied legal control of noise pollution generated by public entertainment places in Thailand, it was found that many legal measurements regarding noise pollution either in direct way or indirect way have been proposed and enacted to apply with the problems of noise pollution emitted to environment by public entertainment places however the increasing of complaints by vicinity affected by noise pollution generated from such operations can be apparently noticed. Therefore some ineffective noise pollution prevention standards then should be analyzed. By taking some provisions of foreign countries namely United Kingdom and Hong Kong into considerations to adopt as a guideline to Thai legislation.

²⁸ *City of London Code of Good Practice for Licensed Premises*, available online at www.cityoflondon.gov.uk/.../licensing/.../CoL-code-of-good-practice.pdf.

Two major recommendations are introduced here. First, governing laws themselves should be amended. Some inappropriate standards of noise pollution control should be adjusted. Second, the functions of exercising powers by responsible authority should be amended by promoting the coordination among responsible authorities and setting forth standard guidelines for local officers' adoptions in order to handle with noise pollution generated by public entertainment places.

REFERENCES

1. Books and Book Articles.

Colin Manchester, Susanna Poppleston, Jeremy Allen. **Alcohol & Entertainment Licensing Law** : Second Edition. New York: USA, 2008.

Robert McCracker, Gregory Jones, James Pereira, Simon Payne. **Statutory Nuisance**. Butterworths Environmental Law Series. Butterworths London Dublin and Edinburgh, 2001.

Rosalind Malcom and John Pointing. **Statutory Nuisance Law and Practice**. Oxford University Place New York, 2005.

กรมควบคุมมลพิษ กระทรวงวิทยาศาสตร์ เทคโนโลยีและสิ่งแวดล้อม. **มลพิษทางเสียง noise**

Pollution. พิมพ์ครั้งที่ 3 , 2544.

(Pollution Control Department, Ministry of Science and Technology, **Noise pollution**, 2001).

อานาจ วงศ์บัณฑิต. กฎหมายสิ่งแวดล้อม. พิมพ์ครั้งที่ 3, กรุงเทพฯ : สำนักพิมพ์วิญญูชน, 2557.

(Amnat Wongbandhit, Environment Law, Faculty of Laws, Thammasat University, Bangkok: Winyuchon, 2014.)

2. Electronic Media

“City of London Code of Good Practice for Licensed Premises January 2013”.

[http:// www.cityoflondon.gov.uk/.../licensing/.../CoL-code-of-good-practice.pdf](http://www.cityoflondon.gov.uk/.../licensing/.../CoL-code-of-good-practice.pdf).

Department for Environment Food and Rural Affairs. “The Noise Act as amended by Anti-social Behavior Act 2003 and the Clean Neighbourhoods and Environment Act 2005 Guidance to Local Authorities in England”, [http:// www.defra.gov.uk](http://www.defra.gov.uk) (accessed March 12, 2014).

2.2 Thai

“กทม.สั่งตรวจสอบบ้านเชิงเสียงดัง หลังกรรมการสิทธิฯ ร้องหนังสือปราบ”,

<http://www.dailynews.co.th/Content/regional> (accessed January 5, 2013).

“คุณภาพชีวิต ผับ เคค เสียงดังเกินมาตรฐาน 100%.”

<http://www.manager.co.th/QOL/ViewNews.aspx?NewsID=9470000092786> (accessed January 5, 2013).

“คำแนะนำของคณะกรรมการสาธารณสุข ฉบับที่ 1 /2548 เรื่อง การควบคุมกิจการที่เป็นอันตรายต่อสุขภาพประเภทกลุ่มบริการ

บันเทิง”, <https://sirchanhod.wordpress.com/2012/02/13/%E0%B8%A1%E0%B8%A5%E0%B8%9E%E0%B8%B4%E0%B8%A9%E0%B8%97%E0%B8%B2%E0%B8%87%E0>

%B9%80%E0%B8%AA%E0%B8%B5%E0%B8%A2%E0%B8%87-noise-pollution/ (accessed June 5, 2014).

“เชียงใหม่จับสถานบริการลงนามร่วมมือจัดระเบียบสังคม”.

<http://www.manager.co.th/Local/ViewNews.aspx?NewsID=9510000030957>
(accessed January 5, 2013).

cm108.com. “ร้องทุกข์ : ปัญหาสถานบันเทิงเสียงดัง ตำรวจช่วยได้แล้ว”,

<http://www.cm108.com/bbb/index.php/topic/> เทศบาลเมืองแม่โจ้

“อำเภอสันทรายจังหวัดเชียงใหม่” http://maejocity.go.th/webboard_detail.php?id=16
(accessed December 3, 2013).

“ที่ว่าการอำเภอบางละมุง ตรวจสอบบริการทั่วเมืองพัทยา”,

<http://www.banglamungdistrict.go.th/?page=news&no=139> (accessed
December 3, 2013).

“ไทยรัฐออนไลน์. ผวจ เชียงใหม่ จัดโซนนิ่งสถานบันเทิง พื้นที่วัด โรงเรียนกรณีศึกษาปัญหาสถาน

บันเทิงใกล้กับมหาวิทยาลัย”, <http://www.thairath.co.th/content/213947>, <http://pub-geoinformatics.blogspot.com> (accessed October 20, 2013).

สถาบันสิ่งแวดล้อมไทย. “ความรู้เกี่ยวกับมลพิษทางเสียง”,

http://www.tei.or.th/cef/nonoise/nonoise_knowledge_4detail.html#6 (accessed
December 25, 2014).

สำนักงานคุณภาพอากาศและเสียง กรมควบคุมมลพิษ กระทรวงทรัพยากรธรรมชาติและสิ่งแวดล้อม.

“เอกสารประกอบการสัมมนาระดมความคิดเห็น เรื่อง แผนแม่บทการจัดการคุณภาพ

อากาศและเสียง พ.ศ.2549-2559”, http://www.pcd.go.th/info_serv/service.html (accessed
January 20, 2015)

3. Other Materials

The interview. Mr.Noppadol Sawat: Chief of Air Quality and Noise Control Section
Sanitary Engineering Division. Public Work Bureau. Chiang Mai Municipality.
November 7, 2013.

(นายพนอด สวัสดิ์ ผู้อำนวยการฝ่ายควบคุมคุณภาพอากาศและเสียง ส่วนช่างสุขาภิบาล สำนักปลัดเทศบาล เทศบาลนคร
เชียงใหม่)

THAILAND'S COMPLIANCE WITH INTERNATIONAL STANDARDS AGAINST ILLEGAL, UNREPORTED AND UNREGURATED FISHERIES *

Thitiwat Aussawarangkul**

ABSTRACT

Thailand is one of the top ranks in seafood distributor to the world particularly in EU, USA and Japan. The huge demand of fish globally makes the seafood industry sector in developed and developing country attempt to develop the fishing technology in order to increase the fish capture. Also, the outcome from the fast growth of population causing great demand of seafood product creates a new problem which is illegal fishery. Illegal Fishing occurs in every region and causes critical effect to the global fishery such as over-exploit fishing and becomes IUU fishing.

IUU fishing in the sense of law that means the act that contravenes national or international law and regulation. Thailand Fishery Act B.E.2490 could not control IUU fishing conduct and it is not up-to-date. Ineffective legal measures to control fishing activity are the reason which brings significant problems. EU countries has announced to fight IUU fishing by complying all measures according with IPOA-IUU to prohibit all fishery product to get into the region. Therefore, IUU fishing could affect Thailand's economy in general because export fishery products of Thailand are in the first ranks of EU.

According to the old Fishery Act, It is obvious that we lack of integrate management operation, then cooperating and cross functioning between competent authority should be considered as first priority to fight IUU fisheries. Therefore, the government amends the Fishery Act to ensure that we are not refrain from action to prevent, deter, and eliminate IUU fishing. However, by the short period of time to amend the new Act, there are still some remaining issues which does not completely solve the problem. Therefore, Thailand need to reconsider and resolve existed loopholes by enacting the new law or amending the new Fisheries Act B.E.2558 to ensure globally that Thailand Fisheries Law is effective in every dimension

Keywords: Illegal Unreported and Unregulated fishing, IUU Fishing, Fisheries.

บทคัดย่อ

ในปัจจุบันประเทศไทยเป็นประเทศผู้ผลิตอาหารทะเลชั้นนำในระดับโลก โดยเฉพาะสำหรับกลุ่มประเทศยุโรป, ประเทศสหรัฐอเมริกา, และประเทศญี่ปุ่น จากการที่ทุกประเทศทั่วโลกมีความต้องการบริโภคสัตว์น้ำในปริมาณมาก ส่งผลให้ภาคอุตสาหกรรมอาหารทะเลในประเทศพัฒนาแล้วและในประเทศกำลังพัฒนามีความมุ่งมั่นที่จะพัฒนาเทคโนโลยีในการทำประมงเพื่อเพิ่มความสามารถในการจับสัตว์น้ำให้มากขึ้นตามความต้องการของตลาด อันเนื่องมาจากการเพิ่มขึ้นของประชากรทั่วโลก ซึ่งการเพิ่มจำนวนของ

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ประชากรและความต้องการที่เพิ่มขึ้นนั้นส่งผลให้เกิดปัญหาการทำประมงที่ผิดกฎหมายเพิ่มมากขึ้นเช่นกัน การประมงที่ผิดกฎหมายนั้นเกิดขึ้นทั่วทุกภูมิภาคและส่งผลกระทบต่อภาคการประมงทั่วโลก เช่น ปัญหาการทำประมงเกินขนาด และการทำการประมงที่ผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม

การประมง ไอยูยู ในนิยามของกฎหมายนั้นคือการทำการประมงที่ขัดต่อกฎหมายของรัฐ หรือขัดต่อกฎหมายสากล และระเบียบต่างๆ ซึ่ง พ.ร.บ.การประมง พ.ศ. 2490 นั้นไม่สามารถควบคุมการทำประมงแบบ ไอยูยู ได้ เนื่องจากเป็นกฎหมายที่ไม่มีความทันสมัย ไม่สามารถรับมือกับวิธีการทำประมงที่พัฒนาขึ้นได้ กฎหมายการควบคุมการทำประมงที่ไร้ประสิทธิภาพเป็นสาเหตุสำคัญที่ทำให้เกิดปัญหาการทำประมง ไอยูยู ทั้งนี้กลุ่มประเทศยุโรปประกาศที่จะต่อสู้กับการทำประมง ไอยูยู โดยการนำมาตรการตามแผนปฏิบัติการสากลเพื่อป้องกัน ยับยั้ง และกำจัดการทำประมงที่ผิดกฎหมาย เพื่อป้องกันสินค้าจากการทำประมงที่ผิดกฎหมายเข้าสู่ภูมิภาค ดังนั้นการทำประมงที่ผิดกฎหมายอาจส่งผลกระทบกับภาคธุรกิจการประมงของประเทศไทย เนื่องจากสินค้าประมงของไทยได้มีการส่งออกไปยังกลุ่มประเทศยุโรปเป็นอันดับหนึ่งของโลก

เห็นได้ชัดว่า พ.ร.บ.การประมง พ.ศ.2490 ไม่มีมาตรการการจัดการและการบริหารการทำประมงที่บูรณาการระหว่างหน่วยงานที่รับผิดชอบ ซึ่งเป็นแนวทางที่สำคัญที่สุดในการต่อสู้กับการทำประมงที่ผิดกฎหมาย ถึงแม้ว่ารัฐได้ดำเนินการแก้ไขกฎหมายการประมงเพื่อสร้างความมั่นใจต่อประเทศผู้นำเข้าสินค้าประมงและเป็นการปรับปรุงมาตรการป้องกัน ยับยั้งและกำจัดการทำประมงที่ผิดกฎหมาย แต่อย่างไรก็ดีในระยะเวลายาวนานในการแก้ไขกฎหมายทำให้เกิดประเด็นที่ยังไม่สมบูรณ์ในการแก้ไขปัญหการทำประมงที่ผิดกฎหมาย ดังนั้นประเทศไทยจึงจำเป็นต้องมีการพิจารณาการแก้ไขปัญหายังเป็นช่องว่างทางกฎหมาย โดยการออกกฎหมายเป็นการเฉพาะ หรือแก้ไขกฎหมายการประมง พ.ศ.2558 เพื่อสร้างความมั่นใจให้กับนานาชาติว่ากฎหมายการประมงของประเทศไทยมีประสิทธิภาพในการจัดการกับการทำประมงที่ผิดกฎหมายในทุกด้าน

คำสำคัญ: การทำประมงที่ผิดกฎหมาย ขาดการรายงาน ขาดการควบคุม, การประมงแบบไอยูยู, การทำประมง

Introduction

Food industry became the most important factor of sustainable and growth of national economic and also a key determinant for the quality of our daily lives and it is probably the biggest business in the world economy.¹ Seafood is one of the most important nutrition of the world provided by the quantity of exploitation. Currently global capture fisheries and aquaculture provide 3.0 billion people, which address the need of feeding and growing the demand for fish consumption.² Thailand fisheries sector is the important factor which makes a large amount of gross income via exported products and national nutrition consumption.³ Increasing demand of seafood products due to the outcome from the fast growth of population creates a new problem which is illegal fishery. Illegal Fishing occurs in every region and causes critical effect to the global fishery such as over-exploit fishing, exploitation and capture in restricted area, the use of illegal fishing gear and etc.

The main common problems that exist in many countries which obstruct the management on the sea life resources and the causes of illegal fishing:

¹ High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, Sustainable fisheries and aquaculture for food security and nutrition (2014). (Hereinafter called HLPE)

² *Id.*

³ *Id.*

1. Large amount of unauthorized ship fishing in the sea territory.
2. Unregulated fishing ship without declaring the ship nationality or switching the flag.
3. Fishing ship which does not declare or report either the catch amount or particular fishing ground to the competent national authority contravenes national laws and regulations.⁴
4. Unauthorized fishing problem has brought an ineffective monitoring system of Flag state and cause illegal fishing methods.

These illegal conducts are obstacles to manage fish stocks effectively and were defined as “illegal unreported and unregulated (IUU) fishing”. IUU fishing destroyed the regional economic and is increasing continually every year as noted by the European Commission in 2005.⁵

The international organization like FAO (Food and Agriculture Organization) and other fishing nations try to find and develop more effective law and policy in order to prevent, deter and eliminate illegal fishing⁶ and reach the conclusion that IUU fishing is the global problem that every country have to solve immediately. FAO launch International Plan of Action on IUU fishing to prevent, deter and eliminate illegal, unreported and unregulated fishing, notably by FAO in 2001.⁷ Also in EU, EU has been fighting with IUU fishing since 2002 by adopting EU Action Plan for the eradication of IUU fishing.⁸ Then, in 2008, the first IUU Regulation (EC 1005/2008) to Prevent, Deter and Eliminated Illegal, Unreported and Unregulated Fishing: IUU Fishing was enacted and the regulation was enforced in 2010.⁹

IUU fishing problems in Thailand occurred simultaneously with the development of fishing technology since B.E.2500.¹⁰ The development of fishing gear and vessel, which make exploitation becomes simple, and the increasing demand of seafood which increase fisheries sector supply create destructive fishery, illegal and unregulated fishing.¹¹ However, Thailand Fisheries Act B.E.2490 has not up-to-date and not provided the effective measures to prevent, control and eliminate IUU fisheries to the level of the international country measures. From the current problem of Thailand that received yellow card on fishery products from EU. They claimed that Thailand fishery law, on IUU scheme, has not been updated and consistent with International law or regulation whether Regional management measure. Therefore, Thailand need to reconsider and resolve existed loopholes by enacting the new law or amending the law to ensure globally that Thailand Fisheries Law is effective in every dimension and to prevent the importer countries from banning Thailand’s fishery products.

⁴ *Id.*

⁵ Ministry of Agric. & Cooperatives, IUU Regulation and Thailand Fishery, http://www.moac.go.th/download/article/article_20101223153932.pdf.

⁶ *Id.*

⁷ *Id.*

⁸ Directorate-General for Mar. Affairs & Fisheries, *Study on the State of Play Regarding Application and Implementation of Council Regulation (EC) No. 1005/2008 of 29 September 2008, Establishing a Community System to Prevent, Deter and eliminate Illegal, Unreported and Unregulated Fishing (IUU Regulation) Specific Contract No.3* (2014). (Hereinafter called DG-MARE)

⁹ *Id.*

¹⁰ Siraprapa Thanpong, *Legal Measure to Control Commercial Fishery* (B.E. 2556).

¹¹ *Id.*

1. IUU fishing problem

The first organization that prescribes the definition of IUU fishing was FAO stated in FAO-IPOA.¹² IUU stands for 3 main activities which are Illegal, Unreported and Unregulated Fishing. Highly demand on fishery products as mentioned earlier is the cause of IUU fisheries problems around the world, let's say that "Need more, exploit more and destroy more". When the normal fishing could not supply fishery products to the highly demand market, then infringement has occurred. Entrepreneurs who care only about their profit always try to do anything to get their profit even if it means to break the law.

In Thailand, Various infringement conducts have then been occurred in Territory Sea and beyond EEZ including in the High Sea. Announcement of United Nations Convention on the Law Of the Sea; UNCLOS has an effect on the dividing territory of the sea. The effect of the new declaration on Thailand's sea territory is 300,000 square mile loss of High Sea territory which can be assessed to the total catch of seafood decrease to about 600,000-800,000 tons per year.¹³ This factor arouse fisherman to sailing in prohibited areas and conduct illegal fishing method to gain more products. They have to infringe the law by fishing in the restricted area, season, or using unregulated fishing gear in Thailand or other countries and cause the worse outcome that affect economy, society and politics. However, Thailand has not concern on IUU fishing terms as international country. FAO-IPOA¹⁴ prescribed terms of IUU fishing as following;

Illegal fishing refers to the following activities:

A.1. Conducted by national or foreign vessels in water under the jurisdiction of a State, without the permission of that state, or in contravention of its law and regulations¹⁵;

A.2 Conducted by vessels flying to the flag of states that we parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measure adopted by that organization and by which State are bound, or relevant provisions of the applicable international law¹⁶; or

A.3 In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization¹⁷.

Unreported fishing refers to the following fishing activities:

B.1 Which have not been reported or have been misreported, to the relevant national authority, in contravention of national laws and regulations¹⁸; or

B.2 Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the procedures of that organization.¹⁹

Unregulated fishing refers to the following fishing activities:

¹² Food and Agriculture Organization of the United Nations, *Illegal, Unreported and Unregulated (IUU) fishing*, <http://www.fao.org/fishery/iuu-fishing/en> (last visited Jan. 20, 2015).

¹³ *Supra* note 10.

¹⁴ *Supra* note 12.

¹⁵ MRAG, *Review of Impacts of Illegal, Unreported and Inregulated Fishing in Developing Countries* (2005).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

C.1 In the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of the organization; or²⁰

C.2 In the area or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under the international law²¹.

Fishery Act B.E.2490 does not state in any section about IUU fishing according to international terms. Even the new Fishery Act B.E.2558 does not prescribe about IUU fisheries term. This could affect the followed legal measures which do not solve a whole scope of IUU fisheries. Moreover, there have others controlling measures which are Flag state measure, Port state measure and Coastal state measure that Thai's law does not prescribe and it causes very big loopholes for IUU infringement. Therefore, State need to analyze how our fishery law need to be amended and whether the new fishery act B.E.2558 is adequate enough to conform to the international standard such as CCRF and IPOA-IUU of FAO including EC regulation (EC 1005/2008) to avoid further problems that could occur from other importer countries.

2. International laws and regulations against Illegal, Unreported and Unregulated Fisheries (IUU fisheries)

2.1 United Nation Convention on the Law of the Sea of 10 December 1982 (UNCLOS)

The reason of enacting UNCLOS is to eliminate fishing problems in High Sea.²² Thailand was signed the UNCLOS on December 10, 1982, being a state party to the convention and agreement relating to the implementation of it.²³ On April 26, 2011, the 6th Joint Session of the Parliament approved Thailand's becoming State party to the United Nations Convention on the Law of the Sea (UNCLOS) 1982. Legal mechanism provided by the Convention allowing Thailand to gradually review its laws and regulations and harmonize with the provisions of the Convention as well as to state Thailand's position in order to protect and preserve national interests.²⁴

The Convention provides for the powers, duties and rights of all States in each maritime zone – internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf and high seas, including different regimes of passage of ships therein.²⁵

Author will give an example of related section in UNCLOS which show that Thailand has duties to fight against IUU fishing. As such, part V, part VII and Section 2 of the Convention.

Part V

²⁰ *Id.*

²¹ *Id.*

²² Isara Chanrachkij et al., *Capture Fisheries Technology Division, Training Department Southeast Asian Fisheries Development Center*, p.12.

²³ Royal Thai Embassy, Sing., *Thailand Becomes State Party to the United Nations Convention on the Law of the Sea (UNCLOS) 1982 and the Agreement Relating to the Implementation of Part XI of the Convention* (2011), http://www.thaiembassy.sg/press_media/news-highlights/thailand-becomes-state-party-to-the-united-nations-convention-on-the-law (last visited Jul. 31, 2015).

²⁴ *Id.*

²⁵ *Id.*

Convention prescribed about duties of state to seek either directly or through appropriate sub-regional or regional organizations to provide conservation and development measure on such particular stocks.²⁶ Furthermore, the Convention prescribed about Cooperation on conservation and promoting the objective of optimum utilization throughout in the region between Coastal states and other states. it is duties of Coastal states and other states whose harvest these species in the region shall cooperate to establish such an organization and participate in its works.²⁷

Part VII

The Convention prescribed about duties of state to fish in High Sea, such as Section I: General Provision which emphasize on giving nationality of vessel. Sub-part 2 has concerning on Conservation and Management of the living Resources of the High Sea by emphasize on establishing Regional and Sub-regional Fisheries Management Organization to be an entity whose supervise all fishing conduct in such High Sea.²⁸

Section 2²⁹

UNCLOS has mentioned about conservation and management issue in section 2. This issue is important as illegal fishing control because of fishery resource is limited source. The convention prescribed about Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas and Cooperation of States in the conservation and management of living resources.³⁰

Therefore, Thailand, as a member state of UNCLOS, has to compliance with International law and standard to fight against IUU fishing. Moreover, Thailand is a distant-fishing nation that takes international legal obligations binding on it seriously.³¹

2.2 Code of Conduct for Responsible Fisheries (CCRF)

Even by the code of conduct itself has no legal binding to any country. However, according to the objective of it, every country which are stakeholders of fishing and aquaculture industries States, fishing entities, international organization (including NGOs IGO and RFBs), have agreed to apply by the code of conduct.

Thailand has been ratifying the code since B.E.2538 in the 28th meeting of FAO councils.³² This ratification has developed Thai fishing policy harmonizing with the changing of global fishing situation concern. The objectives of the Code of Conduct show how to seriously induce every country to solve IUU fishing problem either to help countries and groups of countries to develop or improve their fisheries and aquaculture management measures and conservation measures, while also focusing on ensuring food security and conservation.

2.3 International plan of action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)

The objective of the IPOA to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to

²⁶ UNCLOS 1982, Art. 63.

²⁷ UNCLOS 1982, Art. 64.

²⁸ HLPE, *Sustainable Fisheries and Aquaculture for Food Security and Nutrition* (2014) 14.

²⁹ See also, UNCLOS section 116-119.

³⁰ *Id.*

³¹ Written statement of Thailand, *Request for an advisory opinion submitted by sub-regional fisheries commission (SRFC) to the International Tribunal for the Law of the Sea*, (29 November 2013).

³² Asia-Pacific Fishery Commission (APFIC) *Report of the Fourth APFIC Regional Consultative Forum Meeting, "Improving management and governance of fisheries and aquaculture in the Asia-Pacific region"* RAP Publication 2012/25 110 (2012).

act, including through appropriate regional fisheries management organizations established in accordance with international law.³³

IPOA-IUU is voluntary like the code of conduct and certain part of the plan are based on international law. The Plan are also called the “toolbox”, a set of tools for use in dealing with IUU fishing in its various manifestations. The ‘tool box’ measures include blocking avenues for fraud in critical domains, such as coastal State, port State and flag State controls, and through regional mechanisms and Regional Fisheries Management Organizations (RFMOs).³⁴

2.3.1 All States Responsibility of IPOA-IUU

All state should accept and imply with international law especially UNCLOS 1982. If State gives full effect implement to relevant norms of international law there would be much less IUU fishing.³⁵ State, whose vessels participate to sail in any RFMOs area, should become member of those RFMOs or at least implement all measure to conserve and manage in the RFMOs. State should upgrade technical system to fight IUU fishing.

2.3.2 Flag State Responsibilities of IPOA-IUU

Minimum duties that IPOA-IUU provided for Flag state are; State should control all conducts of all vessels which fly their flag and all transport and support vessels. Flag State’s government has to support all policy to fight with IUU fishing. State should collect all fishing vessels record entitled to fly its flag including all information with respect to each of its registered vessels.

2.3.3 Port State Responsibilities of IPOA-IUU

The plan has provided the following responsibilities and duties of Port state: States should require fishing vessels and vessels involved in fishing related activities seeking permission to enter their ports to provide reasonable advance notice of their entry into port, a copy of their authorization to fish, details of their fishing trip and quantities of fish on board, with due regard to confidentiality requirements.³⁶ A port State can implement some controlling measures even before vessels enter its ports. State should only grant foreign fishing vessels access to its ports where the State has the capability to conduct vessel inspections.

2.3.4 Internationally Agreed Market-related measures

Market-related measures could make a severe effect with the State that does not collaborate to fight IUU fishing. These regulations are consistent with international law to prevent all IUU fishing product trade. The IPOA-IUU calls upon all States to develop additional internationally agreed market-related measures to prevent, deter and eliminate IUU fishing.³⁷ Such measures must be interpreted and applied in accordance with the principles, rights and obligations established by the WTO.³⁸ Market-related measures are focused on import and export of all fishing products. Also, operating the trade measures in such country should be careful to not create unnecessary barriers to trade in other fish and fish products.³⁹

³³ FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001).

³⁴ Gilles Hosch, *Fisheries & Coastal Resources Planning & Management, Assessing the IPOA-IUU*.

³⁵ FAO Fisheries Department, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO Technical Guidelines for Responsible Fisheries. No. 9 p.122 (2002).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Linda Chaves, *Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures to Address IUU Fishing*.

³⁹ *Supra* note 35.

2.4 EC Regulation 1005/2008 to Prevent, Deter and Eliminated Illegal, Unreported and Unregulated Fishing: IUU Fishing

This regulation establishes a contracting party system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. All Member State shall take appropriate measure, in accordance with Community law, to ensure the effectiveness of that system to fight against IUU.⁴⁰ In order to ensure that no products derived from IUU fishing are appeared on the contracting party market or on markets supplied from the community, the regulation seeks to ensure full traceability of all marine fishery products traded with the community, by means of a catch certification scheme. The catch certification scheme may also apply to catches from community vessels which are exported, if the country of final destination requires a catch certificate.⁴¹ In EC regulations have others effective measure that Thailand should analyses to apply with our national law.

2.5 International Agreement on Port State Measures to Prevent, Deter and Eliminated Illegal, Unreported and Unregulated Fishing (PSM agreement)

This treaty is drafted by Food and Agriculture Organization of the United Nations (FAO), which states party aims to use this treaty as the binding instrument to eliminate IUU Fishing. ***This treaty grant power to Port State to refuse the ship with IUU fishing to enter his territory including refuse the goods from such fishing.*** The Department of Fisheries and Marine Department foresee the importance of the measure from the treaty because Thailand is also the port state. Role of Thailand as the port state is develop the standard of the port in order to meet the standard by the agreement. Thailand must arrange database related to the criterion and exchange information to other countries and also specify procedure of inspection of the ship in the port.

3. Thailand national law implementation against IUU fishing

The current Fishery act B.E.2558 that has just been enacted in April 28, B.E.2558, and shall be enforced in sixty days after having been enounced in Government Gazette. There are issues in the new act that can cause problems because the act does not cover all problems and there might be loopholes in enforcing the law. These issues in the new Act and its related regulations, which are inadequate and neither reach the international standard in order to eliminate IUU fishing nor suggest a solution that Thailand should apply in the future.

3.1 Loophole issues in Fishery Act B.E.2558

- Definition of IUU

Definition of IUU fishing is not provided in any section of Fishery act B.E.2558. This could make a significant mistake on interpretation and enforcement problem which conduct infringement. Moreover, it maybe conflicted with international law that the measure shall be applied in a manner and does not discriminate against any groups. Therefore, in order to make our national law consist with international standard, the definition of IUU fishing must be appointed in our Fishery act.

- Transshipment term

Significant loophole of Fishery Act on Flag state measure does not prescribed about Transshipment conduct. Transshipment at the sea is practically one of the most

⁴⁰ Council Regulation (EC) No. 1005/2008, Art. 1 (2008).

⁴¹ Joe Borg, *Challenges of globalisation: working together to strengthen global governance of the oceans*, <http://itssdjournalunclos-lost.blogspot.com/2009/11/eu-has-long-relied-on-unclos-tribunal.html>. (last visited Jun. 12, 2015)

difficult fisheries activities to monitor and overcome in many countries. It can be said that Transshipment at-sea is an important indicator of IUU fishing because this method could lead to “Catches Laundry” where IUU fishing products are transformed into legal fisheries products. Therefore, Thailand need to prescribe legal measure to control Transshipment terms in Fishery Act.

- Fishing in High Sea

On the issue of fishing conduct control in High Sea which stated in Fishery Act can be interpreted that it only covers in RFMO which State is a member. In consequence, legislator should prescribe a penalty in Section 66 on enforcement of Thai fishing vessel that fishes in other High Sea and RFMO area to those Thai fishing vessels engaged in IUU fishing activities in High Sea also the area of organization that State is not a member.

- Catch Certificate

Catch certificate schemes was first applied in Thailand because the EU enacted EC regulation. Thailand have particular practice and policy on Catch Certificate in order to prepare the related sectors, exporting to EU country, in seafood industry to comply with, but these practices do not cover every fisheries sector in the country as a general rule. Therefore, Thailand should consider to expanding a requirement of Catch Certificate to every state who delivers fishery products into the country whether that products are not exported to EU or other countries.

- Port Verification

The old fishery act did not prescribe about Port State Measures (PSM) and that got a big claim from Importer country. Incidentally, legislator inserts Port State measures in New Fishery Act which has been stated in Section 60. This measure has a problem in practical period because it can be enforced instantly with foreign vessels that have been listed in the IUU vessels list only. In case the vessels which have not been listed in the IUU vessels list, Port must allow to land at the port first and then competent officer could examine them at the port. According to section 60, it has not been stated for the additional process of the examination.⁴² Then competent officer does not have an authority to hold all products in possession. Therefore, it creates the systematic verification on vessel and fishery products at port. The government needs to insert the relevant required check in the Fishery Act to allow competent officer to inspect those fishery products before its access in the market.

- Coastal State measures loopholes

Thailand has got a complaint on lacking MCS System. Even now the government has given precedence on MCS via established IUU center by the cooperation of Navy, Port authority, Fishery department. In order to fully enforce with in coastal territory, the government should provide investigation authority to competent officer for investigating foreign vessel which is suspected that engaged IUU fishing and upon request from other states that inform reasonable evidence, as refers to article 118 of UNCLOS. Another issue of Coastal state duty that should prescribe in Fishery act is derived from Article 63 paragraph 2 and Article 64 of UNCLOS that Thailand has fished straddling fish stock and highly migrant fish stock, we need to apply necessary measures on such stocks.

Conclusions and Recommendations

⁴² EC regulation 1005/2008, Art.17 (2008).

Conclusions

From the current problem of Thailand that received yellow card on fishery products from EU. This is a current problem shifting all government sectors to kick-off all measures and improve national law. The cooperative measure with international country and regional country for fighting IUU is required to improve all management procedures, and Thailand Fishery Act does not comply with international agreement that supports to fight with IUU fishing. International countries classify responsibility of state according to UNCLOS and other international standard as Flag State, Port State and Coastal State schemes. Then Thailand should be concerned over all relevant measures to control, deter and eliminate IUU fishing by each scheme.

Flag State measures

According to International law, UNCLOS and UNFSA, measures on factual problem and national's legal Loophole, State must legislate national vessel as soon as possible to maintain all actual operation of vessels to register for benefit of fishing record and fishing control. Besides, Vessel Monitoring System is needed to apply on this stage. VMS would complete a requirement on monitoring system for recording and timely reporting of vessel position furthermore on the data of catch of target and non-target species. Fishing logbook is another requirement to complete monitoring, control and surveillance fishing operation. These are requirement measures that remain loopholes of national law. State should clearly state in Fishery act or issue secondary law to fulfill these loopholes.

Port State measures

Thailand does not prescribe port state measure in Fishery Act B.E.2490 but we just amend and insert new port state measures in Fishery Act B.E.2558. The new act provides authority to competent sector to refuse entry or access to port services, including landing and shipment of fish, to foreign vessel which have engaged IUU fishing. Section 60 could prohibit IUU vessels that have been listed in fishing vessel list of state and other management organization to come at port except the other not-listed vessels that would engage IUU fishing. Nonetheless, verification and inspection authority at port are not provided in the Act.

Coastal state measures

Thailand has got a complaint on lacking MCS System, even it is because of potential on fund, technology and competent officer. Now the government has given precedence on MCS via established IUU center by the cooperation of Navy, Port authority, Fishery department. There would be more strength on operation to Monitoring, Control and Surveillance fishing conduct. However, official authority on investigation is needed in order to inspect fishing vessel which engaged IUU fishing in coastal state jurisdiction whether it is national or foreign fishing vessel.

In aspect of conservation duties under UNCLOS, there have been the provided duties of coastal state of fishing straddling fish stock and highly migratory fish stock to establish conservation and management measures but in this point our Fishery Act is not mentioned clearly. There is providing authority to director-general and local administrator to issue notification on assignment of suitable fishing gear, fishing season and fishing ground which could not cover all area and fish stocks of state responsibility.

Recommendations

Definition of IUU; State should prescribe definition of IUU in Fishery Act B.E.2558 according to Section 2 of IPOA-IUU and EC regulation article 2.

Vessel legislation and fishing report; State should issue the clear provision to make the registered and flied Thai flag fishing vessel install VMS system and report

fishing logbook to help Flag state perform in secondary law under the authority of Section 37 of Fishery Act B.E.2558.

Catch certificate schemes; State should prescribe Catch Certification terms in Fishery Act to set a system on traceability according to EC regulation article 12, 14, 18, 19 which could strengthen the trade terms.

Transshipment schemes; State should prescribe definition of Transshipment and controlling measures on Transshipment in Fishery Act according to UNFSA article 18(3)(a) and EC regulation article 2(10), article 4(3)(4).

Port measures; Set the rule to assign all vessel reports at the specific port of state to keep a record of fishing for benefit of traceability. Moreover, it is important to provide competent officer authority in order to refuse importation in case of inability to submit Catch Certificate according to EC regulation article 18.

Punishment of IUU fishing in High Sea; State should amend the law to give a high punishment to fisher who engaged IUU fishing and to assign punishment for fishing vessel that fish beyond management organization that state is a member in section 66.

For conservation and management duties on straddling fish stock and highly migratory fish stock according to UNCLOS section 63 and 64, state should prescribe measures in Fishery Act to ensure that conservation and management measure are passed on the best scientific evidence available as such precautionary approach according to UNFSA article 6.

REFERENCES

Book

High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security. **Sustainable fisheries and aquaculture for food security and nutrition**. Rome. 2014.

Articles

Aon-Ura, Puangthong. B.E. 2554. "Port State measure to prevent, deter and eliminated Illegal, Unreported and Unregulated Fisheries." Naval War College.

ASEAN-SEAFDEC. "Fish for the People 2020: Adaptation to a Changing Environment." The seventeenth meeting of Fisheries Consultative Group of the ASEAN-SEAFDEC strategic Partnership (FCG/ASSP), on the occasion of the ASEAN-SEAFDEC Conference on sustainable fisheries for food security towards 2020.

Telesetsky, Anastasia. 2014. "Laundeering fish in the global undercurrents: illegal, unreported, and unregulated fishing and transnational organization crime" *Ecology Law Quarterly*: Westlaw// 41 ECGLO 939, 41 Ecology L.Q. 939.

Thesis

Sukitorn, Rapeeporn. B.E. 2554. "**Thailand's Implementation to ratify FAO Port state agreement.**" Thesis, Ramkhamheang University.

Thanpong, Siraprapa. B.E. 2556. "**Legal measure to control commercial fishery.**" Thesis, Thammasat University.

Electronic Media

Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations. 2011. *Overview - Convention and Related Agreements*. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations. Last modified August 8. Accessed August 8, 2015.

http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm.

Directorate-General for Maritime Affairs and Fisheries. 2009. *Handbook on the practical application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (The IUU Regulation)*. Directorate-General for Maritime Affairs and Fisheries, European Commission. Accessed August 8, 2015.

http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/handbook_original_en.pdf.

Joe Borg, *Challenges of globalisation: working together to strengthen global governance of the oceans*,

<http://itssdjournallunclos-lost.blogspot.com/2009/11/eu-has-long-relied-on-unclos-tribunal.html>. (last visited Jun. 12, 2015)

Rujivanarom, Pratch. 2015. *New laws 'too weak' to solve local fishery problems: NGOs*. *Nation*, May 14. Accessed August 8, 2015.

<http://www.nationmultimedia.com/national/New-laws-too-weak-to-solve-local-fishery-problems--30260036.html>.

Other Materials

Office of Agriculture Affairs, Ministry of Agriculture and Cooperatives, Thailand. *IUU Regulation and Thailand Fisheries*.

Chanrachkij, Isara, Saran Petpiroon, Pisanu Siripittrakool, and Nutcharat Wangdee. *Illegal Unreported and Unregulated Fishing: IUU Fishing*. Bangkok: SEAFDEC.

European Community. 2009. "The UN Fish Stocks Agreement (UNFSA) and Tuna RFMO Members." 2nd Joint Tuna RFMOs Meeting report, San Sebastian.

European Commission, Handbook on the practical application of Council Regulation (EC) No.1005/2008 of. *Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*. (Ref: Mare A4/PS D(2009) A/12880) September, 29, 2008.

Office of Agriculture Affairs, Ministry of Agriculture and Cooperatives, Thailand. *IUU Regulation and Thailand Fisheries*.

Royal Thai Embassy, Sing., *Thailand Becomes State Party to the United Nations Convention on the Law of the Sea (UNCLOS) 1982 and the Agreement Relating to the Implementation of Part XI of the Convention* (2011), http://www.thaiembassy.sg/press_media/news-highlights/thailand-becomes-state-party-to-the-united-nations-convention-on-the-law (last visited Jul. 31, 2015).

United Nations. 2014. **"Open-ended Informal Consultative Process on Oceans and the law of the sea, entitled: The role of seafood in global food security."** Advance and unedited reporting material on the topic of focus of the fifteenth meeting of the United Nations. March 14, 2014.

Written statement of Thailand, *Request for an advisory opinion submitted by sub-regional fisheries commission (SRFC) to the International Tribunal for the Law of the Sea*, (29 November 2013).

Law

United Nations. 1982. Convention on the Law of the Sea. December 10, 1982. United Nations Document A/Conf.61/122.

Kingdom of Thailand. B.E. 2558. Thailand Fishery Act. B.E.2558.

Kingdom of Thailand. B.E. 2558. Order of the Head of the National Council for Peace and Order, No. 10/2558.

Food and Agriculture Organization of the United Nations. International Agreement on Port State Measure to Prevent, Deter and Eliminated Illegal, Unreported and Unregulated Fishing. November 22, 2009.

TAX INCENTIVES ON WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT MANAGEMENT IN THAILAND*

Tinnapat Sumleeon**

ABSTRACT

The living standard of today's world has come a long way with technological developments whereby increasingly advanced technology trends to upgrade and change the out-of-date electronic devices to new and more comfortable electronic device to support daily life. It is increasing at an enormous amount of end-of-life electrical and electronic equipment (EEE) which eventually becomes electronic waste (e-waste)/ waste electronic and electrical equipment (WEEE). The enormous rate of WEEE stream that has been generated is fueled by the rapid economic growth and increase demand for EEE is becoming global crisis. Regarding to the environmental management plan, it objects to conserve and recover the resources and environmental quality. The main objectives are to conserve and recover the soil, forest and water resources and water pollution, air pollution, sound pollution and the current waste situation. However, pollution caused by the hazardous wastes has not yet been considered as an important matter. The reason is because Thailand does not have direct or specific legal measures and legislations to manage and control the WEEE and the existing legal measures on WEEE management are still not effective. Consequently, this poor management of WEEE has led to the danger of environmental and human health because the materials contained in the EEE consists of heavy metals such as lead, mercury, cadmium, Brominated Flame Retardants (BFRs), plastics, beryllium which are directly and indirectly affecting the environment and including short-term and long-term human health. Even though Thailand is now trying to announce legal measures in controlling the generating of WEEE at the present, these measures might probably be close to the standard of WEEE controlling and management but it is yet to be covered on how Thai government could be more assertive in conserving natural resources and preventing hazardous effects through reusing, recycling and disposal of WEEE by the current inefficient waste disposal.

In Thailand, the legal measures on WEEE management and other existing provisions may not be efficient enough to support the government in dealing with the WEEE stream problem presently due to the indirect legal provisions applicable. In addition, most of the relevant legal provisions on the matter which are being enforced could be considered as control and order strategy which in order to conserve the environment may require more action than the standard requirement. In conserving the environment, the government needs the individuals' participation by using tax incentives measures to persuade the individuals to join the environmental conservation campaign. Moreover, the government should provide proper legal measure to monitor and manage WEEE problem in WEEE life-cycle. Regarding to this, there are provisions stipulated in the Draft of Electrical Equipment Management and Electronic and Other

* The article is summarized and rearranged from the thesis "*Tax Incentives on Waste Electrical and Electronic Equipment Management in Thailand*", Master of Laws Program in Business Law (English Program), Faculty of Law, Thammasat University, 2014.

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Wastes Act B.E., which introduced by the Pollution Control Department, that would be a solution to tackle the WEEE problem.

Therefore, this thesis will go through international, foreign and domestic legal principles and regulations relating to the WEEE management and analyze the possibilities and enforceability of the relating principles in handling the problems, including method in solving and improving any relating legal principles to WEEE, especially on tax and economic measures for applying and providing incentives for electronic waste management process.

Keywords: Electronic Waste, Waste Electronic and Electrical Equipment, E-waste, WEEE, Incentives, Tax Incentives.

บทคัดย่อ

ด้วยสถานการณ์ของโลกในปัจจุบันได้พัฒนาไปอย่างรวดเร็ว เทคโนโลยีใหม่ๆ ที่ทันสมัยและได้รับการพัฒนาเพื่อตอบสนองความต้องการของผู้บริโภคที่ต้องการอุปกรณ์อิเล็กทรอนิกส์ที่ทันสมัยและสามารถอำนวยความสะดวกในการใช้ชีวิตประจำวัน เมื่อความต้องการของผู้บริโภคต่ออุปกรณ์อิเล็กทรอนิกส์มีมากขึ้น ผู้ผลิตก็เพิ่มปริมาณการผลิตมากขึ้นตามไปด้วย และเมื่อมีการผลิตที่มากขึ้นส่งผลให้การแข่งขันในตลาดอุปกรณ์อิเล็กทรอนิกส์มีมากขึ้นตามไปด้วย อย่างไรก็ตามความทันสมัยและความสะดวกสบายจากอุปกรณ์อิเล็กทรอนิกส์เหล่านี้ ไม่ได้นำมาซึ่งด้านดีเพียงอย่างเดียว เนื่องจากเมื่ออุปกรณ์อิเล็กทรอนิกส์เหล่านี้หมดอายุการใช้งานหรือไม่เป็นที่ต้องการของผู้ใช้ต่อไปก็จะถูกทิ้งและกลายเป็นสภาพเป็นซากผลิตภัณฑ์เครื่องใช้ไฟฟ้าหรือที่รู้จักกันในชื่อ “ขยะอิเล็กทรอนิกส์” ซึ่งก่อให้เกิดปัญหามลพิษไม่เพียงแต่เฉพาะในประเทศไทย แต่ขยะอิเล็กทรอนิกส์ดังกล่าว กลายเป็นปัญหาใหญ่ในสังคมโลกที่ซึ่งเป็นที่น่ากังวล และการแก้ไขปัญหาดังกล่าวเป็นเรื่องที่ทุกคนจะต้องให้ความร่วมมือไม่เพียงแต่ภาครัฐ แต่รวมไปถึงผู้ผลิตและผู้บริโภคด้วย

เนื่องจากซากผลิตภัณฑ์ฯ หรือขยะอิเล็กทรอนิกส์ มีอัตราเพิ่มขึ้นอย่างรวดเร็วเพราะปัจจุบัน การแข่งขันในตลาดอุปกรณ์อิเล็กทรอนิกส์มีอัตราการแข่งขันที่สูงมาก การออกแบบผลิตภัณฑ์ส่วนใหญ่จะมุ่งเน้นไปที่ความสวยงามและความทันสมัย แต่ไม่ได้คำนึงถึงความคงทนและความเป็นมิตรต่อสิ่งแวดล้อมเท่าที่ควร ดังนั้น อุปกรณ์อิเล็กทรอนิกส์เหล่านี้จึงมีอายุการใช้งานที่สั้น โดยเฉลี่ยประมาณสองปี และเมื่อหมดอายุการใช้งานก็กลายเป็นขยะอิเล็กทรอนิกส์ การกำจัดขยะอิเล็กทรอนิกส์ก็กระทำได้อย่างยากเนื่องจากอุปกรณ์อิเล็กทรอนิกส์ส่วนมากประกอบไปด้วยสารเคมีอันตรายที่ส่งผลกระทบต่อสิ่งแวดล้อมและสุขภาพของมนุษย์ ปัจจัยต่างๆ เหล่านี้ทำให้ทั่วโลกหันมาให้ความสำคัญกับการจัดการซากผลิตภัณฑ์ฯ หรือขยะอิเล็กทรอนิกส์อย่างครบวงจร โดยเริ่มตั้งแต่การวิเคราะห์ส่วนประกอบที่เป็นมิตรต่อสิ่งแวดล้อมไปจนถึงการนำกลับมาใช้ใหม่ การใช้ซ้ำ การแยกชิ้นส่วน และการกำจัดอย่างถูกวิธี ทั้งนี้รวมถึงการออกมาตรการต่างๆ เพื่อสนับสนุนและส่งเสริมการจัดการขยะอิเล็กทรอนิกส์อย่างครบวงจร

วิทยานิพนธ์ฉบับนี้จะนำเสนอสถานการณ์ปัญหา แนวคิดและวิธีการทางกฎหมายในการจัดการปัญหาการจัดการซากผลิตภัณฑ์ฯ หรือขยะอิเล็กทรอนิกส์ในต่างประเทศและในประเทศไทย

คำสำคัญ: ขยะอิเล็กทรอนิกส์, มาตรการส่งเสริม, การจัดการขยะอิเล็กทรอนิกส์

Introduction

The living standard of today's world has come a long way with technological developments whereby increasingly advanced technology trends to upgrade and change the out-of-date electronic devices to new and more comfortable electronic device to support daily life. It is increasing at an enormous amount of end-of-life electrical and electronic equipment (EEE) which eventually becomes electronic waste (e-waste)/ waste electronic and electrical equipment (WEEE). The alarmingly fast expansion rate of e-waste that has been generated is fueled by the rapid economic growth and increase demand for EEE or consumer electronic devices (CEDs) which emerging as a global crisis. Due to the hazardous effects and toxicity of e-waste, the problem has become a serious concern.¹

1. Definition of E-waste or Waste Electrical and Electronic Equipment

Electronic waste or e-waste is regulated under the 1989 Basel Convention. The Basel Convention was mainly established as a mechanism to restrict movement of hazardous wastes and to minimize the generation of hazardous substances contained in e-waste.² The definition of "e-waste" has been given by the Basel Action Network (BAN) which defines e-waste as "encompasses a board and growing range of electronic devices ranging from large household devices such as refrigerators, air conditioners, cell phones, personal stereos, and consumer electronics to computers which have been discarded by their users³".

However, the e-waste is officially called as Waste Electrical and Electronic Equipment or WEEE globally. The definition of "WEEE" is stipulated under the Directive 2012/19/EU Of The European Parliament and Of The Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) which means electrical or electronic equipment which is waste within the meaning of Article 3(1) of Directive 2008/98/EC, including all components, sub-assemblies and consumables which are part of the product at the time of discarding.⁴ In light of this study, the term "e-waste" shall be referred as "WEEE" synonymously.

In Thailand, the definition of WEEE is not clearly stated in any existing Thai legislations. However, the Draft of Waste Electrical and Electronic Equipment Management and Other Wastes Act B.E. ... ("the Draft") which was introduced by the Pollution Control Department stipulates the definitions of EEE⁵ and WEEE⁶ in the

¹ Saphore J.M., Nixon H., Ogunseitan O.A. and Shapiro A. A., (2009), *How much e-waste is there in US Basements and attics? Results from a national survey*, **Journal of Environmental Management**, 90.

² Zoeteman B. C. J. and Krikke H. R., (2010), *Handling WEEE waste flows, on the effectiveness of producer responsibility in a globalizing world*, **International Journal of Advanced Manufacturing Technology**, 47, pp 415-436

³ Puckett J., Westervelt S., Gutierrez R. and Takamiya T., (2005), *The digital dump. Exporting re-use and abuse to Africa*, **Report from the Basel Action Network**, Seattle.

⁴ Article 3 (e) of Directive 2012/19/EU Of The European Parliament And Of The Council Of 4 July 2012 on waste electrical and electronic equipment (WEEE).

⁵ The Draft of Waste Electrical and Electronic Equipment Management and Other Wastes Act B.E. ... Section 4 "*Electrical and Electronic Equipment means the product that needs electric current or magnetic field to work and if it is improperly managed when it becomes Waste Electrical and Electronic Equipment, it would cause negative effect to environmental and human health...*"

Section 4. The Draft is currently during processes of enacting the law. According to the Section 4 of the Draft, it stipulates the definition of EEE and WEEE which relate to the global terms. In regards to the definitions of EEE and WEEE, this will help the government to separate WEEE from solid waste and infectious waste for proper management of WEEE since it has to be especially conducted separately from other types of hazardous waste.

2. Problems of WEEE

Due to consumer's demands to have an ever comfortable and convenient daily life, the Information and Communication Technology (ICT) has generated the fast expansion rate of electronic and electrical equipment manufacturing, with advanced technology and application features⁷, fueled by the rapid economic growth and increasing consumer's demand which is causing the shorter lifespan of electronic and electrical products.⁸ The bloom of advanced and well-designed electronic and electrical equipment causes the upcoming WEEE stream which keeps dramatically increasing and is becoming the world crisis.

Moreover, the materials which are contained in EEE products mostly are considered as hazardous substances that may be harmful to the environment and human health if the disposal of WEEE is not conducted properly. Regards to the hazardous substances in EEE, EEE manufacturing has created in hazardous results such as cancer, severe hormonal disorders, respiratory problems, muscle weakness and also anatomical effect. In regard to Thailand's State of Pollution Report 2013 of Pollution Control Department, the report found that in 2013, the amount of 368,314 tons or 65.4 percentages of EEE were thrown away from households. WEEE was dumped by mixing with other solid wastes and most of the WEEE that is found in the household area was battery, cell phones, lubricant oil, mobile batteries, and fluorescents.⁹ Hence, the WEEE was dumped mixing up with other solid wastes. This behavior of the household sector caused the government to spend a high amount of government budget to separate WEEE from other wastes. Besides spending the budget in separation of wastes, the government has also spent a big amount of the budget in order to provide medication and treatment for citizens and restoring the environment. In this regard, we could understand that the problems and the costs spending in WEEE management are connected to the behavior of people and unprofessional management.

3. WEEE Management Methodology

Referring to the management of WEEE disposal, there are methodologies in handling WEEE such as sorting, separation, storage, collection, incineration, landfills and treatment through biological process, physical-Chemical process. Besides the methodologies of WEEE management, there is an approach to tackle the WEEE stream which is Economic Instruments. The Economic Instruments is a policy to address

⁶ The Draft of Waste Electrical and Electronic Equipment Management and Other Wastes Act B.E. ... Section 4 "*Waste Electrical and Electronic Equipment means Electrical and Electronic Equipment, inclusive any part of EEE that expired of lifetime using or abandoned or intended to be discarded by its owner*".

⁷ Ray A., (2008), *Waste Management in developing Asia, Can trade and cooperation help?* **The Journal of Environment & Development**, 17(1), pp 3-25

⁸ Widmer R., Oswald-Krapf H., Sinha-Khetriwal D., Schnellmann M., and Heiz Boni H., (2005), *Global perspectives on e-waste*, **Environmental Impact Assessment Review**, 25, pp 436-458

⁹ Udomsak Sinthipong. **Environmental Laws, 3rd edition**. (Bangkok: Winyuchon, 2013), p. 437-438

environmental taxes and charges to the production and consumption in WEEE stream reduction. It is an alternative method for the government to address taxes into EEE production and changing consumer's behavior in consumption.

Environmental taxation is a well-known method which generally being used in worldwide environmental management. The government could use the environmental tax to minimize the wide range of harm to environment, such as waste disposal, by addressing the taxes to the polluters. The environmental taxes shall leave individual sectors to freely analyze on their liabilities on paying taxes. An environmental tax generally should be levied as directly as possible on the pollutant or action causing the environmental damage. Using the tax to increase the market cost of the polluting activity helps to incentivize the full range of potential abatement options: cleaner production processes; end-of-pipe abatement (i.e., measures to capture and neutralize emissions before they enter the environment); adoption of existing products which cause less pollution; development of new, less-polluting products; and reducing output or consumption.¹⁰

4. International and Foreign Laws on WEEE Management

The United Nation Environmental Program (UNEP) is providing guidance to policy-makers in developing countries on development of indicators that measure progress towards more sustainable patterns of consumption and production.¹¹ According to the economic growth and development patterns, it ensures that environment needs the Sustainable of Consumption and Production (SCP) concern.¹²

SCP has been defined as "The Production and use of goods and services that respond to basic needs and bring a better quality of life, while minimizing the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so as not to jeopardize the ability to meet the needs of future generations."¹³ This shows that the world is concerned on the environmental crisis on using hazardous substances in production. And now the world needs to reduce or limit the use of hazardous substances which would become WEEE in the final stages of EEE life span.

In regards to the global requirement for SCP which is introduced by UNEP, the SCP requires a fundamental rethinking of the way societies produce, use and dispose of products. The resource-intensive consumption and production patterns of the developed countries cannot be replicated worldwide.¹⁴ The rethinking requires a combination of radical innovation in terms of efficiency and connectivity that, together, will result in the transformation required to ensure the maintenance of critical natural capital.¹⁵ In the context of growing population and increased consumption, particularly in the newly industrialized developing world, this declining natural capital stock will be insufficient to sustain current consumption and production patterns.¹⁶

Referring to the SCP, EU has adopted the SCP policy and has set up policies which aim to reduce environmental impact by planning long-term approaches. The purpose of setting up these policies is to turn in to a recycling society and to minimize

¹⁰ Organization for Economic Co-operation and Development. **Environmental Taxation A Guide for Policy Makers**

¹¹ United Nations Environmental Program (UNEP). *SCP Indicators for Developing Countries. A Guidance Framework*. Introduction. p. 2

¹² *Id.*

¹³ Noewegian Ministry of Environment, Oslo Symposium, 1994.

¹⁴ Marrakech Process. **Third International Expert Meeting (June 2007)**. *Background Paper 2: Key Issues of Sustainable Consumption and Production*.

¹⁵ United Nations Environmental Program (UNEP)

¹⁶ *Id.* at p.9

the WEEE stream. Regarding to the minimization of WEEE, the methods of reusing, recycling, recovering and its disposing, incinerating and landfills are methods of the policies under the management of individual sectors and those processes cost financial and environmental expenses.¹⁷ EU has two main legislations that considered as guideline for the WEEE management which are Directive 2011/65/EU (RoHS 2 - Restriction of Hazardous Substances) and Directive 2012/19/EU on Waste Electrical and Electronic Equipment (WEEE). Under the Directives, WEEE management systems must enable WEEE to be collected separately from other waste streams, and take-back schemes must enable consumers to return end-of-life electronics free of charge.¹⁸ The Directive sets compulsory targets for collection and recovery of WEEE, with a combined target for recycling and component reuse. It requires prioritization of reuse over recycling wherever possible, as reuse is up to twenty times more environmentally beneficial than recycling.¹⁹ The WEEE Directive makes producers financially responsible for the end-of-life management of their equipment. This is meant to encourage eco-design, where producers incorporate lifecycle thinking into product design by, for instance, reducing or eliminating toxic inputs, or increasing the product's ability to be reused and/or recycled.

Similarly, Japan, as the world best advanced technology developer, has become the leading country in WEEE stream reduction. In regards to WEEE management under the Japanese legislations, The WEEE management method in Japan is exercised by complying with the policy makers by requesting retailers to collect the EEE and postal networks for computers as of the kinds. The main purpose inspired by the idea that smaller item like cell phones, computer hardwares or small electronic devices are enable and easy to transport by postal networks. Moreover, the method provides convenient to those consumers by not going to the assigned WEEE drop-off location. This WEEE management method shows that the Japan regulations regarding to this study, at the same time, comply the both producer and consumer responsibilities to manage the environmental crisis in good conditions. Accordingly, the consumer shall bear the cost of recycling WEEE and the producer shall bear the cost of operation processes, including the recycling and collecting his own recycling products. Moreover, producer responsibility as mentioned shows that the model of take-back system is capable of distinguishing brands and properties of the electronic devices by using barcode system. The producer of each product can identify the quantity of his recycling products in the market and can monitor to collection method. The take-back method shall be considered as create incentives for eco-designs²⁰ because of extensive producer control on the recycling operations. Not only the take-back system can monitor the electronic devices status, but also can guarantees fair cost allocation among recycling producers. The product design could be influence to the recycling producers because the laws and regulations presently pay most attention on recycling method whereby the other method as reuse method shall not be promoted for privileges as the recycling does. Thus, the producers shall have to design the products to be fully recycled regarding to the recycling cost reduction.

¹⁷ European Commission. *Being wise with waste: the EU's approach to waste management*

¹⁸ Savage et al. 2006. *Implementation of the WEEE Directive in the EU*.

¹⁹ **Computer Aid International. Report 2: WEEE Ver. 2.0 - What Europe must do**

²⁰ Tojo, N. 2004. *Extended Producer Responsibility as a Driver for Design Change: Utopia or Reality? IIIIEE Dissertations 2004:2*, Lund University.

5. Thai Laws on WEEE Management

In Thailand, the legislations concerning on WEEE management may not be efficient enough to support the government in dealing with the WEEE stream currently. Even though Thailand has legislations such as Factory Act B.E. 2535, Public Health Act B.E. 2535, Hazardous Substances Act B.E. 2535 and Enhancement and Conservation of National Environmental Quality Act B.E. 2535, but the legislations are not directly governing to reduce the WEEE stream. Thus the legislations govern in broad range of pollution control which opposites of the Directives of EU and the Japanese legislations that aims to reduce the quantity of WEEE stream by addressing the policies of reusing, recycling and recovering WEEE. Referring to the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 that generally applies to industrial and infectious waste management through environmental planning and environmental quality standards and monitoring. However, the law does not emphasize on WEEE management but it aims to control and reduce pollution which would be applied when the pollution has been occurred. Nevertheless, the legislations are not efficiently enforced which it is found that when any damages arisen from hazardous substances or hazardous waste by producing, recycling, treatment, disposal and transportation, there is no legal measure to enforce the non-compliance to be fully liable for the damages. Despite the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 stipulates the strict liability to the person who allows the leakage or contamination of pollution that causes of death, bodily harm or health injury of other person or causes damage to the property of any person (private or the state) whether it is willfully or negligently conducted, the person shall be liable and has to compensate to the injured or damaged person all expenses including government service for the clean-up of the pollution²¹, but the environmental litigation is not easy for the injured or damaged person to prove that the cause has been arisen from such pollution leakage contamination.

However, the Pollution Control Department issued the Draft by concerning on managing the whole life-cycle of WEEE i.e. starting from environmental friendly design (eco-design which could extend the EEE lifetime, increasing durability and easy to separate its parts for reuse, recovery and recycle), take-back system, collection system and recycling process which would be considered as the prevention solution on WEEE management since the starting process. The extended producer responsibility (EPR) is also considered under the Draft provisions by assigning the producer responsibility for the cost of disposing electronic products and to produce the EEE as green product concerning on the method of recycle, reuse and recovery. The Draft also provides the provisions relating the WEEE management and the collection methodology which could help reduce the thrown away of EEE from individual sectors and prohibit the producer to deny its responsibility after producing the EEE.

Conclusion

In conclusion, the existing legal provisions in Thailand, the whole process of WEEE management in Thailand appears to have no direct legal provision in regards to WEEE management. The legal provisions being enforced shall be considered as indirect provision whereby the definition of WEEE has not yet been defined in any existing law. Since the definition has not yet been stipulated, it would be difficult for the responsible department of the government to exercise its managing plan of WEEE management. Furthermore, the conflict of duty is in doubt because of the many indirect provisions

²¹ The Enhancement and Conservation of National Environmental Quality Act B.E. 2535, Section 96

that are providing authority to the different departments. Moreover, the existing provisions are mostly in command and control strategy; therefore, the managing of WEEE could be difficult to reach the environmental conservation aspect. In contrary, if the government addresses the incentives measure, specifically the tax measure, from the manufacturing process up to the disposal or recycling processes, this could persuade not only the industrial sector, but also the household sector, to participate in environmental sound management. Moreover, in regards to the Draft of Waste Electrical and Electronic Equipment Management and Other Wastes Act B.E. ..., there is a provision stipulated on tax incentives²² which sounds effective enough to be applied. Moreover, Section 34 also provides the general scope of tax incentives which can be issued under the ministerial regulation later on. Therefore, it is necessary to enact the Draft to tackle the WEEE streams in Thailand.

²² The Draft of Waste Electrical and Electronic Equipment Management and Other Wastes Act B.E. ... Section 34

REFERENCES

BOOKS AND BOOK ARTICLES

ENGLISH BOOKS

- Irena Twadowska; Herbert E. Allen, Antonius A.A. Kettrup, William J. Lacy. ***Solid Waste: assessment, monitoring and remediation.***
- Ministry of Finance. ***Information handbook on taxation in Thailand.*** Bangkok : Thammasat University Press, 1980.
- Brookings Conference on the Effects of Tax Policy on Investment, Brookings Institution, 1967. ***Tax incentives and capital spending; papers. Gary Fromm, editor.*** Washington, Brookings Institution, 1971.
- Ishi, Hiromitsu. ***The Japanese tax system.*** 2nd ed. Oxford : Clarendon Press, 1993
- Lent, George E. ***International monetary fund; fiscal affairs department; a survey of Thailand's tax structure.*** n.p., 1970.
- Suvarn Valaisathien. ***The Thai taxation.*** n.p., (1975?)
- Hayashi, Taizo. ***Guide to Japanese taxes 1970-1.*** Tokyo, Zaikei Shoho Sha, 1970.
- Somchai Richupan. ***Integration of tax planning in development planning; the case of Thailand.*** n.p., 1982.

THAI BOOKS

- อุดมศักดิ์ สินธิพงษ์. ***กฎหมายว่าด้วยความเสียหายสิ่งแวดล้อม ความรับผิดชอบทางแพ่ง การชดเชยเยียวยา และการระงับข้อพิพาท.*** พิมพ์ครั้งที่ 1. กรุงเทพมหานคร: สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย, 2554. (Udomsak Sinthipong. ***Legal Provision on Environmental Damage, Civil Liability, Compensation and Dispute Resolution.*** 1st ed. Bangkok: Chulalongkorn University, 2011.)
- สมคิด บางโม. ***ภาษีอากรธุรกิจ = Business taxation.*** ฉบับพิมพ์ที่ 13. กรุงเทพฯ: บริษัท วิทย์พัฒน์ จำกัด, 2551. (Somkit Bangmo. ***Business taxation.*** 13th ed. Bangkok: Vityapat Co., Ltd., 1998.)

ARTICLES

- Electronics Takeback Coalition. "E-WASTE: The Exploding Global Electronic Waste Crisis," ***An Issue Briefing Book.***
- Saphore J.M., Nixon H., Ogunseitun O.A. and Shapiro A. A., (2009), *How much e-waste is there in US Basements and attics? Results from a national survey,* ***Journal of Environmental Management***, 90, PP 3322-3332
- Sthiannopkao S. and Wong M. H., (2012), *Handling e-waste in developed and developed countries, Initiatives, Practices, and Consequences,* ***Science of the Total Environment.***
- Robinson B. H., (2009), *E-waste, An assessment of global production and environmental impacts,* ***Science of the Total Environment***, pp 183-191
- Osibanjo O. and Nnorom I. C., (2007), *The challenge of electronic waste (e-waste) management in developing countries,* ***Waste Management and Research***, 25, pp489-501
- Widmer R., Oswald-Krapf H., Sinha-Khetriwal D., Schnellmann M, and Heiz Boni H., (2005), *Global perspectives on e-waste,* ***Environmental Impact Assessment Review***, 25, pp 436-458

- Ray A., (2008), *Waste Management in developing Asia, Can trade and cooperation help?* **The Journal of Environment & Development**, 17(1), pp 3-25
- Pollution Control Department, **Thailand State of Pollution Report 2013**, (Bangkok: Pollution Control Department, 2015) P.2-9
- Zoeteman B. C. J. and Krikke H. R., (2010), *Handling WEEE waste flows, on the effectiveness of producer responsibility in a globalizing world*, **International Journal of Advanced Manufacturing Technology**, 47, pp 415-436
- Pollution Control Department, Ministry of Science, Technology and Environment, **Manual of Transportation, Movement and Disposal of Hazardous Waste**, (Bangkok: Pollution Control Department, 2000), P.2
- A joint project, Californians Against Waste Foundation, *Toxic TVs and Poison PCs: California's biggest environmental crisis that you've never heard of*, p.10 and infohouse.p2ric.org/ref/30/29310.pdf.
- Marco Martuzzi and Joel A. Tickner. *The precautionary principle: protecting public health, the environment and the future of our children*
- Organization for Economic Co-operation and Development. *Environmental Taxation. A Guide for Policy Makers*
- European Commission. **Being wise with waste: the EU's approach to waste management**
- Savage 2006. Implementation of the WEEE Directive in the EU. **Computer Aid International. Report 2: WEEE Ver. 2.0 - What Europe must do**
- Tojo, N. 2004. *Extended Producer Responsibility as a Driver for Design Change: Utopia or Reality?* **IIIEE Dissertations 2004:2**, Lund University.
- Tojo, N. 2006. *EPR Program for Electrical and Electronic Equipment in Japan: Brand Separation?* **INSEAD WEEE Directive Series Presentation**.

THESES

- รติกร แสงสวัสดิ์. “มาตรการทางกฎหมายในการควบคุมขยะอิเล็กทรอนิกส์จากโทรศัพท์มือถือและแบตเตอรี่.” วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2551. (Ratikorn Sawangsawat. “Legal measures for the control of electronic wastes of mobile-phones and batteries.” Master’s thesis, Thammasat University, Law, 2008.)
- ภาณุศ อภิบาลเกียรติกุล. “มาตรการทางภาษีเพื่อส่งเสริมวิสาหกิจขนาดกลางและขนาดย่อม : ศึกษาเปรียบเทียบประเทศไทยกับประเทศออสเตรเลีย.” วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 2554. (Panu Apibankrietikul. “Tax incentives for small and medium enterprises : a comparative study between Thailand and Australia.” Master’s thesis, Thammasat University, Law, 2011.)
- วชิรศาสน์ ชเลิศเพ็ชร. “มาตรการทางภาษีสำหรับการประกอบธุรกิจเงินร่วมลงทุน (venture capital) ภาคเอกชนในประเทศไทย : ศึกษาเปรียบเทียบกับประเทศออสเตรเลีย.” วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2553. (Wachirasarn Chalertpetch. “Tax measures for private venture capital investments in Thailand: a comparative study with Australia.” Master’s thesis, Thammasat University, Law, 2010.)
- สุทัศน์ ทองสถิตย์. “การใช้มาตรการทางภาษีและกฎหมายในการจัดการปัญหาสิ่งแวดล้อม : ศึกษาเฉพาะกรณีแบตเตอรี่และของเสียอันตราย.” วิทยานิพนธ์ปริญญา

มหำบัณฑิต, คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 2549. (Suthat Thongsathit. “Tax and legal measures on environmental management : battery and hazardous waste case.” Master’s thesis, Thammasat University, Law, 2006.)

วิลาลินี อินทรพรอุดม. “มาตรการทางกฎหมายในการจัดการของเสียอันตรายจากผลิตภัณฑ์ไฟฟ้าและอิเล็กทรอนิกส์” วิทยานิพนธ์ปริญญาโทมหาบัณฑิต, คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 2549. (Vilasinee Intraporn-udom. “Legal measures dealing with harmful wastes of electrical and appliances.” Master’s thesis, Thammasat University, Law, 2006)

Electronic Media

HG.org.Legal Resources, <<http://www.hg.org/tax.html>>

<http://www.tungsong.com/modify-lifetsgcity/garbage_n/garbage_06.html>

EMPA Materials Science & Technology,

<http://www.empa.ch/plugin/template/empa/2/*/--/l=2>

<<http://www.intox.org/databank/documents/chemical/mercury/cie322.html>>

<<http://www.intox.org/databank/documents/chemical/lead/ukpid25.html>>

<<http://www.hc-sc.gc.ca/english/iyh/environment/lead.html>>

<<http://www.deh.gov.au/industry/chemicals/dioxins/pubs/incinfinal.pdf>>

<<http://www.intox.org/databank/documents/chemical/chromium/ehc61.htm>>

<<http://www.c-f-c.com/supportdocs/cfcs.htm>>

<<http://www.intox.org/databank/documents/chemical/cadmium/ehc135.htm>>

E-waste guide, <<http://ewasteguide.info/hazardous-substances>>

<<http://dictionary.cambridge.org/dictionary/business-english/e-waste>>

<<http://oxforddictionaries.com/definition/e-waste>>

<http://www.macmillandictionary.com/buzzword/entries/e-waste.html>.

THE AMBIGUITY OF THE TERM “TRADE SECRET” UNDER TRADE SECRET ACT B.E.2545*

*Treewarat Rathviboon***

ABSTRACT

Considering the claims for damages from the acquisition of trade secrets by unlawful acts, the data or idea has been classified as a trade secret will be considered first and what the defendant does will be the second. The law provides protection and prohibition on the disclosure of confidential information of the industry. Although such confidential information is not patentable, however the protection of trade secrets is still giving protection to the owner.

The majority of legal opinions classify the intellectual property as one criteria of property. It is the primary basis for determining remedies. For example, to consider a trade secret in the case of employment: the trade secrets of business and other information are considered as the property of the employer, the employee cannot use such information in conflict of interest with employers. It is important to protect the trade secret by not disclosing it without consent from its owner. When it comes to the court that whether the non-technical information is concerned as trade secret or not, such issue may cause the problem to the owner of the trade secret because the term trade secret under section 3 of the Trade Secret Act B.E. 2545 does not state the various kinds of trade secret as those in the US law, the Restatement (Third) of Unfair Competition 1995 and the Uniform Trade Secret Act 1985.

This study will conduct a comparative study on the definition of the term “trade secret” in order to protect the owner of the trade secret through the documentary research method, using texts and documents as source materials; for example, international and domestic related laws, journals, periodicals, articles, information through the internet and other relevant documents. The obtained information will be applied and analyzed in order to obtain appropriate and practicable solutions to the problem. The United States laws will be analyzed: the Restatement (third) of Unfair Competition 1995 and the Uniform Trade Secret Act 1985. The thesis is to propose the protection of trade secrets that can truly happen in practice and to propose ways to determine the details, including the scope of the law.

KEYWORDS: term trade secret, trade secret act, infringement of trade secret

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บทคัดย่อ

ในการเรียกค่าเสียหายจากการได้รับข้อมูลความลับทางการค้ามาโดยวิธีการที่เป็นการละเมิดด้วยกฎหมายนั้น ข้อสนเทศหรือความคิดที่ถูกจัดให้เป็นความลับทางการค้านั้น จะถูกนำมาพิจารณาเป็นลำดับแรก และการกระทำของจำเลยจะถูกนำมาพิจารณาเป็นลำดับถัดไป กฎหมายได้ให้ความคุ้มครองและห้ามการเปิดเผยข้อสนเทศที่เป็นความลับของบริษัท ถึงแม้ว่าเทคโนโลยีนั้นจะไม่ได้ได้รับการป้องกันในแง่ของสิทธิบัตร แต่กฎหมายความลับทางการค้าก็ยังสามารถให้ความคุ้มครองแก่เจ้าของข้อมูลได้

ความเห็นทางกฎหมายโดยส่วนใหญ่ เห็นด้วยกับการจัดให้ทรัพย์สินทางปัญญาให้เป็นหนึ่งในประเภทของทรัพย์สิน ซึ่งเป็นพื้นฐานของการเยียวยาความเสียหาย ตัวอย่างเช่น ในการพิจารณาปัญหาความลับทางการค้าในกรณีของการจ้างงานนั้น ความลับทางการค้าถูกมองว่าเป็นทรัพย์สินของนายจ้าง ลูกจ้างจึงไม่อาจใช้ข้อสนเทศอันเป็นความลับนั้นในทางที่ขัดต่อประโยชน์ของนายจ้าง สิ่งสำคัญของความลับทางการค้าคือ ต้องไม่ถูกเปิดเผยโดยที่ไม่ได้รับความยินยอมจากเจ้าของข้อสนเทศนั้น เมื่อเกิดเป็นคดีความที่มีประเด็นในคดีเกี่ยวกับความลับทางการค้า ประเด็นปัญหาว่าข้อมูลที่ไม่เป็นเทคนิคเฉพาะนั้นเป็นความลับทางการค้าหรือไม่นั้น ประเด็นปัญหานี้จะทำให้เกิดข้อหนักใจแก่เจ้าของความลับทางการค้านั้นไม่น้อย เพราะมาตรา 3 ของพระราชบัญญัติความลับทางการค้า พ.ศ.2545 ไม่ได้ครอบคลุมความลับทางการค้าที่มีหลากหลายประเภทดังเช่นกฎหมายของประเทศสหรัฐอเมริกา ดังเช่นคือ the Restatement of Torts 1939 และ the Restatement (third) of Unfair Competition 1995 รวมถึง the Uniform Trade Secret Act 1985 ศาลจึงเพียงวินิจฉัยได้เพียงเท่าที่กฎหมายกำหนด

วิทยานิพนธ์ฉบับนี้ได้ทำการศึกษาเปรียบเทียบค่านิยมความลับทางการค้า เพื่อป้องกันสิทธิของเจ้าของความลับทางการค้าโดยมีการศึกษาจากข้อมูลเอกสารต่างๆที่เกี่ยวข้องเช่นข้อกฎหมายภายในประเทศและข้อกฎหมายต่างประเทศ ซึ่งข้อมูลเหล่านี้จะถูกนำมาศึกษาเพื่อหาแนวทางในการแก้ปัญหาที่เกิดขึ้น กฎหมายของประเทศสหรัฐอเมริกา คือ the Restatement of Torts 1939 และ the Restatement (third) of Unfair Competition 1995 รวมถึง the Uniform Trade Secret Act 1985 ถูกนำมาศึกษาเปรียบเทียบกับพระราชบัญญัติความลับทางการค้าของไทย วิทยานิพนธ์ฉบับนี้มีความมุ่งหวังเพื่อให้เกิดการป้องกันความลับทางการค้าในทางปฏิบัติได้จริง

คำสำคัญ: นิยามความลับทางการค้า, พระราชบัญญัติความลับทางการค้า, การกระทำที่เป็นการละเมิดความลับทางการค้า

Introduction

In virtually every part of business, possessing highly valuable trade secrets and the results of trading can be seen, for instance, a list of important clients, sales techniques, or production techniques, production process, marketing secrets, know-how, and marketing plans. They are valuable as a business's tools and also regarded as valuable potential economic information and generate income for the business owner. The nature of a trade secret is the virtue of not disclosing the information of others, which needs to be protected. A trade secret is information that a business wants to keep secret because releasing the information could harm the business and give its

competitors a tremendous advantage. Using information without consent from the owner of the information is regarded as an unlawful act and also a violation of trade secrets of others. Although the governing law on trade secret protection in various countries may be different in some areas. However, they still follow the guidelines of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is stated in Article 39.

Simply calling something a trade secret is not enough. In order for the information to be considered a trade secret, it must meet the basic requirements; it must (a) be non-public (not known to your competitors); (b) have actual or potential commercial value; and (c) be safeguarded by confidentiality measures including clauses in employee contracts and non-disclosure agreements. These three elements are essential for a business to protect its trade secrets.¹ In Thai jurisprudence, the court directly interprets the term trade secret from the context, which can be the gaps for the vulnerability of trade secret protection and the true owner of the trade secret, a case example is Supreme Court decision 10217/2553.

1. Nature of Trade Secret and the Establishment of an Enforceable Trade Secret Right

The purpose of the trade protection is to protect the nature of the trade secret, its potential economic value and its owner. The eligible information regarding trade secrets contains the following matters:

(1) Such information must not be known or ascertainable by anyone besides the owner or anyone whom the owner involves. It is not easily ascertainable by those typically working on the same kind of information. The concerning information does not need to be highly exclusive data or newly developed data, but those who work in the business realize that such information is classified as confidential.

(2) Such information has potential value, which can give the owner advantage over those who do not control or have this kind of confidential information. It generally takes a large amount of money to create the information or the information is derived from brainstorming or ideas of an expert who works in the business. The business could gain decisive benefits from the usage of such information.

(3) Such information must be protected by the business. Highly cautious measures must be given in order to protect the leak of such confidential information. To maintain the confidentiality of the information is one of the concerning matters. This issue is relevant to the previous one regarding financial value because if such information contains potential economic value, then the owner must take appropriate measures. Not all of the employees of the business can reach such information, but only those who are authorized or have consented; however, while those who have privilege or authority and responsibility may obtain and control such kind of information without ruining its nature, the information is still regarded as a trade secret and a protectable

¹ The European Commission, “**Guide on trade secrets. Protecting your trade secrets in Southeast Asia**”, last accessed on June 22nd, 2015, <http://www.southeastasia-iphelpdesk.eu/sites/default/files/publications/Trade-Secret-English.pdf>.

one. The realization of the enforceable protection on a trade secret is the responsibility of the owner of such kind of confidential information. The owner must be able to prove that such information still existed at the time the alleged infringement occurred and that they were using all possible precautions to maintain the secrecy. The rationale is if there is easily access and such information can be opened or anyone can obtain, its nature is ruined. When it comes to trial, the burden of proof will be on the owner of the trade secret it has to be clarified that he has been using the proper measures in order to protect his business' trade secret. There are several factors to be determined on whether such information is regarded as certain confidential information, as follows:

- (1) Is the information known outside of the business of the trade secret owner?
- (2) How much of the information made known to employees and others involved in the business of the owner of the alleged trade secret?
- (3) What specific steps have been taken by the owner of the trade secret to guard the confidentiality of the information, and to restrict its access to others, including employees who are not involved in the use of the confidential information?
- (4) What is the value of the alleged confidential information to the trade secret owner and to his competition?
- (5) How much in terms of resources and effort has the owner of the alleged trade secret spent in protecting the confidential information?
- (6) How easily is the information acquired, duplicated or reverse engineered by others, such as competitors?"²

2. Convention and Agreement in the Field of Trade Secret Protection

Controlling of trade secrets violation, the Agreement on international cooperation began in the late 1970s, nations began to realize the importance of a counterfeit trademark. In the United States, such issue has gained much attention since 1979.

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The United States and the European Community had reached agreement on a draft "Agreement on Measures to Discourage the Importation of Counterfeit Goods"⁴, between 1980 and 1982. In formal meetings with a number of industrialized countries resulted in a revised draft Anti-counterfeiting Code.⁵ Between 1982 and 1986, the preparation of The General Agreement on Tariffs and Trade (GATT) identified issues that might be relevant to the US Round, concerning the right of intellectual property. The GATT forum was to seek enforcement of intellectual property rights. Subsequent negotiations led by the Ambassador of Switzerland and Colombia, to seek a compromise between the views of the opponents in the jurisdiction of the GATT in these matters. Thus, they produced a proposal that was served as the basis for the declaration of Ministers September 20th, 1986 and was launched as the Uruguay Round.

² Howard B. Rockman, **Intellectual Property Law for Engineers and Scientists**, (United States of America : A John Wiley & Sons, Inc., Publication, 2004), P.435

³ Alfredo Ilardi and Michael Blakeney, "Conventions and Agreements on Intellectual Property", **International Encyclopedia of Intellectual Property Treaties**, P.166

⁴ *Id.* at p.166

⁵ *Id.* at p.166

3. The protection of a trade secret under the US law

To prevent the abuse of trade secrets, the prevention and protection have been launched in the common law legal system for decades. The law of trade secrets has been customized by the debates over the pros and cons including the remedies when a case is brought before the court. In the United States, as major sources of legislation, the following legal provisions are being used to give the legal protection on trade secrets : the Restatement of Torts 1939, the Uniform Trade Secrets Act 1985, and the Restatement (Third) of Unfair Competition 1995. The secrecy information of the master's business which can be called trade secrets, it is the valuable information. It is stated that such information must be identified and treated as confidential. The Uniform Trade Secret Acts has prescribed the meaning for Trade Secret as follows:

“Trade Secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use, and

(ii) Is the subject of efforts that reasonable under the circumstances to maintain its secrecy⁶”

Anything contains value seems to be protected by the aforementioned provision. Considering the fact of its economic value, it means the economic value is the information without the need of other factors to reinforce the value itself. The second concerning is that such secrecy information is not readily ascertainable. For instance, the secret technique of a machine, the secret method of how the thousands tons of goods have been produced per day or how the machine works better than the competitors' machines. The point is the master of that business who owns the efficient machine has been keeping all the techniques, know-how, and other secrecy data with precaution. Others cannot access on such secrecy information. If the competitors know the secrecy information, they may derive the huge benefits from it without having to use any efforts in making their own.

3.1 The Restatement (third) of unfair competition 1995

The United States have made a third amending on the law concerned unfair competition issues. The third Restatement has been making the supplementary on the judiciary more than the Uniform of Trade Secret Act. The internal law of the States are raised and compared with Section 757 of the Restatement of Torts. According to the Restatement (third) of unfair competition, the law has provided the appropriation of trade secret in chapter 4 topic 2 consisted of section 39-45. Except as otherwise noted, the principles of trade secret law described in this Restatement are applicable to actions under the Uniform Trade Secrets Act as well as to actions at common law.⁷ The Third Restatement obviously discards the limitations from the Second Amendment. The Third Restatement is giving the term “trade secret” in the section 39. The section 39 of the restatement has been prescribing the definition of Trade Secret as follows:

⁶The Uniform Trade Secrets Act. Section 1(4) .

⁷World Intellectual Property Organization (WIPO), “United States of America Restatement (third) of Unfair Competition, Chapter 4, Appropriation of Trade Values, Topic2. Trade Secrets (section 39-40)”, (last accessed on June17th,2015), www.wipo.int/wipolex/text.jsp?file_id=194019#LinkTarget_471, p.2

*“Section 39 Definition of Trade Secret: A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficient valuable and secret to afford an actual or potential economic advantage over others.”*⁸

The concept of this section is consistent with the term of trade secret which is described in the Uniform Trade Secret Act section 1(4). However this section is applicable only for civil liability under the rule stated in section 40 of the Restatement (third) of unfair competition. It does not apply in the area of the protection of trade secrets from disclosure under the Freedom of Information Act of the United States. This section reflects the subject matters of trade secret. For instances: a formula, pattern, compilation of data, computer program, device, method, technique, process, other form or embodiment of economically valuable information⁹ also it includes technical matters, non-technical matters, know-how, any methods or process of manufacture. Contrary to the trade secret term adopted in the Uniform Trade Secret Act 1985 (UTSA). It does not specify the duration of economic value. The claims of trade secret is the owner's burden of proof in the case of technical data, specifications of the product, process, or form,

The law does not specify that all information must be contained in a tangible forms but the key issue is to see if the information is also favorable to the benefit only to the defendant. The Court will require the owner, who claims for the damages, to identify more details and information. In some case, the plaintiff's claim is also related to the information that requires expertise's skill which the ex-employees gained from his master's business. The specified term of trade secret information in the mutual agreement between the employer and employee is not regarded as a necessarily factor which can designate the eligible protection of the secrecy information under this section.

3.2 The Uniform Trade Secret Act 1985

The Restatement of Tort 1939 had influenced the formulation of trade secret protection of the US, its influential can be seen in The Uniform Trade Secret Act 1985. It is created to fill the gap which occurred from the Restatement (Second) that had already been removed. Concerning the important of the nature of trade secrets, the issues of the trade secret were brought in the National Conference with the purpose for the creation of the Uniform Trade Secret Act 1985. Under the Uniform Trade Secrets Act 1985, the law follows the provisions of the TRIPS agreement. The term “trade secret” that the Uniform Trade Secrets Act (UTSA) has given is consistent with the given terms on the TRIPS, Article 39.

The uniform trade secrets act (UTSA) provides the protection of trade secrets and ruled out the first template in 1979 and the launched a second revision in 1985. In 1979, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Trade Secrets Act 1979. The Prefatory Note states that the "Uniform Act codifies the basic principles of common law trade secret protection." The original Act or its 1985 revision has been adopted in a majority of the states, except as otherwise noted on prefatory of the law. The annual conference took place in Minnesota on August 2-5, 1985. The conference's agenda was to improve the legislation.

⁸The Restatement (Third) of Unfair Competition 1985, section 39.

⁹*Supra Note.* at p.4

4. Trade Secret under Thai law

The governing law on the term trade secret under Thai law has been following the TRIPS Agreement Article 39. The written meaning is also consistent with the section 1(4) of the Uniform Trade Secret Act 1985. The law has been obtaining the equitable rule through the legislation regarding the Article 39 of the TRISP Agreement. Even though the laws from the different legal systems purport to apply the cases accordingly with Article 39 but there are differences.

4.1 The definition of Trade Secret under the Trade Secret Act. B.E 2545

The Trade Secret Act B.E 2545 states the term trade secret as: “*Section 3 “Trade Secrets” means trade information not yet publicly known or not yet accessible by persons who are normally connected with the information. The commercial values of which derive from its secrecy and that the controller of the trade secrets has taken appropriate measures to maintain the secrecy.*”

The term trade secret under the Trade Secret Act is similar to those in the US laws, they are only different on some perspectives. The definition under the Trade Secret Act does not state term “reasonable under circumstances” as the section 1(4) and the stated term “information that can be used in the operation of a business” as stated in the Restatement (Third) of Unfair Competition 1995.

The term trade secret under the Trade Secret Act B.E.2545 contains three perspectives which are: the information is not readily ascertainable and not normally reached by those typically work in the related areas with such information, such information contains the potential economic value, the owner has to take eligible precaution on the trade secret.

When it comes to the court that whether the non-technical information is concerned as trade secret or not, such issue may cause the problem to the owner of the trade secret because the term trade secret under section 3 of the Trade Secret Act B.E.2545 does not state the various kinds of trade secret as those in the US laws. The court may consider the term trade secret literally as the legal components stated in section 3.

4.2 Analysis of legal problems

According to the Supreme Court Decision 10217/2553, this study has found that there is the ambiguity of the term trade secret under Thai law. The court ruled that providing customer lists and customer premises could not be concerned as a trade secret. The court analyzed in a fair interpretation from the context but if looking in terms of competitive advantage, using the same list of clients list, can be said that they have the exact same markets. The customer list contains what exactly the customers' needs and contains details which might take times and money to gather all of such information. The rationale of the court is regarded the excessive monopoly for plaintiff. The court held that the customer list in this case does not provide things concerning trade secrets. The Court considered the ineligible precaution of the trade secret by the owner in order to consider the term trade secret.

In the case of the Heat & Combustion Co., Ltd. V. Somsak Sukkasem, The Supreme Court Decision 10217/2553 as follows;

(a) Facts: the plaintiffs are the limited company, and the limited partnership represented by Mr. Wisit Jiragulwiwattat as an authority on behalf of plaintiffs. The plaintiffs are the first dealership of G Crompton Schroeder Ratingen (Germany). At time the issue erupted, the defendants were the employees of the plaintiffs as salesmen accordingly with the job applications and the employment contracts. The plaintiffs alleged that the defendants infringe their trade secret, the customer list. The plaintiffs

claim for 5,000,000 baht with interest rate of 7.5 percent per year from the filing date until completed of a payment to the plaintiff and also claim for the prohibition of the abuses by the defendants. The plaintiffs ask for the injunction relief by the court. The plaintiffs alleged that the defendants know about those trade secrets because of the knowledge that they obtained while working with the plaintiffs.

The plaintiffs alleged that defendants signed the employment contracts with the plaintiffs. The plaintiffs alleged that the defendants knew that there was the obligation accordingly with the rule of its company. All of the information that used in the operation of business must be maintained as confidentiality. All the employees were not allowed to disclose or reveal the information to the outsiders otherwise, they would be punished. The plaintiffs had asserted its customer list as the main evidence of the case. The plaintiffs asserted that the customer list was infringed and caused the damages to the business. The plaintiff appealed that the quotation document number 12 which purposed sale to the CIMB Engineering (Thailand) Co.Ltd. is a trade secret of the plaintiffs.

The Court ruled that the plaintiffs' indictment doesn't bring up any statements mentioned the quotation document number 12. Thus, the Court could not consider whether the quotation document is concerned as trade secret or not. The Court ruled that if concerning the customer list as a trade secret as the plaintiff alleged, it shall contrary to the purpose of law. The Court also considered that the employment contract is not counting as the eligible precaution of the secrecy information of the business. The plaintiffs' effort in order to protect his trade secret is not enough. Thus, such information is not a trade secret.

With respect of the Supreme Court decision, It can be said that accordance with the nature of trade secret information of the customer list. The customer list does not contain only customers' telephone numbers as a phonebook, but the list also provides the information which could tell what exactly customers want or what the customers really need or even when they need. The customer list can be characterized as a market tool for the business. And such nature of the list, it does have economic value per se. In this case, the alleged issue was also defeated by technical reasons under the provision of the Civil Procedure Code. The court said that the plaintiff did not take adequate measures to maintain confidentiality. This is just one perspective, compared to the court ruling of the United States Court decisions. In order to consider the issue "whether the customer list is protectable as a trade secret or not" to make a term trade secret clear, the various kinds of trade secret should be specified or giving more options for the court to consider the term trade secret as those in the US laws, the section 39 of the Restatement (Third) of Unfair Competition 1995 and the section 1(4) the Uniform Trade Secret Act 1985. In order to give more choices to the court and really give the remedies to the owner of the trade secret when the surrounding circumstances reflect that there might be the dishonest mean by the defendant. The section 1(4) of the Uniform Trade Secret Act states that ".is subject of efforts that are reasonable under the circumstances to maintain its secrecy." In the aforementioned case of the Supreme Court decision 10217/2553. It is hard for the owner of a trade secret, the customer list, to maintain its secrecy because those two defendants' job description is dealing with the owner's trade secrets. As the plaintiffs alleged, there are rules and those stated terms in the contract of employment that all the workers in the plaintiffs' business cannot disclose any information otherwise they would be punished. Considering with the nature of the defendants' job descriptions and the nature of the trade secret, the customer lists, under these circumstances these could be that the plaintiff is having the reasonable efforts under the circumstances to maintain the secrecy of the customer list.

Conclusions and Recommendations

When it comes to the court that whether the non-technical information is concerned as trade secret or not, such issue may cause the problem to the owner of the trade secret. The term trade secret under section 3 of the Trade Secret Act B.E.2545 does not state the various kinds of trade secret as those in the US laws. Since the section 3 does not state the terms “reasonable under circumstances” as the section 1(4) of in the Uniform Trade Secret Act 1985 and the stated term “information that can be used in the operation of a business” as the Restatement (Third) of Unfair Competition 1995, the burden of proof falls into the plaintiff’s side. The term trade secret under Thai law has followed the TRIPS Agreement Article 39. The equitable rule is already applied in the Article 39. Thus, the term trade secret under the Trade Secret Act B.E.2545 is obtaining the equitable rule as those governing laws of the United States.

In the Supreme Court decision 10217/2553 the surrounding circumstances show that the defendant are reasonable to know that the customer list belongs to the plaintiffs and also it could be a significant operation of the plaintiffs’ business, as they are having an employment contract with the plaintiffs. The plaintiffs and the defendants are having the relationship by the employment contracts, the employment contracts should be the reflection between the parties more than the precaution measures. Under the surrounding circumstances, as the defendants’ job descriptions are dealing with the trade secret as they’re salesman, the rules of the business and the statement which stated in the employment contract has shown the subject of efforts that are reasonable in order to maintain its secrecy. The nature of trade secret, the potential economic value of the customer list as the tool of the business that used in the operation of a business, is not really considered under the Supreme Court Decision 10217/2553. The nature of the information which is contained in the list is not just a phonebook. The owner of such customer list has to take times and money in order to acquire those information. The owner of trade secrets should be protected more on their efforts and their significant business information.

In order to decrease the ambiguity of the term trade secret with the concerning of the nature of the trade secret, there are some statements which may need to be inserted. The study of the other jurisprudence, the US jurisprudence reflects the effectiveness of the law on the protection of a trade secret. Concerning precaution measures of the plaintiff with the surrounding circumstances, the plaintiffs should be subjected for the protection. The section 1(4) ii of the Uniform Trade Secret Act 1985 and the statement contained in the section 39 of the Restatement (Third) of Unfair Competition 1995 are the concerning provisions which the author would recommend, they can be assisted with the protection of the nature of the trade secret and its owner. The statement says “..any information that can be used in the operation of a business ..”under section 39 of the Restatement (third) of Unfair Competition 1995 and the statements says “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy” of the Uniform Trade Secret Act 1985 can decrease the ambiguity of the term trade secret when it comes to court. Those two statements under the section 39 covers various kinds of information and the section 1(4) ii could help when the surrounding circumstances show that the defendants’ job descriptions have to deal with the trade secret and it is impossible for the plaintiffs to refrain all information from those employees who have to work with such trade secret.

REFERENCES

1. Books and Book Articles

- Allison Coleman, **The Legal Protection of Trade Secrets**. Sweet & Maxwell, 1992
- Catherine Colston, **Principle of Intellectual Property Law**. Cavendish Publishing Limited, 1999
- Catherine Colston and Kirsty Middleton, **Modern Intellectual Property Law**. Cavendish Publishing Limited, 2005
- Deborah E. Bouchoux, **Protecting Your Company's Intellectual Property**. Amacom, 2001
- Howard C. Anawalt and Elizabeth Enayati Powers, **IP Strategy Complete Intellectual Property Planning Access and Protection 2000 Edition**. West Group, 2000
- Howard B. Rockman, **Intellectual Property Law for Engineers and Scientists**. Wiley Interscience, 2004
- John Hodgson and John Lewithwaite, **Law of Torts, Third Edition**. Blackstone Press, 2001
- Law and Information Service Secretariat of the Senate, “**Draft of the Trade Secrets Act. B.E...**”, 2000
- Lionel Bently Brad Sherman, **Intellectual Property Law**. Oxford University Press, 2001
- Peter Groves, **Intellectual Property with Competition Law and Practice**. Cavendish Publishing Limited, 1994
- Surapon Triwate. **Trade Secret Act B.E 2545**. Winyuchon, Bangkok, 2546
- Playut Thatanarm “ The revert engineering Case study in Well known of product principle” Master of Law, Assumption University, 2011.
- Wichaya Nakreesatit “ Problems on Double importation of invention studying in The Revert Engineering” Master of Law, Assumption University, 2011.

2. Electronic Books

- Terrence F. Mac Laren, **Worldwide Trade Secrets Law, Volume 2**, P. B3-5 (2001).

3. Encyclopedia

Alfredo Ilardi and Michael Blakeney, **international Encyclopedia of Intellectual Property Treaties**, 2004

4. Websites

American Bar Association Baltimore, Maryland, “**Uniform Trade Secret Act with 1985 Amendments Drafted by the National Conference of Commissioners on the Uniform State Laws**”,

<http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf..>

(accessed

on July 2nd, 2015)

Christopher cole, “**the Exclusive Trade Secret known as a Customer list**”,

<<https://www.sheehan.com/view-pdf.aspx?pubID=903>> (accessed on June 25th, 2015)

E.I. duPONT deNEMOURS & COMPANY, Inc., Plaintiff-Appellee, v. Rolfe

CHRISTOPHER et al., Defendants-Appellants No. 28254,

<<http://cyber.law.harvard.edu/people/tfisher/1970%20Dupont.pdf>>

The European Commission, “**Guide on trade secrets. Protecting your trade secrets in Southeast Asia**”,

<[http://www.southeastasiaiprhelphdesk.eu/sites/default/files/publications/Trade-Secret-](http://www.southeastasiaiprhelphdesk.eu/sites/default/files/publications/Trade-Secret-English.pdf)

English.pdf>(access on June 22nd, 2015)

Jeffrey K. Riffer and Joanna H. Kim, “**Pitfalls to the Defense of Reverse**

Engineering”, <<http://cdfirm.com/pitfalls-to-the-defense-of-reverse-engineering/>> (accessed on July 2nd, 2015)

5. Other Material

C. Schwab, “*Keeping Confidence Trade Secrets in Business Strategy and Starting Your Business*”,

<www.wipo.int/edocs/mdocs/.../wipo_aripo_smes_hre_07_topic07.ppt>

(accessed on June 16th, 2015)

PROTECTION OF MOBILE APPLICATION USERS' PERSONAL DATA*

Warin Asavaratana**

ABSTRACT

At present, mobile apps become an important part of many people's lives. A study conducted in 2014 by twenty-six worldwide data protection authorities showed that there are three major data protection problems in the mobile app context. First, the mobile apps appear to request excessive access to personal data. Second, there is no notice about data protection policies that mobile app users could read before downloading such mobile apps. Third, mobile app users have no real control over their personal data.

Although Thailand has also been confronted by mobile app data protection problems, the existing laws are insufficient to govern such problems. Moreover, there have been attempts to pass personal data protection bills intended to deal with the data protection problems. However, if either of the bills were enacted, there would still be shortcomings causing mobile app data protection problems to remain unresolved.

This thesis aims to study on the problems of Thai law on mobile app data protection, analyze and compare to foreign legislations, namely Canada, the United States of America, and the European Union. In conclusion, this thesis proposes that a specific law providing mobile app developers' liabilities should be enacted and a specific authority handling data protection complaints should be established in order to govern the mobile app data protection problems.

Keywords: Data Protection, Mobile Applications, Data Protection and Privacy

บทคัดย่อ

ในปัจจุบันโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ (Mobile Apps) ได้กลายเป็นส่วนสำคัญในชีวิตผู้คนจำนวนมาก งานวิจัยในปี พ.ศ. ๒๕๕๗ ซึ่งจัดทำโดยหน่วยงานคุ้มครองข้อมูลจากทั่วโลกระบุว่า ปัญหาหลักเกี่ยวกับการคุ้มครองข้อมูลในโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่มีอยู่ ๓ ประการ ได้แก่ ๑. โปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่มีการขอเข้าถึงข้อมูลส่วนบุคคลของผู้ใช้เกินความจำเป็น ๒. ไม่มีนโยบายเกี่ยวกับการคุ้มครองข้อมูลให้ผู้ใช้ได้อ่านก่อนที่จะดาวน์โหลดโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ และ ๓. ผู้ใช้โปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ไม่สามารถควบคุมข้อมูลส่วนบุคคลของตนได้อย่างแท้จริง

ถึงแม้ว่าประเทศไทยจะเผชิญปัญหาเกี่ยวกับการคุ้มครองข้อมูลในโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ก็ตาม แต่กฎหมายที่บังคับใช้อยู่ในประเทศไทยก็ไม่สามารถจัดการกับปัญหาเหล่านี้ได้ ทั้งนี้ มีร่างพระราชบัญญัติคุ้มครองข้อมูลส่วนบุคคลจำนวน ๒ ฉบับอยู่ในระหว่างพิจารณา ซึ่งร่างพระราชบัญญัติเหล่านี้มีวัตถุประสงค์เพื่อจัดการกับปัญหาการคุ้มครองข้อมูล อย่างไรก็ตาม ไม่ว่าร่าง

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พระราชบัญญัติฉบับใดจะได้รับความเห็นชอบออกเป็นกฎหมาย ข้อบกพร่องในร่างทั้งสองฉบับจะทำให้ปัญหาเกี่ยวกับการคุ้มครองข้อมูลในโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ไม่ได้รับการแก้ไขต่อไป

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาถึงปัญหาของกฎหมายไทยในการคุ้มครองข้อมูลในโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่ วิเคราะห์และเปรียบเทียบกับกฎหมายต่างประเทศ ได้แก่ แคนาดา สหรัฐอเมริกา และ สหภาพยุโรป โดยสรุปแล้ว วิทยานิพนธ์ฉบับนี้เสนอให้มีกฎหมายโดยเฉพาะกำหนดความรับผิดชอบของผู้พัฒนาโปรแกรมประยุกต์และให้มีหน่วยงานโดยเฉพาะกำกับดูแลข้อร้องเรียนเกี่ยวกับการคุ้มครองข้อมูล เพื่อที่จะจัดการกับปัญหาการคุ้มครองข้อมูลในโปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่

คำสำคัญ: การคุ้มครองข้อมูล, โปรแกรมประยุกต์สำหรับอุปกรณ์เคลื่อนที่, การคุ้มครองข้อมูลและความเป็นส่วนตัว

Introduction

At present, mobile apps become an important part of many people's lives. People who use this technology gain benefits from the great functionality of mobile apps. However, beneath the success of the mobile app business, there is a cost to users' personal data. A study¹ in May 2014, which was conducted by twenty-six worldwide data protection authorities by evaluating 1,211 mobile apps both iPhone and Android, concluded that, there are three major mobile app data protection problems. In brief, these three major problems are as follows:

- 1) The mobile apps appear to request excessive access to personal data based on users' understanding of mobile apps' functionality.
- 2) There is no notice about data protection policies and practices that users are able to read before downloading such mobile apps.
- 3) Users have no real control over their personal data.

The legal world relies on permission-based controls.² In case users download the mobile apps without the provided information about the type of personal data that will be collected, the purposes for which such personal data will be collected, and the identity of third-parties that the collected data will be disclosed to, such downloading could not be considered legitimate consent. Therefore, if users' personal data are accessed, stored, used, or disclosed without obtaining explicit and legitimate consent from such users, it shall be an infringement of the right to the protection of personal data. Moreover, the situation where users cannot control their personal data can lead to other problems such as identity theft, blackmail, junk mail, spam, unsolicited mails or messages.³ At this point, mobile app developers are the key people for these data protection problems. They are the data controllers who determine the purposes and means of the processing of personal data.⁴ Therefore, the mobile app developers are

¹ Office of the Privacy Commissioner of Canada, "Results of the 2014 Global Privacy Enforcement Network Sweep", https://www.priv.gc.ca/media/nr-c/2014/bg_140910_e.asp. (last visited Oct. 9, 2014).

² Oliver Bray, "The app effect: how apps are changing the legal landscape", 19(2) **C.T.L.R.** 66 (2013).

³ Clark D. Asay, "Consumer Information Privacy and the Problem(s) of Third-Party Disclosures", 11 **Nw. J. Tech. & Intell. Prop.** 39 (2013).

⁴ Article 29 Data Protection Working Party, "Opinion 02/2013 on apps on smart devices", 9, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf

directly responsible and liable for any infringement of the right to the protection of mobile app users' personal data.

Canada and the EU already have specific laws providing mobile app developers' liabilities. They also have specific authorities enforcing and implementing their laws. In the USA, at a state level, especially in California, there are a supervisory authority and laws governing mobile app data protection problems. On the contrary, in Thailand, the existing laws are insufficient to deal with such problems. Moreover, there have been attempts to pass Personal Data Protection Bills. Even if either of the Bills were enacted, there would still be shortcomings causing mobile app data protection problems to remain unresolved.

Law Concerning Mobile Application Data Protection in Canada

In Canada, the Personal Information Protection and Electronic Documents Act ("PIPEDA") provides liabilities of mobile app developers and establishes the specific supervisory authority which handle data protection complaints arising from the mobile apps. In brief, the significant matters in the PIPEDA are as follows:

Mobile Application Developers' Liabilities

- Information

The mobile app developers have an obligation to provide the mobile app users with certain information about their data protection policies and practices before the mobile app users download such mobile apps. The specific information needed is as follows:⁵

- (i) The identity of a person who is responsible for data protection practices, and a person to whom complaints about data protection issues will be sent.
- (ii) The ways to access to mobile app users' PI collected by the mobile app developers.
- (iii) A list of the type of PI that will be collected and a description of the purposes for which such PI will be used.
- (iv) Information about the mobile app developers' policies; and
- (v) A list of the type of mobile app users' PI that will be disclosed to third parties.

- Purpose Specification

The mobile app developers have to provide exact information about what are the purposes for which the PI is collected. Furthermore, the collected PI has to be only used for the identified purposes.⁶

- Data Minimization

The mobile app developers have to collect both the amount and the type of mobile app users' PI only that is necessary to achieve the specified purposes.⁷

- Right of Access

The mobile app developers have an obligation to inform, upon request, the mobile app users of the existence, use, and disclosure of their PI. They also have to give the mobile app users access within a reasonable time period and at no expense if feasible.⁸

⁵ PIPEDA, sec 5, clause 4.8.

⁶ PIPEDA, sec 5, clause 4.2.

⁷ PIPEDA, sec 5, clause 4.4.

⁸ PIPEDA, sec 5, clause 4.9.

- Security

The mobile app developers have to apply security safeguards to protect the mobile app users' PI, which they have retained, against loss, theft, unauthorized access, use, disclose, duplication, or alteration.⁹

Supervisory Authority and Means of Handling Data Protection Complaints

By the virtue of the PIPEDA, the privacy commissioner of Canada ("the Commissioner") is the supervisory authority who is responsible for enforcing and implementing the PIPEDA. Their missions include handling data protection complaints.

In practice, when the mobile app users have found that their PI has not been handled in compliance with the PIPEDA, they can file a complaint with the Commissioner.¹⁰ After that, the Commissioner may initiate an investigation of the complaint if the Commissioner is satisfied that there are reasonable grounds to investigate the matter.¹¹ Within one year, the Commissioner shall send the findings and recommendations to the mobile app users and the mobile app developers. Also, the Commissioner shall inform the mobile app users about the right to apply to the Court for a hearing concerning the complaint.¹² At this point, the Commissioner can get involved in a court hearing by obtaining consent from the mobile app users.¹³

Apart from any other remedies, the Court may order the mobile app developers to correct their data protection practices in order to comply with the PIPEDA, order the mobile app developers to publish a notice of any action taken to correct their data protection practices, or award damages to the mobile app users.¹⁴

Laws Concerning Mobile Application Data Protection in the United States of America

In the USA, there is no specific federal law concerning data protection in the mobile apps. However, at a state level, especially in California, there are laws concerning mobile app data protection. These laws are the Business and Professions Code of the State California Section 22575-22579 or the California Online Privacy Protection Act of 2003 ("Cal-OPPA") and the California Civil Code of the State California Section 1798.83 ("Shine the Light Law"). In brief, the significant matters in these laws are as follows:

Mobile Application Developers' Liabilities

- Information

The mobile app developers have to post their privacy policies.¹⁵ Such privacy policies must meet the following requirements:¹⁶

- (i) Identify the categories of PII the operators collect and the categories of third-party persons with whom the operators may share PII.
- (ii) Explain how the consumer can review and request changes to PII if the process to review and request changes are available.
- (iii) Describe the ways that the operators would notify consumers of changes to the privacy policy.

⁹ PIPEDA, sec 5, clause 4.7.

¹⁰ PIPEDA, sec.11 (1).

¹¹ PIPEDA, sec.11 (2).

¹² PIPEDA, sec.13.

¹³ PIPEDA, sec.15.

¹⁴ PIPEDA, sec.16.

¹⁵ Cal-OPPA, sec. 22575. (b).

¹⁶ Kelsey Maxwell, "Online Behavioral Advertising: The Pros and Cons of Regulation and Suggestions for Adherence to California's Constitutional Right to Privacy", 19 **Nexus: Chap. J. L. & Pol'y** 60-61 (2013-2014)

- (iv) Identify the effective date of the privacy policy.
- (v) Describe the ways that the operators provide “Do Not Track” options through web browsers.
- (vi) Inform consumers whether other parties may collect PII across different websites over time.

- Right of Access

The mobile app developers have to provide, upon request, information about a list of the categories of PI disclosed to third parties and the names and addresses of the third parties that received such PI. Moreover, mobile app developers must also provide instructions about how mobile app users can make their disclosure request.¹⁷ It should be noted that mobile app users can only request on the condition that the third parties shall use the disclosed PI for direct marketing purposes.¹⁸

However, the mobile app developers may be exempted from the aforementioned liability by adopting a privacy policy that allows mobile app users to opt-in or opt-out of the sharing of their PI.¹⁹

- Right to Object

The mobile app developers must provide the mobile app users the right to object disclosure of their PI to the third parties for direct marketing purposes. Moreover, the mobile app developers must also provide means to exercise this right free of charge.²⁰

Supervisory Authority and Means of Handling Data Protection Complaints

With regard to the State of California, where the mobile app developers’ liabilities are provided, the office of the Attorney General of California (“AG”) is the supervisory authority who is responsible for enforcing the Cal-OPPA and the Shine the Light Law. Although the mobile app users can file a complaint about the mobile app data protection problems with the AG, the AG does not represent the mobile app users in personal legal actions. The mobile app users have to pursue remedies in their private dispute on the basis of tort law.²¹ In conclusion, the AG shall file a lawsuit against a business which violates provisions provided in the Cal-OPPA and the Shine the Light Law. In addition, such a lawsuit does not aim to remedy the injured mobile app users.

Law Concerning Mobile Application Data Protection in the European Union

In the EU, the Data Protection Directive is a central piece of data protection legislation to which all EU member states must enact their data protection law pursuant. In brief, the significant matters in this Directive are as follows:

Mobile Application Developers’ Liabilities

- Information

The mobile app developers must inform the mobile app users about certain information, such as the identity of the mobile app developers, the types of personal

¹⁷ Privacy Rights Clearinghouse, “California’s “Shine the Light Law” goes into effect Jan. 1, 2005”, <https://www.privacyrights.org/ar/SB27Release.htm> (last visited April 17, 2015).

¹⁸ *Id.*

¹⁹ Shine the Light Law, sec. 1798.83. (c)(2).

²⁰ Tanya Forsheit, “Is There a Privacy Policy for that App?”, 17, available at http://www.lacba.org/Files/Main%20Folder/Sections/International%20Law/InternationalLawNewsletter/files/privacyapp_forsheit_article.pdf.

²¹ State of California Department of Justice: Office of the Attorney General, “Protecting Consumers”, <http://oag.ca.gov/consumers> (last visited Dec. 8, 2014).

data that will be collected, the purposes for processing of the collected personal data, and the identity of the third parties in case such personal data are transferred.²²

- Purpose Specification

The mobile app developers have to provide the purposes that are explicit and legitimate.²³ To be clear, the provided purposes must be specific regarding the processing of the mobile app users' personal data. Also such specific purposes have to be legitimate.

- Data Minimization

The mobile app developers must only collect the mobile app users' personal data that is necessary to achieve the specified purposes and not be excessive in relation to the specified purposes.²⁴

- Right of Access

The mobile app developers must provide the mobile app users the right to access their personal data that are collected without unreasonable delay or expense.²⁵

- Security

The mobile app developers are responsible to adopt appropriate measures in order to protect the mobile app users' personal data from alteration, destruction, loss, or unauthorized processing.²⁶

Supervisory Authority and Means of Handling Data Protection Complaints

By the virtue of the Data Protection Directive, each member state of the EU has to provide that one or more supervisory authorities are responsible for monitoring the application of the Data Protection Directive.²⁷ The mobile app users can lodge a claim concerning any infringement of their rights under the national provisions adopted pursuant to the Data Protection Directive. The supervisory authority shall investigate the claim in order to check on the lawfulness of data processing of the mobile app developers. When the investigation is complete, the mobile app users shall be informed of the outcome of the claim.²⁸ The supervisory authority is authorized to issue a warning to the mobile app developers, to order the blocking, erasure, or destruction of data, or to impose a ban on processing. Moreover, the supervisory authority can also engage in legal proceedings or bring the claim before the judicial authorities.²⁹

Law Concerning Mobile Application Data Protection in Thailand and the Analyses of the Personal Data Protection Bills

The Existing Laws

- Civil and Commercial Code

According to Section 420, any person who violates other persons' rights is liable for the damage and is required to pay compensation.³⁰ Therefore, the mobile app developers must be liable for any infringement of mobile app users' personal data, such as disclosure of users' personal data without obtaining consent.

However, there are two shortcomings when apply this section to the mobile app context. First, the mobile app users have to prove that the mobile app developers violate their rights. At this point, it is burdensome for the mobile app users because it needs

²² Data Protection Directive, art. 10.

²³ Data Protection Directive, art. 6 (b).

²⁴ Data Protection Directive, art. 6 (c).

²⁵ Data Protection Directive, art. 12.

²⁶ Data Protection Directive, art. 17.

²⁷ Data Protection Directive, art. 28, para. 1.

²⁸ Data Protection Directive, art. 28, para. 4.

²⁹ Data Protection Directive, art. 28, para. 3.

³⁰ Civil and Commercial Code, sec. 420.

technical knowledge to show that there is an exploitation of their personal data. Second, even if they could prove this, it would be difficult to identify the certain damage or loss because most mobile app data protection problems cause emotional distress which is difficult to be converted to monetary form. Moreover, it appears that Thai Courts do not recognize this type of emotional damage.³¹

- Official Information Act B.E.2540

The Official Information Act B.E. 2540 provides almost the same data protection practices as the international standard.³² However, this act only covers the personal information controlled or stored by state agencies or state enterprises. Thus, the mobile app developers are not subjected to this act.

- Computer Crime Act B.E.2550

Under the Computer Crime Act B.E. 2550, there are provisions providing mobile app developers' liabilities. Nevertheless, such provisions could be only applied to the mobile app context in certain circumstances and, therefore, cannot deal with the mobile app data protection problems sufficiently. The significant provisions are as follows:

Section 5³³ imposes penalties on illegal access to the computer system that has a specific access prevention measure. There are two shortcomings when applying this section to the mobile app data protection problems. First, the access has to be illegal, which means that such access is committed without obtaining consent.³⁴ Nevertheless, the mobile app users are the persons who give, by themselves, the consent allowing access to their smartphones. Second, this section is only applied to the smartphones that take specific access prevention measures. Thus, smartphones that have not taken such measures are outside the scope of this section.

Section 7³⁵ is similar to Section 5 but it imposes penalties on illegal access to the computer data instead of the computer system. It also has similar shortcomings. First, the mobile app developers usually dictate the data protection policies and practices by which they may access the mobile app users' personal data, thus their access to computer data is committed with consent. Second, this section is also only applied to the mobile app users' personal data that have taken specific access prevention measures.

Section 14 (1)³⁶ imposes penalties on inputting to a computer system fake computer data, either in whole or in part, or false computer data in the manner that is likely to cause damage to other persons or the public. With regard to the mobile app context, the mobile app developers might be subject to Section 14(1) in cases where they do not handle the collected personal data in compliance with the provided data protection policies because it could be considered they provides false statement in the policies. However, if the mobile app developers do not provide any policy at the beginning, they will not be subject to this section.

³¹ จักรินทร์ โกเมศ, ค่าเสียหายสำหรับความเสียหายทางจิตใจตามกฎหมายลักษณะละเมิด, (วิทยานิพนธ์ปริญญาโทบัณฑิต, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554) (Jukarin Komase, Damages for Mental Injury under Law of Torts, (LL.M. thesis, Thammasat University, Law, 2011)).

³² Chungtong Opassiriwit, "The Problem and Present Situation of Privacy Rights in the Digital in Thailand", http://www.oic.go.th/content_eng/digital.htm (last visited Oct. 26, 2014).

³³ Computer Crime Act B.E.2550, sec. 5.

³⁴ ไพบุลย์ อมรปัญญาเกียรติ, คำอธิบาย พ.ร.บ. คอมพิวเตอร์ พ.ศ. 2550, น. 38 (พิมพ์ครั้งที่ 1 2553), (Paiboon Amornpinyokiat, **Explanation on The Computer Crime Act B.E.2550**, 38 (1st ed. 2011))

³⁵ Computer Crime Act B.E.2550, sec. 7.

³⁶ Computer Crime Act B.E.2550, sec. 14.

The Proposed Laws

In respect of the Personal Data Protection Bills, at the time of writing this article, there are two bills using the same title as “Personal Data Protection Bill B.E.” The first bill has been introduced by the Official Information Commission (the Bill by OIC). Another bill has been introduced by the Electronic Transactions Development Agency (Public Organization) (the Bill by ETDA). Both bills are still in a stage of legislative process. Although the Bill by OIC and the Bill by ETDA are slightly different from each other in details, both bills provide mobile app developers’ liabilities at nearly the same level as provided in Canada and the EU. The supervisory authorities, which handle data protection complaints, are also established by the virtue of both bills. However, both bills still have shortcomings causing the mobile app data protection problems to remain unresolved. In brief, these shortcomings are as follows:

1) Under the Bill by OIC, the definition of personal data is too narrow. The Bill by OIC places emphasis on information about the “identity” of persons. Therefore, the mobile app users’ personal data, which are not related to the persons’ identity, shall not be protected from unauthorized use and disclosure.

2) In both bills, there is no standard form of the notice about data protection policies in the mobile. Moreover, there are uncertainties about whether the mobile app developers can inform the notices in their website, or whether they have to make available links to notices on the page before downloading mobile apps.

3) The right to object to disclosure of personal data for direct marketing purposes is not recognized in both bills. The mobile app users have to face with a take-it-or-leave-it situation where they have to accept all the terms and conditions that are provided in the notices, otherwise they must not download such mobile apps.

4) The supervisory authority established by both bills does not help the mobile app users in pursuing remedies. The mobile app users have to pursue remedies on their own by filing a lawsuit with the Court. The problem in this point is that the mobile app users may not have enough technical knowledge to prove an infringement of their right to the protection of personal data and eventually their lawsuit might be dismissed by the Court.

5) If either the Bill by OIC or the Bill by ETDA were enacted into law, a number of mobile apps, which are developed in compliance with the Cal-OPPA, would be illegal. Because the mobile app developers’ liabilities required by both bills are at a higher level than the mobile app developers’ liabilities required by the Cal-OPPA. Consequently, Thai consumers shall lose opportunity to use such mobile apps.

Conclusion and Recommendations

A number of mobile apps have been found to access personal data at a greater level than is needed to operate their expected functions. Also, there are use and disclosure of personal data without consent from the mobile app users, and a failure to provide information about data protection policies and practices of such mobile apps. These problems can be considered an infringement of the mobile app users’ data protection rights and have a significant impact on mobile app users’ lives. Although there are laws concerning data protection in mobile apps in Thailand, the existing laws are insufficient to govern mobile app data protection problems. Furthermore, the Personal Data Protection Bills also have shortcomings which will cause such problems to remain unresolved.

After studying mobile app data protection laws in the foreign countries, namely Canada and the USA, and in the EU, and analyzing shortcomings in the existing Thai laws and the Personal Data Protection Bills, the writer would like to suggest the following points in order to be added to the Bill:

1) The meaning of “Personal Data” should be defined as identified or identifiable information about an individual.

2) The right to object to disclosure of personal data for direct marketing purposes should be recognized.

3) Certain information about the data protection practices should be presented in the app platform for the mobile app users to consider before they download such mobile apps. The form of this information must be well designed to fit smartphones’ screens, not be lengthy, and inform, at a minimum, the following information:

- The type of personal data that will be collected.
- The use of such collected personal data
- Whether the collected data will be disclosed to third-parties or not
- If yes, the identity of third-parties.

Moreover, there must be a hyperlink to the whole content of the notice about data protection policies of such mobile apps in the app platforms as well. The notice shall explain the other information about data protection policies such as the identity and contact detail of the mobile app developers, the right of access or the right to object and how to exercise such rights.

4) The mobile app developers’ liabilities should be applicable as the same level as provided in the Cal-OPPA. Moreover, such liabilities should be provided in a separate ministerial regulation.

5) The means of handling data protection complaints used in Canada should be adopted in the Bill. The Commission should be able to be involved in a lawsuit filed by the mobile app users by obtaining consent from such mobile app users.

REFERENCES

Books

- ไพบุณย์ อมรวิญญูเกียรติ, คำอธิบาย พ.ร.บ. คอมพิวเตอร์ พ.ศ. 2550, พิมพ์ครั้งที่ 1.
กรุงเทพมหานคร: โปรวิชั่น, 2553 (Paiboon Amornpinyokiat. **The Explanations on
Computer Crime Act B.E.2550**. 1st ed. Bangkok: Provision, 2011.)

Articles

- Asay, Clark D. “Consumer Information Privacy and the Problem(s) of Third-Party Disclosures.” **Northwestern Journal of Technology & Intellectual Property** 11 (2013): 321-356.
- Bray, Oliver. “The App Effect: How Apps Are Changing the Legal Landscape.” **Computer and Telecommunications Law Review** 19(2) (2013): 66-70.
- Maxwell, Kelsey. “Online Behavioral Advertising: The Pros and Cons of Regulation and Suggestions for Adherence to California’s Constitutional Right to Privacy.” **Nexus: Chapman’s Journal Law & Policy** 19 (2013-2014): 51-76.

Thesis

- จักรินทร์ โกเมศ. “ค่าเสียหายสำหรับความเสียหายทางจิตใจตามกฎหมายลักษณะละเมิด.”
วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554. (Jukarin
Komase. Damages for Mental Injury under Law of Torts. Master’s thesis,
Thammasat University, Law, 2011.)

Electronic Media

- Article 29 Data Protection Working Party. “Opinion 02/2013 on apps on smart devices.”, <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf> (accessed October 10, 2014).
- Forsheit, Tanya. “Is There a Privacy Policy for that App?”, <http://www.lacba.org/Files/Main%20Folder/Sections/International%20Law/InternationalLawNewsletter/files/privacyapp_forsheit_article.pdf> (accessed January 7, 2015).
- Office of the Privacy Commissioner of Canada. “Results of the 2014 Global Privacy Enforcement Network Sweep.”, <https://www.priv.gc.ca/media/nr-c/2014/bg_140910_e.asp> (accessed October 9, 2014).
- Opassiriwit, Chungtong. “The Problem and Present Situation of Privacy Rights in the Digital in Thailand.”, <http://www.oic.go.th/content_eng/digital.htm> (accessed October 26, 2014).
- Privacy Rights Clearinghouse. “California’s “Shine the Light Law.” goes into effect Jan. 1, 2005.”, <<https://www.privacyrights.org/ar/SB27Release.htm>> (accessed April 17, 2015).
- State of California Department of Justice: Office of the Attorney General. “Protecting Consumers.”, <<http://oag.ca.gov/consumers>> (accessed December 8, 2014).

ZONING MEASURE BY INCLUSIONARY ZONING FOR AFFORDABLE HOUSING*

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ABSTRACT

City Planning is a key mechanism for government to manage and control the direction of the city. City Planning arranges all areas into zones according to land use classification. Each classification indicates activities that are allowed or disallowed to be conducted. City Planning can be enforced when come into the law form.

However, when the City Planning law is enforced, the price of land continuously increases and in turn affects the house price. At present, the price of land and house has been extremely increasing when comparing to the past. Many consumers cannot afford to buy a house because their income is too low, so they are forced to live far from the city center. Hence, these consumers have to face many inconveniences such as daily traffic jam and stress; such difficulty is considered adverse effect of Planning law.

The City Plan Act, B.E. 2518, disregards the affordable housing issue. This act supports the zoning planning and city plan procedure and makes the zoning planning and city plan concrete and enforceable. However, there is no provision that would encourage developers to supply the affordable housing while they could still enjoy profit due to they have much potential than consumer to access to the public resources. As a result, many consumers have to face the problem of unaffordable housing or be forced to live in the areas which are far from the city as the accumulated problems.

The sustainable growth of society, private sector and consumer can occur if there are more dimensions in laws which balance benefit among stakeholders, implement good planning, and support co-operation between government, private sectors, and consumer.

This thesis studies the relationships between City Planning law vs. land price, the Corporate Social Responsibility concept (CSR), existing Planning law, the alternative planning system which called "Inclusionary Zoning" and applications under the Inclusionary Zoning Law of three selected foreign countries, namely the California and Oregon State in the United States, the United Kingdom, and Malaysia. From studying these countries, it is anticipated that Thailand would see the problems arising from legal measures against the unaffordable housing which is the adverse effect of planning regulations and thus be able to provide proper legal measures to cope with the issue. This thesis also identifies and recommends alternative solutions.

Keywords: Inclusionary Zoning, Zoning, Affordable Housing, city planning

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บทคัดย่อ

การวางผังเมืองเป็นเครื่องมือที่สำคัญเครื่องมือหนึ่งของภาครัฐบาลในการควบคุมและจัดการกับเมือง เพื่อให้เป็นไปตามนโยบายต่างๆของรัฐบาลที่ได้วางไว้ งานประเภทหนึ่งของการวางผังเมืองก็คือการแยกและจัดระเบียบการใช้ที่ดินให้เป็นหมวดหมู่ โดยจะจัดระเบียบพื้นที่ทั้งหมดของเมือง และแบ่งเป็นหมวดหมู่และกำหนดประเภทของการใช้ที่ดิน ซึ่งจะอนุญาตหรือไม่อนุญาตการทำการกิจกรรมใดๆต่อที่ดินตามที่ได้กำหนดไว้ ซึ่งในการบังคับเพื่อให้เป็นไปตามที่ได้วางแผนไว้ จึงต้องตรากฎหมายมาเพื่อให้อำนาจในการกำหนดและบังคับใช้ข้อกำหนดดังกล่าว

ผลจากการบังคับใช้กฎหมายการผังเมืองนี้ เป็นหนึ่งในสาเหตุที่สำคัญที่ส่งผลกระทบต่อราคาที่ดินที่เพิ่มสูงขึ้นอย่างรวดเร็วและต่อเนื่อง และเนื่องด้วยที่ดินเป็นต้นทุนที่สำคัญของที่อยู่อาศัย ดังนั้นจึงมีผลทำให้ราคาที่อยู่อาศัยเพิ่มสูงขึ้นอย่างรวดเร็วและต่อเนื่อง เป็นผลให้ผู้บริโภคจำนวนมากที่มีรายได้น้อย ไม่สามารถซื้อที่อยู่อาศัยได้ และโดนบีบบังคับให้ไปอยู่ในเขตที่ไกลเมืองออกไปมากยิ่งขึ้นโดยปริยาย ซึ่งส่งผลกระทบต่อคุณภาพชีวิตของประชาชนที่ไม่สามารถมีที่อยู่อาศัยในตำแหน่งที่ใกล้แหล่งงานได้

กฎหมายที่บังคับใช้ในปัจจุบันคือพระราชบัญญัติการผังเมือง พ.ศ. 2518 ซึ่งจากกฎหมายฉบับนี้มุ่งสนับสนุนการทำงานของคณะกรรมการผังเมือง กระบวนการวางผังเมือง และนำผังเมืองที่ได้รับอนุมัติจากคณะกรรมการผังเมืองให้มีผลทางกฎหมายและบังคับใช้ได้จริง โดยไม่ได้คำนึงถึงผลกระทบข้างเคียงที่เกิดจากการวางผังเมือง คือราคาที่ดินที่เพิ่มสูงขึ้นซึ่งส่งผลกระทบต่อการจัดหาที่อยู่อาศัยของผู้บริโภคที่มีรายได้น้อยเข้ามาประกอบการพิจารณาผังเมือง อีกทั้งกฎหมายฉบับดังกล่าวไม่ได้สนับสนุนผู้ประกอบการเอกชนในการจัดสร้างที่อยู่อาศัยสำหรับผู้มีรายได้น้อยในขณะที่ผู้ประกอบการอสังหาริมทรัพย์มีศักยภาพในการเข้าถึงทรัพยากรและใช้ประโยชน์จากอำนาจที่ตัวเองมีได้อย่างเต็มที่ ทำให้ปัญหาดังกล่าวตกเป็นภาระของภาครัฐบาลในการใช้งบประมาณแผ่นดินจำนวนมากในการแก้ไขปัญหา

การเติบโตร่วมกันอย่างยั่งยืนของทั้งผู้ประกอบการ ผู้บริโภคและภาครัฐบาลสามารถเกิดขึ้นมาได้หากกฎหมายมีมิติที่เพิ่มมากขึ้นโดยคำนึงถึงปัจจัยนี้เข้าไปอยู่ในเนื้อหาของกฎหมาย การจัดทำผังเมือง และการร่วมมือกันของทุกฝ่ายที่เกี่ยวข้อง เพื่อสร้างสมดุลของผลประโยชน์ให้ดีขึ้นมากกว่าตัวกฎหมายเดิมที่บังคับใช้อยู่

วิทยานิพนธ์ฉบับนี้จึงมุ่งศึกษาถึงความสัมพันธ์ระหว่างกฎหมายการผังเมืองที่ส่งผลกระทบต่อราคาที่ดิน แนวคิดเรื่องการดำเนินธุรกิจที่ร่วมรับผิดชอบต่อสังคม และศึกษาถึงแนวทางการแก้ไขปัญหาที่เรียกว่าการจัดหมวดหมู่การใช้ประโยชน์ที่ดินแบบรวมเข้าด้วยกัน โดยศึกษาแนวทาง การบังคับใช้มาตรการทางกฎหมายจากประสบการณ์ของสามประเทศอันได้แก่ สหรัฐอเมริกาในรัฐแคลิฟอร์เนียและโอเรกอน มาเลเซีย และประเทศสหราชอาณาจักรอังกฤษ และจากการศึกษานี้มุ่งหวังให้สังคมจะสามารถเห็นและตระหนักถึงปัญหาของการวางผังเมืองที่ส่งผลกระทบต่อการจัดหาที่อยู่อาศัยของผู้มีรายได้น้อยและนำเสนอมาตรการทางกฎหมายที่เหมาะสมเพื่อเยียวยาและแก้ไขปัญหาดังกล่าวต่อไป

Introduction

Generally, land use restriction by zoning is one of the government's mechanisms to control, direct, and manage the city. The basic idea of zoning is to impose the use of particular areas which can or cannot be used for some activities. The objectives of zoning are to manage the growth of the city, to allocate the public facilities, and to provide the effective social welfare as much

as possible. The knowledge of zoning is derived from architecture and engineering. It is adapted for the government policy planning.

However, the traditional concept of zoning is not effective enough in managing the city. It leaves many problems behind; one of these is the rapid increasing land price.¹ Consequently, this will obstruct the poor or low income people in acquiring a house. Finally, the poor cannot afford the house, and this leads to another social problem.

Inclusionary zoning is a new alternative solution which mostly use in many states in United States. It is the planning law with some obligations more than the traditional planning law by imposing duty and incentives to developers to build affordable housing with the sales price lower than the market rate to the specific income rank. Developers who comply with this obligation will receive some incentive from government whether in the form of density bonus, rapid permitted procedure, reduce some design standard etc. With adapting the Corporate Social Responsibility (CSR) concept will benefit for all stakeholders in receiving sustainable growth.²

1. The Study of the Effect of Planning Law toward the Land Price

According to the research, planning laws give the positive result to the increasing price of land. There are three main factors that can affect the land price. They are “the scarcity effect, the amenity, and the value of an individual exemption from land-use regulation”³

Planning law is the key factor that impacts the land price because it limits the use and creates liabilities for the land owners and developers who have to comply with

¹ Demographia, **The Association between Prescriptive Land use and Higher House Prices**, Literature Review on Smart Growth, Growth Management, Livability, Urban Containment and Compact City Policy, *available at* <http://www.demographia.com/db-dhi-econ.pdf> (last visited June1, 2015).

² International Federation of Accountants, “*Good Governance and Sustainability Fundamental to Improved Business Reporting*”, Project on Business Reporting, June 2010, <http://www.ifac.org/sites/default/files/downloads/Good-Governance-and-Sustainability-Fundamental-for-Improved-Business-Reporting.pdf>

³ William K. Jaeger, **The Effects of Land-Use Regulation on Property Value**, *available at* <http://dnr.wi.gov/topic/shorelandzoning/documents/landusereffect-propvalues.pdf> (last visited June1, 2015).

the law, for example, through the limited quantity of constructions, or limited use of the land. The details regulated in planning law directly impact the supply of land.⁴

Some of the regulations have the negative effect because they lead to the decrease of the land price. However, there are very few regulations that cause too much difficulty for the land owners, developers or the net of amenities deduct with the burden of that regulation result in zero or minus.⁵

1.1 The City Planning towards the land price in Thailand

One objective of city planning is to create amenities to the land as in Thailand many areas where the infrastructures were build, the prices are increased. The reasons of the increasing of the price can be explain by the amenity effect and the scarcity effect which the details are in the prior part which mentioned above such as the land price within 40 meters from the Talingchan- Bangbuatong Road moved up 12.3% during B.E. 2537-2541⁶ or in Bangkrapi district, the more sufficient and recondition of public facilities creates more demand which impacts the average 256.46% of the market price between year 2530 to 2540⁷

1.2 The Housing Environment in Bangkok

In housing aspect, the housing price depends on the conventional housing market. This means when using market mechanism, the attractive price can motivate supplier to supply housing into the market. Hence, high demand does not directly affect the supply of housing.⁸

In the demand of housing depends on these following factors: the growth rate of the macroeconomic, national economic policies, lending from commercial bank, speculation from the high income people, type of investment in real estate of developers and ability or power of buyers⁹

Hence the housing environment in Bangkok is in the imperfect market, this means excessive supply does not directly effect to the housing price. Additionally, the excessive demand does not directly effect to the housing price. So even in Bangkok which has the high demand in housing and high demand in supply housing, the capability of the buyer to afford the house still remains. Due to the high demand not has the power or ability to afford it. In other side the high supply is resulted from the wrong business's decision.¹⁰

⁴ Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed* (1996)

⁵ Peter V. Schaeffer & Cecily A. Millerick, *The Impact of Historic District Designation On Property Value: An Empirical Studies*, 5 Econ Dev. Q. 301, 311, (1911)

⁶ สุวรรณี กลิ่นจันทร์, *การวิเคราะห์ปัจจัยที่มีผลกระทบต่อราคาที่ดินและแนวโน้มราคาที่ดินในอนาคต กรณีศึกษาของอำเภอบางบัวทอง จังหวัดนนทบุรี*, มหาวิทยาลัยรามคำแหง, 2548 (Suwannee Klinchan, *The Analysis of factors which affect to the land price and the trend of future price in Bang Bua Thong, Nonthaburi province*, Ramkhamhang University, 2548)

⁷ จีรศักดิ์ สังข์ช่วย, *การเปลี่ยนแปลงราคาที่ดินเพื่อที่อยู่อาศัย ปี 2530-2540: กรณีศึกษา แขวงหัวหมาก เขตบางกะปิ, จุฬาลงกรณ์มหาวิทยาลัย*, 2544 (Jeerasak Sungchue, *The Change in Residential Price B.E. 2530-2540: the case study of Hua Mark, Bangkapi, Bangkok*, Chulalongkorn University B.E.2544)

⁸ วารสารธนาคารอาคารสงเคราะห์ ปีที่ 4 ฉบับที่ 13 เมษายน-มิถุนายน 2541 (Government Housing Bank Journal, 4th Year, Volume 13, April-June B.E 2541)

⁹ *Id.*

¹⁰ *Id.*

1.3 The Corporate Social Responsibility Concept

The Corporate Social Responsibility Concept is a business concept which aims to balance benefit among business sector and public sector. Hence it is good to the business to take this concept in to account and to adapt this concept to real practice in order to fit the benefit in these dimensions: proper returns to owner, quality goods and services, good employment condition, and others benefit which is expected from the community regardless the law will prescribe or not.”¹¹

Inclusionary Zoning by its features has this CSR concept. Additionally, enacted Inclusionary Zoning into the mandatory or law form will ensure the effectiveness of reducing the unaffordable housing problem.

1.3.1 The Significance of the Corporate Social Responsibility

Without CSR, in the current complex society, the problems arising from the business sectors can be found in the form of:¹²

- (1) Increasing gap between the poor and the rich because the different power in access to public resources, information, and laws which leads to inequality in the society;
- (2) Political issues as consequence of the problems derived from the social gap between the rich and the poor;
- (3) Devouring public resources because the old school economic concept in finding maximum profit but neglecting consumers, society and environment;
- (4) Cultural destruction because the more the people concern on generating profit, the more ignorance towards the culture they become.

2. Inclusionary Zoning

Inclusionary zoning is also a tool that the government uses in order to serve its citizen by means of imposing the duty (mandatory) to the developers or encourage them to do (voluntary) using some incentives that can motivate the developers to create the affordable housing for the moderate or lower income which the amount of income in each ranking is indicated by government agency.¹³

¹¹ OECD, **Corporate responsibility: Frequently asked questions: What is corporate responsibility?** available at: <http://www.oecd.org/corporate/mne/corporateresponsibilityfrequentlyaskedquestions.htm> (last visited June1, 2015).

¹² เครือข่ายธุรกิจเพื่อสังคมและสิ่งแวดล้อม SVN Asia (Thailand) ร่วมกับ สำนักงานปฏิรูประบบสุขภาพแห่งชาติ สถาบันธรรมรัฐเพื่อการพัฒนาสังคมและสิ่งแวดล้อม ภาควิชาเศรษฐศาสตร์ คณะสังคมศาสตร์ มหาวิทยาลัยศรีนครินทรวิโรฒ มูลนิธิซีเมนต์ไทย วารสารธุรกิจกับสังคม สถาบันสิ่งแวดล้อมไทย สถาบันคีนันแห่งเอเชีย, งานสัมมนา CSR In Action (Social & Environment business network, SVN Asia(Thailand) co-operation with the National Health System Reform Office (HSRO), Good Governance for Social Development and the environment Institute (GSEI), Economic Faculty of Srinakarinwirot University, SCG Foundation, Business & Social Journal, Thailand Environment Institute Foundation and Kenan Institute Asia, CSR in Action Seminar)

¹³ PolicyLink, *Inclusionary Zoning, 2003*, available at <http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137027/>

Comparing between Mandatory Inclusionary Zoning and Voluntary Inclusionary Zoning, from the studies found that the Mandatory can produce or can supply more the affordable housing to the market.¹⁴

2.1 Characteristic of Inclusionary Zoning

Inclusionary Zoning must have at least one from these characteristics¹⁵: Inclusionary Percentage, Alternative On-Site Development, Income Target, Remain the Affordable housing, Development Incentive.

2.2 Inclusionary Zoning Experiences

2.2.1 United States

According to study, each state which adapts this inclusionary zoning will set the structure of enforcement by dividing into two levels which are:

In the state level will enact the model law as the law which will prescribe the scope of duties and power of government agencies, obligations and incentives which will allow with developers.

In the local level, the local has authorities which given by the model law to set all obligations and incentives which will suit to their local

2.2.2 Malaysia

The legal system, in order to cope with this regime, divided into 3 core steps which are National Developing Plan to set the target of the amount of housing, then the state government set the policies which will impose quota to developers by the delegation of power from the National Land Code Act which empower to state government to enact their laws which the state can indicate the conditions and the prohibition of land use¹⁶ through the State Gazette¹⁷ and the local authority implement in through the Town and Country Planning Act, 1976 in Section 19 (1)

2.2.3 England

Inclusionary Zoning in England is designed to decrease the intensity of details in inclusionary zoning law by mean of negotiation between developer and local authority. In order to develop any site, all developer have two choices to be permitted, first developer must comply with the obligations; or make an agreement with the local authority. Agreement between developer and the local authority may have some duties to developer whether in the form of operates some activities or pay some specific fee to the local authority.¹⁸

According to the experience of three countries found that to enforce this system through the legislation must indicate the target and mission in the state level and delegated power to the local level for adapting to suit its area.

However in the details of the studied experience, Malaysia has the most inflexible laws among the others while in England has the negotiation system and developed the program to calculate the suitable percentage which will impose duty to developers while in United States the level of flexible regulations depend on each state.

Hence, to adapt this Inclusionary Zoning in Thailand, it is a necessary to amend the planning law and the relevant laws in order to solve the problem of high

¹⁴ Nicholas Brunick, Lauren Goldburg, Susanna Lehvlin, “*Voluntary or Mandatory Inclusionary Zoning, Production, Predictability and Enforcement*”, Business and Professional People for the public interest, August 2004, available at <http://www.bpichicago.org/documents/mandatoryv.voluntary5.06.pdf>

¹⁵ Dustin C. Read, Jr., “*Inclusionary Zoning*”, Homes for Working Families, Inc., May 2008

¹⁶ The National Land Code S 120, S 116(4)

¹⁷ The National Land Code S 52(2)

¹⁸ Town and Country Planning Act (1990) s 106(1)

housing price by adapting the concept from the Housing Element Law and Inclusionary Zoning of California. In addition, the successful Inclusionary Zoning in England should be brought into discussion. In addition bring the concept of inclusionary zoning which practices in England in issues of the negotiation, concern the financial feasibility of developers and its innovation program which will calculate the suitable of burden that can get along with business sector for effectiveness in using.

2.3 The Similarity of Inclusionary Zoning and the Corporate Social Responsibility

Inclusionary Zoning's features and outcomes match with the principle of CSR which requires business to take some actions showing responsibility to community whether by law or voluntary. This CSR concept, if being used continually, benefits the business and community in the long term. Without CSR concept in doing business or having less concern and understanding of this concept, it can contribute to social gap and economic disparity.¹⁹

However, it might be difficult to receive the co-operation from all businesses, so, for the effectiveness of practice; the concept must be infiltrated through the legislation in the form of Inclusionary Zoning. Nevertheless, a hundred of laws cannot be successful unless there was a good cooperation from communities and developers. Therefore, for the best practice, business sector should willingly comply with the law.

3. Planning Law in Thailand

3.1 City Plan and Zoning Definition

City plan is an official document that includes city preservation and development as one of the objectives of the plan. City plan must indicate visions, missions, targets, analysis of the existing conditions and future trend, description of the current physical economic and social conditions, and must set the mission plan in order to achieve the target.²⁰

Zoning is one part of the city plan which categorizes land and all areas of that city into many suborders and divides those suborders into zoning. The zoning will allow or prohibit certain activities that may be conducted in each zone in order to serve the city planning purposes.²¹

3.2 The Legal Plan

3.2.1 The City Plan Act, B.E. 2518

The City Plan Act is the model law which specifies the general rules and regulations for planning process and the method of implement the city plan. However in the enforcement issue, the specific law must be enacted in order to use in specific areas. At present, the current act delegates power to government agencies to enact the Comprehensive Plan and the Specific Plan.²²

¹⁹ *Supra* Note 10

²⁰ ศูนย์บริการวิชาการ คณะสถาปัตยกรรมศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, รายงานฉบับสมบูรณ์ โครงการจัดทำมาตรฐานด้านผังเมืองของกรุงเทพมหานคร (Educational Service Center, Faculty of Architecture, Chulalongkorn University, **The Final Report: The Standard Zoning Process in Bangkok**)

²¹ ขนิษฐา เทียบจริยาวัฒน์, การศึกษาแนวทางการวางและจัดทำผังเมืองเฉพาะใหม่, มหาวิทยาลัยศิลปากร 2553 (Kanittha Tiebjariyawat, **A study to propose guidelines for preparing and making a new specific plan**, Silapakorn University B.E.2553)

²² เอกบุญ วงศ์สวัสดิ์กุล, ความรู้เบื้องต้นเกี่ยวกับกฎหมายผังเมือง พร้อมด้วย พ.ร.บ. การผังเมือง พ.ศ. 2518 และกฎหมายประกอบ, สำนักพิมพ์นิติธรรม 2538 (Ekboon Wongsawatdkul, **Introduce to the City Plan Law along**

3.2.2 The Royal Decree for survey and preparation of making the comprehensive and specific plan

This Royal Decree will empower the authorities to necessary entering into the surveyed land, indicate the surveyed land whether this land will form to the comprehensive plan or the specific plan, indicate the land use regulation etc.²³

3.2.3 The Comprehensive Plan

The comprehensive plan is the guideline plan imposed by the government agency. This plan is the legal plan²⁴ which imposes the duty to comply with all levels of users, whether in private or government agency and the users will be legally punished if acting in contrary to this plan.

3.2.4 The Specific Plan

This plan is the action plan, which aims to comply with the comprehensive plan.²⁵ The specific plan thoroughly indicates details in order to achieve the comprehensive plan.

3.3 The Factors that have an impact on the Planning Policy

- * The National Economic and Social Development Plans
- * Increasing Public Welfare
- * Development Policies of Central Government Agencies
- * Development Policies of Provincial Government Agency
- * Project of Transportation System or Public Facilities
- * Big Project of Private Sector
- * The Existing or Former Plans

Conclusion and Recommendations

According to the study, it is found that planning Law has the adverse effects toward the land price which will be consequently affect the housing price. The knowledge or the information used as the input of planning is not proper and not focus on the side effect of the planning. The co-operation between the government agencies is ineffective and leads to inharmonious and unexpected outcome which results in other problems such as spawn, misuse of existed affordable housing, and loss of government budget. The existing planning law constrains the private developers from supplying the affordable housing due to some regulations which concern on density, architectural design, or restrict certain land use. Hence, the problem of inability to own housing among the poor or the lower income remains unchanged.

In other countries such as the United States, England, and Malaysia, they have the system which is called “Inclusionary Zoning” to solve this high housing cost problem which used lower budget than Thai policy does. For example, by means of enacting the “Housing Element Law” as the model that elucidates the objective, the

with the City Plan Act B.E. 2518 and the supplement laws, Nititham Publisher B.E. 2538)

²³ พระราชบัญญัติการผังเมือง พ.ศ. 2518 มาตรา 15 (The Zoning Act, B.E. 2518 S 15)

²⁴ กฎกระทรวงให้ใช้บังคับผังเมืองกรุงเทพมหานคร พ.ศ. 2549 (The Enforcing of Zoning Ordinance, B.E. 2549)

²⁵ ณัฐกันต์ ดั่งปาน, การบังคับใช้ผังเมืองเฉพาะเพื่อการจัดการสิ่งแวดล้อมเมืองและชุมชน, นิติศาสตร์บัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556 (Nattakun Duangpan, **The Enforcement of Specific Zoning for Environment and Community Management**, Faculty of Law, Thammasat University)

duties, and the minimum standard for local to adapt into their jurisdiction. Hence the regulations can reduce the problem of overlapping and less co-operation among government agencies. In addition, Inclusionary Zoning system will enforce, encourage and offset the cost of the private developers in order to supply the affordable housing.

In business sector, to put Inclusionary Zoning into practice is by adaptation of CSR concept. The value gained will be added to the products and the proper profit can strengthen that business in the long run as the sustainable growth in the industry. The survival of society equals to the survival of business. However it is difficulty to receive the cooperation because many of business concern in maximizing their profit so it is necessary to enforce them for the effectiveness of Inclusionary Zoning.

According to the existing laws, it is a necessary to amend the City Planning Act in the Definition part In section 4 should add the meaning of “*Development Project*” in order to effective enforcement and prevent private sectors from violating this law. And amend in the Comprehensive Plan’s elements in section 17 must contains:

“(6)sufficient provide affordable housing to targeted income by proper impose obligations and incentive to developers

In order to comply with (6), the minimum of percentage that each comprehensive plan will impose to developers is not less than 10% of affordable unit of their development project²⁶ or pay fee for affordable housing fund not less than 5% of their total revenue from that development project²⁷

Developers who be obliged to build the affordable housing will receive some incentives to offset developers cost one or more of the following incentives:

- (a) Density adjustments.*
- (b) Fee waivers or reductions.*
- (c) Finance-based incentives but not excess 2 times of tax deductible expense.*
- (d) Preferential treatment for processing of permits.*
- (e) Expedited service for local approval processes.*
- (f) Modification of height, floor area or other site-specific requirements.”*

The number of inclusionary percentage comes from the study; the obligation varies between 5-40% of affordable units in each development project. Hence 10% is the low burden obligation which is not too much for developers.

The alternative obligation derived from this study that there might be an event which some development projects aims to sell to the luxury market. Hence, this sentence can make the obligation more flexible and suitable for the business plan

In additional for the effective in planning, should amend in the Specific Plan’s elements in section 28 by adding:

“(10) assess the housing need in each ranking income and sufficient provide affordable housing to targeted income which will be prescribed.

(11) detail of obligations in order to supply affordable unit in each ranking

²⁶ Supra note 86

²⁷ Supra note 89

income and the details of incentive that will give to the developers to offset their cost and as be the incentive for supplying the affordable housing.”

Other recommendations to enhance the law and effective in solving problems are: reevaluating the Zoning Ordinance and others relevant laws, improving the effectiveness of supply the affordable housing by the Social Development and Human Security Department, supporting the study of the high housing solution and realizing significance of the problem of unaffordable housing.

REFERENCES

Books

Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 1996.

Dustin C. Read, Jr., *Inclusionary Zoning*, Homes for Working Families, Inc., May 2008.

Peter V. Schaeffer & Cecily A. Millerick, *The Impact of Historic District Designation*

On Property Value: An Empirical Studies, 5 Econ Dev. Q. 301, 311, 1911.

ชนิษฐา เทียบจริยาวัฒน์, *การศึกษาแนวทางการวางและจัดทำผังเมืองเฉพาะใหม่*, มหาวิทยาลัยศิลปากร 2553 [Kanittha Tiebjariyawat, A study to propose guidelines for preparing and making a new specific plan, Silapakorn University B.E.2553]

งานสัมมนา *CSR In Action* เครือข่ายธุรกิจเพื่อสังคมและสิ่งแวดล้อม SVN Asia (Thailand) ร่วมกับสำนักงานปฏิรูประบบสุขภาพแห่งชาติ สถาบันธรรมรัฐเพื่อการพัฒนาสังคมและสิ่งแวดล้อม ภาควิชาเศรษฐศาสตร์ คณะสังคมศาสตร์ มหาวิทยาลัยนครินทรวิโรฒ มูลนิธิซีเมนต์ไทยวารสารธุรกิจกับสังคมสถาบันสิ่งแวดล้อมไทย สถาบันคีนันแห่งเอเชีย [CSR in Action Seminar, Social & Environment business network, SVN Asia(Thailand) co-operation with the National Health System Reform Office (HSRO), Good Governance for Social Development and the environment Institute (GSEI), Economic Faculty of Srinakarinwirot University, SCG Foundation, Business & Social Journal, Thailand Environment Institute Foundation and Kenan Institute Asia].

ณัฐกัณฑ์ ดั่งพาน, *การบังคับใช้ผังเมืองเฉพาะเพื่อการจัดการสิ่งแวดล้อมเมืองและชุมชน*, นิติศาสตร์บัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556, [Nattakun Duangpan, The Enforcement of Specific Zoning for Environment and Community Management, Faculty of Law, Thammasat University].

วารสารธนาคารอาคารสงเคราะห์ ปีที่ 4 ฉบับที่ 13 เมษายน-มิถุนายน 2541 [Government Housing Bank Journal, 4th Year, Volume 13, April-June B.E 2541].

ศูนย์บริการวิชาการ คณะสถาปัตยกรรมศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, รายงานฉบับสมบูรณ์ โครงการจัดทำ มาตรฐานด้านผังเมืองของกรุงเทพมหานคร, [Educational Service Center, The Final Report: The Standard Zoning Process in Bangkok Faculty of Architecture, Chulalongkorn University].

เอกบุญ วงศ์สวัสดิ์กุล, ความรู้เบื้องต้นเกี่ยวกับกฎหมายผังเมือง พร้อมด้วย พ.ร.บ. การผังเมือง พ.ศ. 2518 และกฎหมายประกอบ, สำนักพิมพ์นิติธรรม 2538 [Ekboon Wongsawatdkul, **Introduce to the City Plan Law along with the City Plan Act B.E. 2518 and the supplement laws**, Nititham Publisher B.E. 2538].

Electronic Media

Demographia, “The Association between Prescriptive Land use and Higher House

Prices.” <http://www.demographia.com/db-dhi-econ.pdf> (accessed June 1, 2015).

International Federation of Accountants, “Good Governance and Sustainability Fundamental to Improved Business Reporting”, Project on Business Reporting, June 2010, <http://www.ifac.org/sites/default/files/downloads/Good-Governance-and-Sustainability-Fundamental-for-Improved-Business-Reporting.pdf>Innovative (accessed June 1, 2015).

Nicholas Brunick, Lauren Goldberg, Susanna Lehvin, “Voluntary or Mandatory Inclusionary Zoning, Production, Predictability and Enforcement”, Business and Professional People for the public interest, August 2004 <http://www.bpichicago.org/documents/mandatoryv.voluntary5.06.pdf> (accessed June 1, 2015).

OECD, “Corporate responsibility: Frequently asked questions: What is corporate responsibility?”available at: <http://www.oecd.org/corporate/mne/corporateresponsibilityfrequentlyaskedquestions.htm> (last visited June1, 2015).

PolicyLink, “Inclusionary Zoning”, 2003, <http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137027/> (accessed June 1, 2015).

CONSUMER PROTECTION REGARDING ONLINE AIR TICKET BOOKING *

Worrapan Jantaramard**

ABSTRACT

Currently, many Air Travel Consumers face problem regarding online air ticket reservation service not only direct making reservation through the website of airline company but also through intermediary channels because of marketing strategies aiming for commercial benefits of entrepreneur e.g. publication of information which some are false statement or inequality of contractual terms stipulated by one party including the operation of online air ticket booking via electronic network has not distinct control measures.

In Thailand, even though there are several of laws concerning the protection of consumer's rights in connection with online air ticket reservation i.e. Consumer Protection Act B.E. 2522 as amended in B.E. 2556, Unfair Contract Terms Act B.E. 2540 including the Announcement of Ministry of Transport on Protection of Passenger's Rights Using Thai Air Carrier's Services for Domestic Schedule B.E. 2553 providing consumer protection of passenger's rights regardless of the method of air ticket reservation. Nevertheless, the protection of consumer's right in this issue is lack of not only practicable and proper measures but also appropriate legal punishment applied with current circumstance.

Keywords: Consumer Protection, Electronic Commerce, Online Air Ticket Booking.

บทคัดย่อ

ในปัจจุบัน ผู้บริโภคซึ่งเป็นผู้โดยสารสายการบินต่างประสบปัญหาอันเนื่องมาจากการให้บริการจองตั๋วโดยสารออนไลน์ ไม่ว่าจะเป็นการจองตั๋วโดยสารผ่านทางเว็บไซต์ของสายการบินโดยตรง หรือผ่านทางช่องทางจัดจำหน่ายโดยตัวแทนจำหน่าย และด้วยเหตุที่ว่าในปัจจุบัน การเดินทางโดยเครื่องบินได้รับความนิยมมากขึ้น จึงทำให้ธุรกิจสายการบินเป็นธุรกิจที่มีการแข่งขันสูง ผู้ประกอบการต่างวางแผนในการใช้กลยุทธ์ทางการตลาดเพื่อสร้างผลประโยชน์ให้แก่ธุรกิจของตนมากที่สุด เช่น การนำเสนอข้อมูลเที่ยวบินผ่านช่องทางออนไลน์ โดยอาจปกปิดข้อมูลบางส่วน หรือนำเสนอข้อมูลที่ไม่ตรงต่อความเป็นจริงเพื่อดึงดูดให้ผู้บริโภคตัดสินใจใช้บริการกับสายการบินของตน หรือความไม่เท่าเทียมกันของอำนาจในการฟ้องร้องสัญญา ซึ่งโดยมากมักเป็นสัญญาสำเร็จรูปที่กำหนดโดยผู้ประกอบการสายการบินเพียงผู้เดียว รวมทั้ง การดำเนินการจองตั๋วเครื่องบินผ่านช่องทางออนไลน์ในประเทศไทยนั้นยังขาดมาตรการที่เหมาะสมในการควบคุมและกำกับดูแล เป็นต้น

สำหรับประเทศไทยนั้น มีกฎหมายหลายฉบับที่เกี่ยวข้องกับการคุ้มครองผู้บริโภคในการจองตั๋วโดยสารเครื่องบินผ่านช่องทางออนไลน์ ได้แก่ พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 (แก้ไขเพิ่มเติม

* The article is summarized and rearranged from the thesis "Consumer Protection regarding Online Air Ticket Booking" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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พ.ศ. 2556), พระราชบัญญัติข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540 รวมถึงประกาศกระทรวงคมนาคม เรื่อง การคุ้มครองสิทธิของผู้โดยสารที่ใช้บริการสายการบินของไทยในเส้นทางบินประจำภายในประเทศ พ.ศ. 2553 โดยกฎหมายต่างๆเหล่านี้ ได้ให้ความคุ้มครองแก่สิทธิของผู้บริโภคซึ่งเป็นผู้โดยสารสายการบินโดยไม่คำนึงถึงช่องทางการจองตั๋วโดยสาร แต่อย่างไรก็ดี การคุ้มครองสิทธิของผู้บริโภคของไทยในเรื่องดังกล่าว ยังขาดมาตรการทางกฎหมายที่สำคัญ รวมถึงวิธีปฏิบัติและบทลงโทษที่เหมาะสมกับสภาวะการณ์ของปัญหาที่เกิดขึ้นในปัจจุบัน

คำสำคัญ: การคุ้มครองผู้บริโภค ธุรกิจทางอิเล็กทรอนิกส์ การจองตั๋วเครื่องบินผ่านช่องทางออนไลน์

Introduction

At the present time, tourism industry is an industry which is enlarged and plays a key role in Thailand's economic and social system. In addition, it is also a significant income source acquiring foreign currencies as well as it is conducive to the development of transportation infrastructure including trading and investment. According to above reasons; at the present, Thai Government launched the National Tourism Development Plan B.E. 2555-2559¹ in order to revive and invigorate tourism section as well as to speed up the potentiality to increase national income, distribute income and sustainable development coexistingly.

Aviation business is nearly the first one among tourism businesses which an electronic system is applied. The electronic system almost totally changes both form and method of business operation including but not limited to providing service information, marketing communication which satisfies the traveler. In accordance with the characteristic of the electronic system, it is the network globally connected which makes entrepreneur and traveler communicates conveniently even though they live in different hemisphere.² The electronic system is deprived of limitation of time zone and place. These make operators of air transportation business begin to establish online reservation channel not only operates directly through their official website (Direct Booking Channels) but the electronic air ticket booking is also conducted by agencies' websites (Intermediary Channels).

Due to the air transportation becomes popular and as a result of using electronic system for online air tick booking is substantially convenient and low cost, the number of online air ticket operators is significantly increased and the business situation is very competitive. Moreover, this online channel also increases customer in the future who is internet user; in the other word, any traveler who is interested in travelling by an aircraft could surf information on the internet for his consideration and in case of any inquiry,

¹ Ministry of Tourism and Sports, *แผนพัฒนาการท่องเที่ยวแห่งชาติ พ.ศ. 2555-2559* [National Tourism Development Plan B.E. 2555-2559] (2011), available at http://www.tica.or.th/images/plan_tourism2555-2559/2555-2559.pdf. (last visited July 29, 2015)

² *เมื่อพฤติกรรมนักท่องเที่ยวเปลี่ยนถึงเวลาที่ ททท. ใช้แอปฯ ทำตลาด* [TAT Uses Mobile App in Response to Changes in Tourists' Behavior], Siam Rath, Jul. 7, 2015, available at <http://www.siamrath.co.th/web/?q=เมื่อพฤติกรรมนักท่องเที่ยวเปลี่ยนถึงเวลาที่-ททท-ใช้แอปฯ-ทำตลาด>. (last visited July 26, 2015)

the traveler could contact the entrepreneur via email or other contact channel provided³; finally; getting enough and sufficient information, the travel could immediately reserve air-ticket through online system. Thereby, each operator uses its best effort to attract customer and traveler's attention and the information or conditions of the agreement which is mostly an adhesion agreement may not be provided or set forth straightforwardly. Upon the process of online reservation, the agreement is formed over an internet network; by the operator's solely discretion without any negotiation or amendment proposed by the customer. Furthermore, most business operator tends to draft the adhesion agreement for its benefit where the inequality provisions are contained therein e.g. an exclusion clause which limits liabilities of the operator in case of flight delay, flight cancellation or in case of denied boarding which affect consumer's rights.

1. Fundamental right of aviation passenger as a consumer in the European Union

The fundamental rights of a consumer who is an aviation passenger travelling to the country which is a member state of EU or departing from any of EU member state is preserved in the Regulation No. 261/2004 of the European Parliament and of the Council.

In the Treaty Establishing European Economic Community (EEC Treaty), the major aim of the treaty is to establish a common market and stipulate the change of transportation policy under Clause 84(2)⁴. Later, the judgment of the European Court of Justice No. 209-213/84 ruled that the general provision of the EEC Treaty is applied to the air transportation.⁵

Subjected to this Regulation, the fundamental rights of consumer who is an air passenger are preserved regardless of the channel where the consumer makes an air ticket reservation. The airline which is a business operator shall be liable to the passenger for the denied boarding, Flight cancellation or long delay flight.

1. Denied Boarding

Upon the Regulation (EC) No. 261/2004; Article 4, the operator is entitled to deny boarding by calling for the volunteers to abandon their reservations and such volunteer shall receive benefits under the conditions to be agreed between passenger and operator as a consideration for his abandonment.

³ PATA 60th Anniversary and Conference: *ความเป็นจริงใหม่ของการเดินทางท่องเที่ยว*

ปัจจุบัน และอนาคต, TAT Review, Nov. 28, 2011, available at

<http://www.etatjournal.com/web/etat-journal/2011/2011-oct-dec/369-42554-pata-60th-anniversary-and-conference>. (last visited July 11, 2015)

⁴ “The Council may acting by a qualified majority decide whether to want procedure appropriate provisions may be laid down for sea and air transport.” (EEC Treaty cl. 84(2)).

⁵ Jacqueline Dutheil de la Rochère, *Contribution of the European Court of Justice to the Implementation of the EEC Treaty in the Field of Air Transport: Past and Future*, Air and Space Law, 161-163 (1992) as cited in Ananchai Sakdejayont, *Protection of Airline Passenger Rights: The Case of Thailand* (1983) (LL.M. thesis, Thammasat University).

In addition to this; with reference to Article 4(3) of the Regulation No. 261/2004⁶, the air carrier shall assist passenger who is refused to board against his will upon Article 8 and 9 thereof. In summary, the trader shall propose options to the passenger between a reimbursement within 7 days as from the denied boarding date for a full of air ticket fare which the method thereof shall be made in cash, bank order or bank cheques or with signed agreement or shall be made in form of travel voucher and/or other related service⁷ or offer a re-routing to a passenger together basic assistance such as food and beverage including communications, accommodation and transportation.

2. Flight Cancellation

With respect to the Regulation of the European Union No. 261/2004, in case of flight cancellation; whether the air ticket was booked by normal channel or by electronic channel, the passenger shall have same right as the denied boarding passenger plus a right to be compensated as the following;

- EUR 250 compensation for all flights of 1,500 km. or less⁸;
- EUR 400 compensation for all flights intra-European Union of more than 1,500 km. or for all other flights between 1,500 to 3,500 km.⁹;
- EUR 600 compensation for all flights which do not fall under the abovementioned conditions.¹⁰

In response to the aforementioned, we may see that the legal measures of the European Union regarding flight cancellation are interesting. They provide step-by-step of measures to heal consumer whose flight was cancelled.

3. Flight Delay

Not only denied boarding, flight cancellation but also flight delay is the important air transportation problems tending to affect the rights of consumer. Many consumers miss their flights without their faults while their traveling purposes are also failed.

Though, the EU Regulation No. 261/2004 does not contain a definition of 'flight delay', the concept may, however, be clarified in the light of the context in which it occurs. In that regard, it should be recalled, first, that a 'flight' within the meaning of Regulation No 261/2004 consists in an air transport operation, performed by

⁶ "If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Article 8 and 9." (*Id.* at art. 4(3))

⁷ Regulation No. 261/2004, art. 8(1).

⁸ Regulation No. 261/2004, art. 7(1)(a).

⁹ *Id.* at art. 7(1)(b).

¹⁰ *Id.* at art. 7(1)(c).

an air carrier which fixes its itinerary (*Case C-173/07 Emirates Airlines [2008] ECR I-5237, paragraph 40*)¹¹. Thus, the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier's pre-arranged planning.

In case of delay, the passenger is entitled to get compensation and basic assistance similar to the case of flight cancellation. In the other word, the air carrier shall provide meals and drinks properly including communication method, transportation and accommodation. Additionally, in case the delay is more than 5 hours long, the passenger has the right to get refund of all fares.

2. Fundamental right of aviation passenger as a consumer in Thailand

Even though, Thailand has the Consumer Protection Act B.E. 2522 as amended by the Act B.E. 2553, it is just a general law regarding the overview of consumer protection. There are certain defects as well as lack of proper legal measures in order to protect rights of consumer; especially the consumer in the online air ticket booking who is non-predominant party of the contract. In addition, these laws have no secondary law or enforceable regulation and the online air ticket reservation business; which is an electronic commerce as well as the adhesion agreement is contained as a partial of the booking procedure, has not yet been announced to be a business whose contract is controlled in order to create preventive measures. Nevertheless; though, there is the Announcement of the Ministry of Transport on the Protection of Passenger Right Using Thai Air Carriers' Services for Domestic Scheduled Air Service B.E. 2553 providing the protection of rights of customer who is an aircraft passenger regardless of the method of air ticket booking.

This Announcement had been enacted by virtue of the Order of the Revolutionary Council No. 58 dated January 26, 1972, Article 7 which the Transportation Minister assigned the Department of Air Transportation (currently is the Department of Civil Aviation) to be the authority to control aviation upon this Announcement providing protection of the rights of passengers as the following;

1. Denied Boarding

The definition of 'Denied Boarding' is defined in Section 2 paragraph 6¹² of the Announcement, it means a rejection to carry air passenger on a booked flight indicated in the air ticket even though such passenger have presented himself and ready to be boarded in accordance with Section 3 thereof; except the circumstance where the air carrier is reasonable to deny boarding e.g. the reason of health, safety or security or inadequate required travel documentation.

¹¹ Christopher Sturgeon v. Condor Flugdienst GmbH & Stefan Böck v. Air France SA, C-402/07 & C-432/07 (Bundesgerichtshof & Handelsgericht Wien, Nov. 19, 2009), available at <http://curia.europa.eu/juris/document/document.jsf?docid=73703&doclang=EN> (last visited on Aug. 1, 2015). (last visited July 29, 2015)

¹² *"Denied boarding means a refusal to carry passengers on a flight indicated in the ticket, although they have presented themselves for boarding under the conditions laid down in Section 3 ; except where there are reasonable grounds to deny them boarding, such as a reasons of health, safety, security or inadequate travel documentation."* (The Announcement § 2, para. 6).

According to the Announcement, in case of denied boarding, the air carrier is obliged to offer curable options to passenger whose flight is denied by

- Refund all fares and related expenses; or
- Re-Routing

In the event that the passenger chooses refund option, the airline shall pay the refund only by cash, banking transfer or cheque¹³ within 7 days if the passenger purchased air ticket by cash¹⁴ or 45 days in case the ticket was paid by credit card.¹⁵ If the air carrier would like to refund in other method e.g. travel voucher or others instead of cash redemption, the passenger's consent is required.¹⁶

If the passenger chooses a re-routing, any fee or fare shall not be charged to the passenger. Furthermore, in case the fare of such re-routing is lower than the fare and related expenses which the passenger paid for his seat in the denied boarding flight, the differential shall be returned subjected to the same condition as the refund option.

2. Flight Cancellation

The cancellation of flight may be taken place at any time due to the airline does not operate the flight at all for a certain reasons. Upon the flight cancellation, a hundred of passengers miss their destination either for business or travelling purpose. The Ministry of Transportation perceives these problems then announced the Announcement as a curable legal measure to protect consumer's rights for flight cancellation circumstance.

With reference to Section 2, paragraph 5, the definition of 'Flight Cancellation' is defined as a cancellation of any flight of the schedule which has already been announced including the cancellation of any extra flight¹⁷. In case of flight cancellation, the airline shall treat the passenger by offering options to passenger whose flight is cancelled by

- Refund all fares and related expenses; or
- Re-Routing with an initial assistance

If the passenger do not wish to travel with the air carrier anymore and prefers a refund, the air carrier shall refund all fares and related expenses to the passenger with the same condition of the denied boarding circumstance.

Similarly, if the passenger prefers a re-routing, the airline shall perform a re-routing with the same condition of the denied boarding circumstance plus an initial assistance.

In this regard, an initial assistance which the air carrier shall provide the passenger are meals and drinks, communication method (i.e. free telephone or e-mail service), accommodation (if needed) and transportation between the accommodation and the airport.

¹³ The Announcement § 6 (3).

¹⁴ *Id.* at § 6 (3)(a).

¹⁵ *Id.* at § 6 (3)(b).

¹⁶ *Id.* at § 5(1)(a).

¹⁷ "Cancellation means a cancellation of any flight of the time table that has already been announced including the cancellation of an extra flight." (The Announcement § 2, para. 5).

3. Flight Delay

According to Section 2; paragraph 4 of the Announcement, the flight delay is defined as a flight which is operated later than the announced schedule¹⁸. In case of delay, the treatment which the airline is obliged to provide the passenger depends upon the duration of delay as the following;

1) In case the delay is more than 2 hours but not exceed 3 hours, the air carrier shall¹⁹;

- Provide food and drink; free of charge, at the amount compatible to the waiting time for new schedule.

- Provide communications by any means i.e. telephone, facsimile or e-mail etc. as proper without additional charge.

However, if the passenger does not wish to wait and travel, the air carrier shall return all fare and related expenses which the passenger paid for the delayed flight with the same condition of refund in case of denied boarding.

2) In case the delay is more than 3 hours but not exceed 5 hours, the air carrier shall provide food, drink and proper communication similar to the delay which is more than 2 hours but not exceed 3 hours as aforementioned. In addition to this, the air carrier shall also offer the passenger to choose an option as the following;

- Receive refund of fare and related expenses in full or in partial for non-used ticket²⁰. In this occasion, the air carrier shall return all fare and related expenses which the passenger paid for the delayed flight with the same condition of refund in case of denied boarding, or;

- Re-routing within the same day or the next day or any other later day upon passenger's discretion, for travelling to the destination specified in the air ticket or any other destination nearly the destination of the cancelled flight²¹. In case the re-routing changes the destination, the air carrier shall be responsible for providing transportation to the passenger to go to the destination where the passenger wishes to travel before the cancellation is occurred.²²

Conclusion

According to the abovementioned statement, even though this Announcement seems to provide a proper protection to air transport passenger; upon the author's point of view, it is still not practicable in certain portions. It is to say that this Announcement does cover only for a passenger travelling on domestic scheduled flight whose air ticket reservation has already been confirmed. Hence; according to this Announcement, there is a gap of protection because other passengers travelling by international air carriers' service or by Thai air carriers' services but on an international routes shall not be protected under this Announcement. In addition, this Announcement is lack of the punishment measure applied to an airline violating this Announcement which makes this Announce to be unenforceable in practice.

¹⁸ "Flight delay means a flight that operates later than from the scheduled flight timetable." (The Announcement § 2, para. 4).

¹⁹ *Id.* at § 4 (1).

²⁰ The Announcement § 4 (2) (c)(1).

²¹ *Supra* note 236 at § 4(2)(c)(2).

²² *Id.* at para. 2

Moreover, although the Unfair Contract Terms Act B.E. 2540 aims to protect consumer's rights regarding entering into the fairness agreements; to provide protection, the judicial procedure is required which it takes a long period and a burden of expense shall be bear upon the consumer who is damaged from such unfair terms.

Due to online air ticket booking is a kind of electronic transaction becoming widespread acceptance and provides lots of information to consumers for their consideration. Consumers have risks when making online reservation. According to the abovementioned; even if Thailand has general laws of consumer protection, it is also lacking of the appropriate legal measures to provide sufficient protection in connection with the online air ticket booking in practice. In this regards, the Committee on Contract should be taken into account to determine online air ticket reservation as a business which its contract is controlled as well as the Announcement of the Ministry of Transport on the Protection of Passenger Right Using Thai Air Carriers' Services for Domestic Scheduled Air Service should be considered for further amendment set forth in Section 3(1) thereof on the scope of the passenger whose rights shall be preserved thereunder in order to include all passengers whether travels domestic or international route as the following;

“Section 3 Air passenger has the rights to be protected under this Announcement as follows:

(1) a passenger travelling on domestic or international scheduled flights who has a confirmed reservation on the flight concerned and have paid for the tickets, including the passenger travelling on the frequent flyer program or any other supportive program offered by an airlines; and, ...”.

REFERENCES

Books and Book Articles

Bridge, Michael. *The Sale of Goods*. Oxford: Oxford University Press, 2014.

Kelman, Michael Chissick & Alistair. *Electronic Commerce: Law and Practice*.
London: Sweet and Maxwell, 1999.

McCall, James R. *Consumer Protection: Cases, Notes and Materials*. West Pub. Co,
1977.

Mckendrick, Ewan. *Contract Law*. Palgrave Macmillan Law Masters, 2005.

Schulze, Reiner. *Common European Sales Law (CESL)*. Verlag C. H. Beck in
Gemeinschaft mit Hart Publishing, 2012.

Woodroffe, Robert Lowe & Geoffrey. *Consumer Law and Practice*. London: Sweet and
Maxwell, 1995.

แจ้งสว่าง, ศรีสุภางค์. *บทบาทของสำนักงานคณะกรรมการคุ้มครองผู้บริโภคในการกำกับ
ดูแลด้านการโฆษณาสินค้าและบริการ*. 2540.

ศุภินิตย์, สุขม. *คำอธิบายกฎหมายเกี่ยวกับการโฆษณา*. กรุงเทพมหานคร: นิติบรรณาการ,
2550.

ศูนย์พัฒนาอิเล็กทรอนิกส์. *พาณิชย์อิเล็กทรอนิกส์เพื่ออุตสาหกรรมท่องเที่ยวไทย*.
กรุงเทพมหานคร: โรงพิมพ์เดือนตุลา , 2543.

สำนักงานคณะกรรมการคุ้มครองผู้บริโภค. *สคบ.กับการคุ้มครองผู้บริโภค*.
กรุงเทพมหานคร: บริษัท ประชุมทองพรินติ้ง กรุป จำกัด, 2546.

สำนักงานเลขาธิการคณะกรรมการเทคโนโลยีสารสนเทศแห่งชาติ. *คำอธิบาย
พระราชบัญญัติว่าด้วยธุรกรรมทางอิเล็กทรอนิกส์ พ.ศ. 2544*. กรุงเทพมหานคร:
บริษัท จีรัชการพิมพ์ จำกัด, 2545.

อาจารย์วิชา, ไพโรจน์. *ครบเครื่องเรื่องคุ้มครองผู้บริโภคด้านสัญญา*. กรุงเทพมหานคร:

สำนักพิมพ์วิญญูชน, 2543.

—. *โฆษณาอย่างไรให้ถูกต้องและถูกใจ*. กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2544.

Articles

Duncan, Nora K. "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code" *Louisiana Law Review*, Volume 34, No. 5 Special Issue, 1974, page 1081-1100.

Kennedy, Duncan, From the Will Theory to The Principle of Private Autonomy: Lon Fuller's "Consideration and Form", *Columbia Law Review*, Vol. 100:94, page 94-175.

Poole, J.W. Looney & Anita K. "Adhesion Contracts, Bad Faith, and Economically Faulty Contracts." *Drake Journal of Agricultural Law*, Vol. 4, 1999: 177-194.

Sterkin, Sierra David. "Challenging Adhesion Contracts in California: A Consumer's Guide." *Golden Gate University Law Review*, Vol. 34, Iss. 2 (2004), Art. 3; page 285-324.

Weber, David P. "Restricting the Freedom of Contract: A Fundamental Prohibition." *Yale Human Rights and Development Journal*, Vol. 16 [2013], Iss. 1, Art. 2.

พินัย ณ นคร, "กฎหมายว่าด้วยข้อสัญญาไม่เป็นธรรม: แนววิเคราะห์ใหม่เชิงเปรียบเทียบ," วารสารนิติศาสตร์, เล่มที่ 30 น. 546-588 (ธันวาคม 2543).

รุ่งทิพย์ วงษ์ปฏิการ. "พาณิชย์อิเล็กทรอนิกส์กับการท่องเที่ยว," จลสารท่องเที่ยว 19 (ตุลาคม-ธันวาคม 2543): น. 34-37.

Electronic Media

ABTA. "Guidance on the application of the Code of Conduct." March 11, 2013.

[http://67d8396e010decf37f33-](http://67d8396e010decf37f33-5facf23e658215b1771a91c2df41e9fe.r14.cf3.rackcdn.com/general/Code_of_Conduct_Guidance_Mar_2013.pdf)

[5facf23e658215b1771a91c2df41e9fe.r14.cf3.rackcdn.com/general/Code_of_Conduct_Guidance_Mar_2013.pdf](http://67d8396e010decf37f33-5facf23e658215b1771a91c2df41e9fe.r14.cf3.rackcdn.com/general/Code_of_Conduct_Guidance_Mar_2013.pdf).

Farrow, Dash. *Website Agreements: Browse-wrap vs. Clickwrap Agreements*. July 19, 2015. <http://www.dashfarrow.com/website-agreements-browse-wrap-vs-clickwrap-agreements/>.

Legal Information Institute. *Adhesion Contract (Contract of Adhesion)*. n.d. https://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion.

Lumm, David F. Katz & Daniel C. *Ninth Circuit Clarifies Notice Requirements for Browse-Wrap Agreements*. August 28, 2014. <http://www.nelsonmullins.com/articles/browse-wrap>.

Rutledge, Kade Miller & Karl. *Client Alert - Zappos and Its Effect on "Browsewrap" Agreements*. August 2013. <http://www.lrrlaw.com/zappos-and-its-effect-on-browsewrap-agreements-08-05-2013/#.VcOtXfmqpBd>
